COMMISSION DECISION (EU) 2024/2860

of 24 November 2023

on SA.32953 (2014/C) – State aid measures in favour of Trenitalia SpA – Italy

(notified under document C(2023) 8017)

(Only the English version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

(1) On 18 April 2011, the Commission received a complaint concerning the possible grant of State aid by Italy to Trenitalia S.p.A. ('**Trenitalia**'), a company part of the Ferrovie dello Stato Group ('**FS Group**'), in the form of compensation for the discharge of public service obligations in rail freight transport granted under three public service contracts (the '**Measures**'). This complaint was registered under reference number SA.32953 (2014/NN – ex 2011/CP). On 26 September 2011, the complainant provided additional information.

(2) By letter of 18 October 2011, the Commission forwarded that complaint to the Italian authorities and requested information regarding the Measures.

(3) On 16 November 2011, Italy asked for an extension of the deadline to reply to the request for information, which the Commission granted on 24 November 2011. On 14 December 2011, Italy asked for clarifications with regard to the Commission's request for information, which the Commission provided on the same day. On 15 December 2011, Italy asked for a further extension of the deadline to provide the information required, which was granted on 20 December 2011.

(4) On 31 January 2012 and 17 February 2012, Italy provided partial replies to the request for information of 18 October 2011. On 22 February 2012, the Commission sent a reminder to Italy, requesting the missing information. On 11 April 2012, Italy provided further information in response to the Commission's request for information of 18 October 2011.

(5) On 4 April 2012, the complainant complemented its complaint with further allegations.

(6) On 29 October 2012, the Commission requested further information from Italy. Italy sent the requested information on 8 January 2013, on 11 January 2013 and on 17 January 2013.

(7) On 29 October 2013, the Commission received additional allegations by the complainant.

([1]) OJ C 156, 23.5.2014, p. 77.

(8) 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**') with respect to the aforementioned Measures (the '**opening decision**').

(9) The opening decision concerned also the possible grant of State aid in the form of free transfers of railway infrastructure assets by Rete Ferroviaria Italiana S.p.A to Trenitalia and FS Logistica (case SA.32179). The Commission will assess those measures in a separate decision. This Decision deals exclusively with the compensation paid to Trenitalia under three public service contracts ('**PSCs**') for the discharge of public service obligations ('**PSOs**') in the rail freight sector.

(10) On 22 April 2014, Italy asked for an extension of the deadline within which 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 deadline to submit comments on the opening decision, which the Commission granted on the following day.

(11) The opening decision was published in the *Official Journal of the European Union* of 23 May 2014 ([2]). The Commission invited interested parties to submit their comments on the Measures.

(12) On 24 June 2014, Italy provided its comments on the opening decision. The Commission received comments on the opening decision from three interested parties: the Community of European Railways and Infrastructure Companies ('**CER**') provided comments on 19 June 2014; FerCargo, an association of private rail freight operators, provided comments on 8 July 2014 ([3]); and the FS Group provided comments on 23 July 2014 ([4]).

(13) The Commission forwarded the interested parties' comments to Italy. On 20 November 2014, Italy sent its comments on these interested parties' comments. On 4 November 2015, Italy complemented its comments with additional information.

(14) On 22 December 2017, the Commission sent a request for information to Italy, to which Italy partially replied on 5 and 15 February 2018. A meeting took place on 21 March 2018 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 18 December 2018, a meeting took place between the Commission services and the Italian authorities. Following that meeting, Italy provided additional information on 18 and 19 February 2019.

(15) 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 ([5]). During the period of the COVID-19 crisis, the Commission had to give priority to COVID-19 State aid measures ([6]); as a consequence, the completion of the formal investigation procedure on the Measures at hand as well as the completion of other procedures has been delayed.

([2]) Cf. footnote [1].

([3]) On 13 June 2014, Fercargo asked the Commission for a prolongation of the deadline to provide comments on the opening decision. The request was justified by the need to collect sufficient information from all members of the association. On 17 June 2014, the Commission granted FerCargo an extension of the deadline.

([4]) On 16 June 2014, the FS Group sent to the Commission a reasoned request for a prolongation of the deadline to provide comments on the opening decision. On 17 June 2014, the Commission granted the FS Group time until 23 July 2014 to provide comments.

([5]) 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.

([6]) A list of all the decisions adopted by the Commission during the COVID-19 pandemic under Article 107(2)b TFEU, Article 107(3)b TFEU and the Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20.3.2020, p. 1) is available at this website: https://competition-policy.ec.europa.eu/state-aid/coronavirus_en (last accessed on 15.11.2023).

(16) 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 immediate social and economic negative repercussions in the Union. Under those exceptional circumstances, the Commission was called to respond urgently to notifications of State aid measures granted in the context of the Ukrainian crisis ([7]). In the course of 2022 and 2023, the Commission had to give priority to the examination of those State aid measures, ([8]) with consequent further delay in the completion of the formal investigation procedure on the Measures under investigation.

(17) On 19 January 2023, the Commission sent a further request for information to the Italian authorities to which they replied on 11 April 2023, after having asked, and obtained, a prolongation of the initial deadline to submit their answers. That last request aimed, among others, at clarifying the structure of the FS Group following the restructuring process of Trenitalia's freight business.

(18) 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 ([9]) and to have this Decision adopted and notified in English.

2. DESCRIPTION OF THE LEGAL FRAMEWORK GOVERNING THE PROVISION OF RAIL FREIGHT TRANSPORT SERVICES

2.1. The liberalisation of rail freight transport in the Union and in Italy

2.1.1. *In the Union*

(19) The Union liberalised rail freight transport services in three waves.

(20) The first legislative initiative in the early 1990's resulted in the adoption of Council Directive 91/440/EEC ([10]) that Member States had to transpose by 1 January 1993. That text initiated the liberalisation of rail transport by introducing a right of access to railway infrastructure for international groupings and railway undertakings operating combined ([11]) international freight transport services accompanied by the principle of separation between the activities of infrastructure management and transport. That separation principle applied not to structures but to functions, more particularly the accounting function. That Directive merely provided (as an option) for that separation to be achieved by the creation of distinct divisions within a single undertaking or by entrusting infrastructure management to a separate entity.

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

([8]) A list of all the decisions adopted by the Commission under the Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia in 2022 is available at this website: https://competition-policy.ec.europa.eu/state-aid/temporary-crisis-and-transition-framework_en (last accessed on 15.11.2023).

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

([10]) 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).

([11]) According to Article 1 of Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States (OJ L 368, 17.12.1992, p. 38), combined transport means 'the transport of goods between Member States where the lorry, trailer, semi-trailer, with or without tractor unit, swap body or container of 20 feet or more uses the road on the initial or final leg of the journey and, on the other leg, rail or inland waterway or maritime services where this section exceeds 100 km as the crow flies and make the initial or final road transport leg of the journey:
— between the point where the goods are loaded and the nearest suitable rail loading station for the initial leg, and between the nearest suitable rail unloading station and the point where the goods are unloaded for the final leg, or;
— within a radius not exceeding 150 km as the crow flies from the inland waterway port or seaport of loading or unloading.'
In other words, combined transport is a form of intermodal transport where the larger part of the journey is by rail, inland waterways or sea and any initial and/or final leg carried out by road is strictly limited.

(21) Directive 91/440/EEC was amended by Directive 2001/12/EC of the European Parliament and of the Council ([12]) which was part of the so-called '**first railway package**' ([13]), to be transposed by Member States by 15 March 2003. Directive 2001/12/EC granted railway undertakings a right of access on a non-discriminatory basis for railway undertakings in relation to the following types of services:

— international freight services on the Trans-European Rail Freight Network – TERFN ([14]) (Article 10(3));

— international freight services on the entire European rail network, from 15 March 2008 (the second sentence of Article 10(3)).

(22) With the view to improving safety, interoperability and opening of the rail freight market, the Union adopted Directive 2004/51/EC of the European Parliament and of the Council ([15]) as part of the so-called '**second railway package**' ([16]). That directive established a right of access for railway undertakings in relation to the following types of services:

— international freight services from 1 January 2006 (thereby anticipating the term of 15 March 2008 laid down by Directive 2001/12/EC);

— all types of freight services (national and international) from 1 January 2007.

(23) As a result, the rail freight market opened up 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 Union network; 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.

(24) Directive 2012/34/EC of the European Parliament and of the Council ([17]) repealed with effect from 17 June 2015 Directive 91/440/EEC as amended by Directive 2001/12/EC and Directive 2004/51/EC. Article 10(1) of Directive 2012/34/EC 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'.

([12]) 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).

([13]) This package included also 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).

([14]) 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, C. Vecchia, Genoa, Gioia Tauro, La Spezia, Livorno, Naples, Piombino, Ravenna, Salerno, Savona, Taranto, Trieste, Venice.

([15]) 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).

([16]) This 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).

([17]) 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).

2.1.2. *In Italy*

(25) Italy first liberalised rail freight transport services as of 22 October 2003, with the entry into force of Legislative Decree No 188/2003 of 8 July 2003 ('**the 2003 Decree**') ([18]) transposing the first railway package. In relation to national freight services and national and international passenger services provided on the national railway infrastructure, Article 6 of the 2003 Decree granted various access rights, subject to compliance with certain requirements ([19]), to railway undertakings making use of the national rail network – subject to reciprocity in the case of railway undertakings established abroad.

(26) Italy transposed Directive 2004/51/EC by Legislative Decree No 162/2007 of 10 August 2007 (in force as of 23 October 2007). That decree amended the 2003 Decree by granting railway undertakings access as of 23 October 2007 to the entire 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 infrastructure for operating all types of rail freight services ([20]).

(27) Last, Italy transposed Directive 2012/34/EU by Legislative Decree No 112/2015 of 15 July 2015 (in force as of 27 July 2015). That decree reaffirmed railway undertakings' right of access to the rail freight transport market under equitable, non-discriminatory and transparent conditions, in order to ensure competition in the railway sector ([21]).

2.2. **The legal framework governing public service obligations in rail freight transport**

2.2.1. *The Union legislation*

(28) According to Article 93 TFEU, 'aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service'.

(29) Based on Article 93 TFEU, the Council adopted Regulation (EEC) No 1191/69 of 26 June 1969 concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway ('**Regulation (EEC) No 1191/69**') ([22]). Regulation (EEC) No 1191/69 laid down the rules applicable to public service obligations ('**PSOs**') applicable in the field of rail transport services from 1 July 1969 until 2 December 2009 for passenger transport services and until 3 December 2012 for freight transport services (see recital (34)).

([18]) Legislative Decree No 188/2003 of 8 July 2003 (Gazzetta Ufficiale n 170) which replaced Presidential Decrees 277/98 of 8 July 1998 (Gazzetta Ufficiale n 187) and 146/99 of 16 March 1999 (Gazzetta Ufficiale n 119) which transposed Directives 91/440/EC, 95/18/EC and 95/19/EC.

([19]) 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 the 2003 Decree, a specific authorisation from the Ministry of Infrastructure and Transport (Article 6(2) of the 2003 Decree) as defined under Article 131(1) of Law No 388 of 23 December 2000. That latter 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/or guarantee the economic viability of the rail transport activities in Italy.

([20]) Article 25(1) of Legislative Decree No 162/2007 amending Article 12(1) of the 2003 Decree. Italy no longer required railway undertakings to be in possess of the specific authorisation from the Ministry of Infrastructure and Transport described in footnote [19] as of 1 January 2007.

([21]) Article 2(1)(c) of Legislative Decree No 112/2015.

([22]) Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1) as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991.

(30) Article 2 of Regulation (EEC) No 1191/69 defined PSOs as 'obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions'. PSOs within the meaning of Regulation (EEC) No 1191/69 consisted of obligations to operate ([23]), obligations to carry ([24]) and tariff obligations ([25]). The parameters to be taken into account in the determination of the economic disadvantages caused by the imposition of PSOs and the compensation procedures were defined in Articles 5 and 10 to 13 of Regulation (EEC) No 1191/69. Where a transport undertaking operated not only services subject to PSOs but also other activities, Article 1(5) of that Regulation required separation of accounts as well as putting into place mechanisms apt to avoid any cross-subsidisation between the public service division and the division in charge of other activities.

(31) Council Regulation (EEC) No 1893/91 ([26]) amending Regulation (EEC) No 1191/69 removed the possibility for Member States to maintain or impose PSOs on transport undertakings, except for those whose activities were confined exclusively to the operation of urban, suburban or regional passenger transport services ([27]). The amendment introduced in Regulation (EEC) No 1191/69 a new section on PSCs, composed of a single article (Article 14), offering the possibility for Member States to conclude PSCs to provide the public with adequate transport services ([28]).

(32) Regulation (EEC) No 1107/70 of the Council ([29]) further regulated the granting of aid for transport by rail, road and inland waterway. That Regulation provided that Member States could not impose PSOs involving the granting of aid under Article 93 TFEU except for either tariff obligations not falling under Regulation (EEC) No 1191/69 ([30]) or transport undertakings or activities to which that Regulation did not apply.

(33) In the *Altmark* judgment ([31]), the Court indicated that Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70 were deemed to have listed exhaustively the circumstances in which the authorities of the Member States could grant aid under Article 93 TFEU. This point was further confirmed by the Court in the *Combus* judgment ([32]).

(34) Regulation (EC) No 1370/2007 of the European Parliament and the Council ([33]) repealed both Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70; it entered into force on 3 December 2009. However, Article 10 of Regulation (EC) No 1370/2007 provided that Regulation (EEC) No 1191/69 continued to apply to rail freight transport services for a period of three years after the entry inro force of Regulation (EC) No 1370/2007.

([23]) See Article 2(3) of Regulation (EEC) No 1191/69.
([24]) See Article 2(4) of Regulation (EEC) No 1191/69.
([25]) See Article 2(5) of Regulation (EEC) No 1191/69.
([26]) Council Regulation (EEC) No 1893/91 of 20 June 1991 amending Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 169, 29.6.1991, p. 1).
([27]) Article 1(5) of the amended Regulation (EEC) No 1191/69 provided as follows: 'However, the competent authorities of the Member States may maintain or impose the public service obligations referred to in Article 2 for urban, suburban and regional passenger transport services. The conditions and details of operation, including methods of compensation, are laid down in Sections II, III and IV.'
([28]) See Article 14(1) of Regulation (EEC) No 1191/69.
([29]) Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway, (OJ L 130, 15 June 1970, p.1). That regulation was without prejudice to the provisions of Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings and of Council Regulation (EEC) No 1191/69.
([30]) Within the definition of tariff obligations given in Article 2(5) of Regulation (EEC) No 1191/69.
([31]) Judgment of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, Case C-280/00, ECLI:EU:C:2003:415, paragraph 108.
([32]) Judgment of 16 March 2004, T-157/01, *DanskeBusvognmænd v Commission* ('*Combus*'), ECLI:EU:T:2004:76, paragraph 100.
([33]) Regulation (EC) No 1370/2007 of the European Parliament and the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, (OJ L 315, 3.12.2007, p. 1)

(35) Regulation (EC) No 1370/2007 applies only to the transport of passengers by rail and other track-based modes and by road, excluding the transport of freight (Article 1). Article 9(2) of Regulation (EC) No 1370/2007 states that 'without prejudice to Articles [93, 106, 107 and 108 TFEU], Member States may continue to grant aid for the transport sector pursuant to Article [93 TFEU] which meets transport coordination needs or which represents reimbursement for the discharge of certain obligations inherent in the concept of a public service, other than those covered by this Regulation'. Thus, at the end of the 3-year period (i.e., after 3 December 2012), the compatibility of aid granted for the discharge of PSOs in rail freight transport had to be assessed directly under Article 93 TFEU.

2.2.2. *The Italian legislation*

(36) Law No 210 of 17 May 1985 ('**Law 210/1985**') ([34]) empowered the State to maintain, remove or introduce PSOs with respect to the FS Group and to compensate the latter for the costs directly linked to the discharge of those PSOs.

(37) According to Article 18, paragraphs 1 and 2, of Law 210/1985, the Minister for Transport had to determine by decree the PSOs that had to be maintained for the FS Group, with the possibility in the future to remove and/or establish new PSOs or extend the scope of those already imposed. In the event of establishment or extension of PSOs, the FS Group acquired the right to receive a financial compensation for the related expenses under the rules laid down in Regulation (EEC) No 1191/69.

(38) Concerning more specifically tariff obligations, Article 16 of Law 210/1985 stated that, while acknowledging that the tariffs were approved by the Board of Directors of the FS Group to ensure a balanced management, the public authorities could determine by decree the maximum tariffs applicable for the transportation of persons and of certain types of goods. That Article established that any difference between the tariffs imposed by the public authorities and the standard tariffs set by the Board of Directors of the FS Group could give rise to a reimbursement under Regulation (EEC) No 1191/69.

(39) Law No 41 of 28 February 1986 ('**Law 41/1986**') ([35]) abolished all PSOs, including obligations to operate and tariff obligations for which the FS Group was recognised a right to reimbursement under Regulation (EEC) No 1191/69 (Article 10, paragraph 15). However, in accordance with Articles 16 and 18 of Law 210/1985, the Ministry of Transport could by decree list the PSOs to be maintained due to their public interest and within the limits of the funds allocated by the State budget.

(40) On 16 January 1990, the Ministry of Transport adopted Decree 1-T ('**Ministerial Decree 1-T/1990**'). Article 2 of that decree established a list of tariff obligations to be imposed on the FS Group for the transport of certain categories of passengers and goods. That list included tariff obligations on:

— freight transport between the Italian mainland and Sardinia, in accordance with Article 12 of Law of 11 June 1962 No 588 ([36]) ('**Law 588/1962**') establishing the criteria for the calculation of rail tariffs for the connections with Sardinia;

— international freight transport through the port of Trieste; and

— international freight transport within the European Coal and Steel Community.

(41) As of 1 July 1992, following the entry into force of Regulation (EEC) No 1893/91 amending Regulation (EEC) No 1191/69 (recital (31)), the Italian authorities regulated the imposition of PSOs via PSCs, abandoning the system of unilateral imposition of PSOs established by decree.

([34]) Law No 210/1985 of 17 May 1985 instituting the entity 'Ferrovie dello Stato'.

([35]) Law No 41 of 28 February 1986 relating to the provisions on the annual and multi-annual budget of the State.

([36]) Article 12 of Law No 588/1962, establishing a plan to encourage the economic and social development of Sardinia reads as follows: 'for goods carried by the ferry service, the rail tariffs calculated on a virtual distance of 100 km shall apply' and 'such transport shall not be subject to fixed rates, surcharges and special charges in an amount exceeding that in force in Italy for the same distance and for the same goods, nor to transit quotas'.

(42) As a result, as far as rail freight transport services were concerned, Italy implemented the tariff obligations referred to in recital (40) for the period July-December 1992 in a PSC concluded on 23 January 1991 between the Ministry of Transport and the FS Group. Italy maintained those tariff obligations for the year 1993 by concluding a new PSC on 29 December 1992 with the FS Group. Italy subsequently concluded with the FS Group two additional PSCs for the periods 1994-1996 and 1997-1999. The contract for the period 1997-1999 introduced a clause of continuity, by which, at the expiry of the contract, the FS Group was under the obligation to comply with the tariff obligations defined in the contract until the signature of the next PSCs.

(43) The PSCs concluded respectively for the periods 1994-1996 and 1997-1999 imposed tariff obligations on the following services provided by the FS Group:

— national freight transport between the Italian mainland and Sardinia, in accordance with Article 12 of Law 588/1962 establishing the criteria for the calculation of rail tariffs for the connections with Sardinia;

— international freight transport through the port of Trieste;

— international freight transport within the European Coal and Steel Community: that obligation stemmed from the agreement between the Government Representatives of the Member States of the European Coal and Steel Community, signed on 21 March 1955, which provided for the application of reduced rates for the transport of coal and steel;

— national rail freight transport over distances exceeding 1 000 km; and

— international rail freight transport between the Italian port of Trieste and Hungary: in accordance with Article 5 ([37]) of the bilateral agreement between Italy and Hungary of 19 April 1988, ratified by Law No 440 of 30 December 1989 ('**Law 440/1989**') ([38]), a 15 % discount on the ordinary rate for transits through Austria and a 50 % reduction of the ordinary rate for transits through (former) Yugoslavia was established.

(44) During the period 2000-2014, Italy adopted the Measures under investigation. Section 3 of this Decision describes those Measures.

3. DESCRIPTION OF THE MEASURES

3.1. Beneficiary

3.1.1. *Trenitalia*

(45) Trenitalia was established in June 2000 as a fully controlled subsidiary of Ferrovie dello Stato S.p.A., the holding company of the FS Group, whose sole shareholder is the Italian Ministry of Economy and Finance. The establishment of Trenitalia followed the reform of the FS Group, initiated in July 1998 by the organic, legal and accounting separation of the activities of the FS Group (infrastructure, passenger transport services, regional transport services and freight transport services) and furthered by the establishment of separate legal entities controlled by the FS Group (Trenitalia in June 2000 and Rete Ferroviaria Italiana in July 2001). As soon as it was created, Trenitalia took over the provision of rail freight services from the FS Group. Trenitalia is currently the largest rail operator in Italy, and was active until 31 December 2016 in both passenger and freight transport.

([37]) Providing that '[f]or import and export freight transport to and from Hungary through the free port of Trieste the rail rates of the State border stations to those of the free port of Trieste are determined by applying a more favourable treatment than that provided for by the current Conditions and Rates of the Italian State Railways' and that '[a]ll matters concerning rail services, including fares, will be the subject of a separate agreement to be concluded between the Italian State-owned railway company and the Hungarian railway infrastructure manager, following consultation with the other railway administrations of the transit States'.

([38]) Article 11 of Law 440/1989 limited the validity of the bilateral agreement to five years, renewable automatically for five-year periods with the possibility for any party to terminate it six months before the beginning of each period.

3.1.2. *The 2017 reorganisation of the FS Group's freight activities*

(46) As of 1 January 2017, the FS Group decided to reorganise its freight activities by regrouping into one single entity, the Mercitalia Group ([39]), all of the activities of the FS Group relating to the rail freight transport services ([40]). As a result, the FS Group transferred the Trenitalia's rail freight business (the so called 'cargo division') to a newly-created company, Mercitalia Rail S.r.l. ('**Mercitalia Rail**'), ([41]) fully controlled by Mercitalia Logistics S.p.A. ('**Mercitalia Logistics**') ([42]), itself being exclusively controlled by the FS Group. Through Mercitalia Logistics, the FS Group provides freight transport services in Italy and abroad using both conventional and combined transport techniques ([43]).

(47) The transfer took place after Mercitalia Rail had acquired the relevant safety certificates to be able to operate as railway undertaking on the rail freight transport market ([44]). The transaction took the form of a proportional spin-off of all assets and liabilities of Trenitalia's cargo division in favour of Mercitalia Rail ([45]), including employees, rolling stock, maintenance facilities, commercial contracts, and the investments held by Trenitalia in companies active in the cargo transport and/or logistics sector ([46]). Given the type of operation, which was a matter of internal restructuring within the FS Group, Mercitalia Rail did not pay any compensation to Trenitalia for the transferred activities.

(48) As of 1 January 2017, Mercitalia Rail became the new owner of the Trenitalia's cargo division.

([39]) The annual financial report for 2017 of the FS Group (available at https://www.fsitaliane.it/content/dam/fsitaliane/en/Documents/investor-relations/financial-statements/2017_Annual_report_FS.pdf, last accessed on 15.11.2023) states that '2017 was a historic year for [the FS Group, with the start-up of Mercitalia Rail, Trenitalia's spin-off in the cargo sector. In addition, Mercitalia Logistics was established through the transformation of FS Logistica and operates as the subholding company responsible for coordinating all the group's logistics and cargo transport companies, which together form the Mercitalia [Group]' (p. 3). In their replies of 11 April 2023, the Italian authorities explained that the Mercitalia Group is currently composed of Mercitalia Logistics and its six subsidiaries: Mercitalia Rail, Mercitalia Intermodal SpA, Mercitalia Shunting & Terminal Srl, TX Logistik and TerAlp.

([40]) See https://www.mercitaliarail.it/content/mercitalia_rail/it/chi-siamo/il-business-merci-del-gruppo-fs-italiane.html (last accessed on 15.11.2023). As explained by the Italian authorities in their replies of 11 April 2023, that reorganization concerned the rail freight activities of Trenitalia as well as of all other companies of the FS Group active on the rail freight market.

([41]) The existing company FS Telco Srl changed its name into Mercitalia Rail Srl and started pursuing a new object, namely the provision and commercialisation of rail freight transport services, including dangerous goods and waste, in Italy and abroad.

([42]) In 2017, the company FS Logistica SpA, which was set up in 2007 as a result of Ferrovie dello Stato's decision to group in one single dedicated operator all the logistics activities carried out within the FS group, changed its name into Mercitalia Logistics SpA.

([43]) In its annual financial report for 2017 (cf. footnote [39]), the FS Group stated that 'with respect to cargo transport, the [FS Group] has generated and is pursuing, with the creation of the Mercitalia [Group] headed by the sub-holding company Mercitalia Logistics S.p.A., a new business model consisting of the development of integrated cargo transport and logistics transport solutions at the best market conditions. Within the [group], the rail service, which benefits from the expertise and professional experience of the subsidiary Trenitalia S.p.A.'s cargo business unit, performed well in this first year, partly due to the integration with other group companies' (see p. 62).

([44]) Access to the railway infrastructure is granted only to railway undertakings that hold a valid safety certificate. The safety certificate gives evidence that the railway undertaking has established its safety management system and is able to comply with its legal obligations. At that time, the legislative framework was given by 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), which was in force until 30 October 2020 (included). From 31 October 2020 it was repealed by Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (OJ L 138 26.5.2016, p. 102).

([45]) In their replies of 11 April 2023, the Italian authorities submitted to the Commission the act of spin-off, which was signed by the legal representatives of Trenitalia and Mercitalia Rail on 21 December 2016, with effect as of 1 January 2017. The spin-off led to the reduction of Trenitalia's share capital and to a proportional increase of the value of Mercitalia Rail's capital, for an amount equivalent to the book value of Trenitalia's transferred cargo division.

([46]) See the annual financial report for 2017 of the FS Group (cf. footnote [39]), p.174.

3.2. **The Measures**

(49) Between 2000 and 2014, Trenitalia received a total of EUR 1,6 billion of financial compensation from the State for the discharge of PSOs in the field of rail freight transport services throughout the Italian territory, including to/from Sardinia and Sicily. Those PSOs were provided on the basis of the following three PSCs concluded between the Ministry of Infrastructure and Transport (the '**MIT**') and Trenitalia under Regulation (EEC) No 1191/69.

— A first contract, signed on 18 October 2002, covering initially the period 1 January 2000 – 31 December 2001 and applying to passenger ([47]) and freight transport services. That contract was automatically extended at the date of its expiration for two years until the end of 2003 by virtue of a continuity clause (the '**First Contract**').

— A second contract, signed on 27 March 2007, covering initially the period 1 January 2004 – 31 December 2006 and applying only to freight transport services. That contract was automatically extended at the date of its expiration for two years until the end of 2008 by virtue of a continuity clause (the '**Second Contract**').

— A third contract, signed on 3 December 2012, covering the period 1 January 2009 – 31 December 2014 and applying only to freight transport services (the '**Third Contract**'). The validity of that contract expired on 31 December 2014, without extension.

(50) The First Contract and the Second Contract indicate that, in their absence, Trenitalia would not have provided commercially the relevant freight transport services under the same terms and conditions ([48]). The Third Contract refers to the obligation for Member States under Regulation (EEC) No 1191/69 to compensate the undertaking on which a '*public service obligation*' is imposed. The PSOs are defined as obligations which the transport undertaking, were it to consider its own commercial interests, would either not assume or it would not assume to the same extent or under the same conditions.

Table 1

List of PSCs covered by the formal investigation procedure

PSCs	Application period	Signature	First payment	Total compensation
I	1.1.2000 – 31.12.2003	18.10.2002	2003	EUR 404,6 million
II	1.1.2004 – 31.12.2008	27.3.2007	2007	EUR 613,7 million
III	1.1.2009 – 31.12.2014	3.12.2012	2010	EUR 612,1 million

([47]) As the opening decision concerned only rail freight transport services, passenger services are not covered by this Decision.

([48]) Article 5(1) of the First Contract reads: 'The Ministry acknowledges that the freight transport services pursuant to point 2 herein below were rendered in accordance with the provisions of the Service Agreements of 1994 1996 and 1997-1999, with international obligations of the State, with the Decree of the Ministry of Transport No 1-T of 1990 and with related legal obligations referred to therein, and concurrently acknowledges that, had these services been rendered by the Company on a purely commercial basis, they would have been rendered on a different scale or under different conditions than those that effectively took place'. Article 2(3) of the Second Contract reads: 'if those same services had been provided by the Company on a purely commercial basis they would have been provided to a different extent or on different conditions from those actually obtaining. In particular, the carriage of goods to and from the two largest islands guarantees ongoing connections with the mainland and mobility for long- and very long distance goods traffic and helps to restore territorial balance'.

3.2.1. *The First Contract*

3.2.1.1. Background on the conclusion of the First Contract

(51) In accordance with the continuity clause contained in the PSC concluded for the period 1997-1999 (see recital(42)), the FS Group continued to apply tariff obligations on its rail freight services beyond the expiry date of that latter contract, i.e. beyond 31 December 1999.

(52) On 18 March 1999 ([49]), a directive issued by the Prime Minister required the FS Group to draw up a business plan in view to updating the obligations contained in the PSC covering the period 1997-1999. The FS Group presented its business plan 1999-2003 to the MIT in 1999. That business plan also detailed the rail freight services operated by the company under conditions that would not be viable at commercial terms without compensation. The MIT approved the business plan in July 2000, identifying the services that it considered essential to maintain for the public interest ([50]).

(53) Trenitalia ([51]) and the MIT concluded the First Contract on 18 October 2002.

3.2.1.2. Content of the First Contract

(54) The First Contract required Trenitalia to comply with certain tariff obligations (i.e., the obligation to charge a price for specific services lower than the otherwise market price as per Trenitalia's rate card in the absence of tariff obligations) and obligations to operate against payment of a compensation calculated in accordance with the methodology set out by the contract.

(55) The First Contract maintained the existing tariff obligations that were established in the PSC for the period 1997-1999 (see recital (43)) for the following rail freight services operated by Trenitalia, without modification of the parameters to determine the related compensation:

— *Rail freight transport between the mainland and Sardinia*: in accordance with Article 12 of Law 588/1962, the First Contract provided for a compensation calculated as the difference between the rail tariff calculated on the actual distance travelled between Civitavecchia and Golfo Aranci (250 km) and the tariff calculated on a virtual distance of 100 km;

— *Rail freight transport over distances exceeding 1 000 km* ([52]): this obligation aimed at keeping regressive kilometrical tariffs above the threshold of 1 000 km. In the absence of this obligation, the rate applied by Trenitalia for freight transport would not have decreased anymore beyond the thousandth kilometre (i.e., the level where fixed costs are recovered entirely) ([53]). The First Contract provided for a compensation calculated as the difference between the amounts that would have been obtained by applying the theoretical kilometre fare (which ceases to decrease after the point at which the fixed costs are recovered entirely, equivalent to the thousandth km) and the amounts which were effectively obtained by applying the kilometre fare provided in the contract with Trenitalia, which continues to decrease even beyond 1 000 km;

([49]) Directive of the Prime Minister of 18 March 1999, published in the Italian official journal No 113 of 17 May 1999.
([50]) Those services are listed in recital ((55)).
([51]) Trenitalia took over the operation of rail freight services from the FS Group as of its establishment in June 2000.
([52]) This obligation covered only national traffic.
([53]) As stated in the Explanatory Report of February 2002 (Annex 9.1 to Italy's reply of 29 October 2012) '[t]he rate applied for freight transport increases as the number of kilometres increases, but not proportionally; there is a decreasing scale that is more pronounced in the initial kilometre bands and then gradually flattens out to become almost asymptotic. However, after the thousandth kilometre, the tariff becomes more regressive, reflecting the tariff obligations introduced by the previous service contracts'.

— *Rail transport of coal and steel within the European Coal and Steel Community*: the First Contract provided for a compensation calculated as the difference between the revenues derived from the application of the tariff obligations and the revenues that Trenitalia would have had from the application of its standard rate. This obligation remained in force until 1 May 2002 ([54]);

— *International rail freight transport services between the Italian port of Trieste and Hungary*: the First Contract provided for a compensation calculated on the basis of a 15 % discount on the ordinary rate for transits through Austria and a 50 % reduction of the ordinary rate for transits through the countries of the former Yugoslavia (Slovenia and Croatia) that had been established pursuant to Article 5 of Law 440/1989. Article 11 of Law 440/1989 limited the validity of the bilateral agreement between Italy and Hungary to five years, renewable automatically for five-year periods with the possibility for any party to terminate it six months before the beginning of each period. The contract provided for a compensation calculated as the difference between the revenue derived from the application of the tariff obligations and the revenue that Trenitalia would have had received by applying its standard rate;

— *International rail freight transport services through the port of Trieste Marittima*: in line with the provisions of Ministerial Decree 1-T/1990, the First Contract provided for tariff obligations on international rail freight transport services passing through the port of Trieste Marittima ([55]) other than those operated between the port of Trieste and Hungary based on Law 440/1989 ([56]). The compensation was equal to the difference between the revenue derived from the application of the tariff obligations and the revenue that Trenitalia would have received by applying its standard rate, multiplied by the total number of wagons transiting in import/export through the port of Trieste Marittima.

(56) The First Contract introduced also new tariff obligations concerning the following rail freight services operated by Trenitalia:

— *Intermodal transport services on the Lyon – Torino route*: on 15 July 1999, the FS Group and the company *Société Nationale des Chemins de fer Français* (**'SNCF'**) contractually agreed to apply a 30 % discount on the standard rate on intermodal transport services on the Lyon Venissieux – Torino Orbassano route. The discount aimed at overcoming the congestion of the road passes between Italy and France caused by the closure for three years of the Mont Blanc tunnel following an accident in March 1999. Those services allowed the fluid transit of the goods transported by road haulage at the Italian-French border, regardless of the length of the road transport leg ([57]). The First Contract provided for a compensation that was calculated as the difference between the revenue derived from the application of the tariff obligations and the revenue that Trenitalia would have had received by applying its standard rate. That obligation was in force from 1 January 2000 until the end of 2001;

— *Combined land rail freight transport services*: that obligation covered only national services. It aimed at encouraging the re-balancing of polluting transport modes (such as road) with more sustainable modes of transport (such as rail). It remained in force until 31 December 2003. The First Contract provided for a compensation calculated as the difference between the average price of conventional rail transport ([58]) and that of combined transport, applied to the overall volume of combined traffic.

([54]) That is six months after publication in the Official Journal of the European Community of Decision of the Representatives of the Governments of the Member States, meeting within the Council, of 23 October 2001 terminating the Agreement of 21 March 1955 on the establishment of international railway tariffs for the carriage of coal and steel, which led to the cessation of the agreement of 21 March 1955.

([55]) The port of Trieste Marittima is only one part of the port of Trieste; it consists of the port basin close to the port loading and unloading docks (Pier V, VI and VII). Trieste Marittima is to be understood as the Trieste rail station 'Campo Marzio', which is the main infrastructure serving the said docks.

([56]) Ministerial Decree No 239/T of 13 April 1992 clarified that those tariff obligations cannot be added to those provided for by Law 440/1989.

([57]) In other words, the part of the journey operated by road transport had no limit in length and could exceed the part of the rail journey (cf. footnote [11]).

([58]) Conventional rail transport refers to the transport services carried out from the point of origin to the point of destination exclusively by rail.

(57) Furthermore, the First Contract also introduced obligations for Trenitalia to operate *ferry crossing and manoeuvring for freight transport between the mainland and the islands of Sardinia/Sicily*. These obligations allowed for the provision of rail freight transport services between the mainland and each of the two islands, the trains being put on ferries on the maritime section of the route. The compensation covered the fees paid by Trenitalia to the infrastructure manager for the provision of ferry crossing and manoeuvring services, calculated on the basis of an embarkation and disembarkation handling price and a unit price for ferry costs, multiplied by the number of journeys carried out.

(58) Under Article 8 of the First Contract, Trenitalia was obliged to send to the MIT the certified financial accounts relating to the discharge of the PSOs for the year 2001.

(59) Article 10 of the First Contract required Trenitalia at the expiry of the First Contract to continue to provide the services covered by the First Contract until notice by the MIT ([59]). The compensation for any additional month of service could not exceed one-twelfth of the yearly compensation set for 2001. If legal provisions incompatible with the obligation to continue services were enacted, Trenitalia was entitled to suspend performance of the services rendered under the continuity clause, without prejudice to the compensation due for the services rendered up to that date, in accordance with the procedures laid down in Articles 4 and 14 of Regulation (EEC) No 1191/69.

(60) Article 11 of the First Contract set a penalty up to EUR 250 000 for each non-compliance with any of the PSOs listed in recitals (55) to (57).

(61) The compensation for the years 2000-2003 (EUR 356,4 million) was paid by Italy in 2003 (EUR 237,6 million) and 2005 (EUR 118,8 million).

3.2.2. *The Second Contract*

3.2.2.1. Background on the conclusion of the Second Contract

(62) At the expiry of the First Contract (31 December 2001), Trenitalia continued to operate the PSOs imposed under the First Contract, in accordance with the continuity clause (see recital (59)). However, the PSOs provided for under the First Contract in the following services were no longer effective as of:

— 1 January 2002 for intermodal transport services on the Lyon – Torino route (see recital (56));

— 1 May 2002 for rail transport of coal and steel within the European Coal and Steel Community following the termination of the European Coal and Steel Community (see recital (55));

— 1 January 2004 for combined land rail freight transport services (see recital (56)).

(63) The report provided by Trenitalia to the MIT on the financial costs for 2005 incurred by Trenitalia for the discharge of the PSOs under the First Contract revealed that the First Contract, as regards the freight transport between the mainland and the islands of Sardinia/Sicily, covered only costs for ferry crossing and manoeuvring and did not take into account additional costs borne by Trenitalia for the discharge of PSOs between the mainland and Sardinia/Sicily. In order to comply with the PSOs under the First Contract, Trenitalia had to manage and maintain several rail stations and infrastructures in Sardinia and Sicily to organize the loading and unloading of the goods. Those costs had not been taken into account under the First Contract, although they were effectively borne by Trenitalia and directly linked to the provision of the PSOs imposed by the First Contract.

([59]) Article 10 of the First Contract also expressly stated that the MIT had to re-establish the public service obligations and the criteria for determining the relevant compensation, taking account of the deregulation process in force and on the basis of studies and in-depth analyses to be carried out.

(64) As a result, in the course of 2006 the MIT prepared a new PSC. Trenitalia and the MIT concluded the Second Contract on 27 March 2007 for the period 2004-2006, acknowledging the PSOs operated by Trenitalia under the continuity clause contained in he First Contract.

3.2.2.2. Content of the Second Contract

(65) The Second Contract continued to impose the same tariff obligations (with the same parameters to determine the amount of compensation) already contained in the First Contract ([60]):

— the regressive tariff obligation on rail freight transport over distances in excess of 1 000 km;

— the tariff obligation on international rail freight transport between the port of Trieste and Hungary;

— the tariff obligation on international rail freight transport services through the port of Trieste Marittima;

— the tariff obligation on rail freight transport between the mainland and Sardinia.

(66) The Second Contract also continued to impose on Trenitalia an obligation to operate ferry crossing and manoeuvring (for traffic to/from Sardinia and Sicily) as in the First Contract (see recital (57)).

(67) By contrast with the First Contract, the Second Contract imposed an additional obligation requiring Trenitalia to serve a certain number of train stations listed in Annex 1 to the Second Contract for freight services to/from Sardinia and Sicily to maintain the same volume of rail freight services provided to/from those islands in 2004.

(68) As a result, the Second Contract also introduced a new compensation methodology for the PSOs provided to/from Sardinia and Sicily. Those PSOs accounted for more than 70 % of the compensation under the Second Contract. By contrast with the First Contract (see recitals (55) to (57)), the compensation granted to Trenitalia under the Second Contract covered the difference between the costs linked to the organisation of the rail freight services between the mainland and Sicily/Sardinia (including the management of the train stations) and the revenues derived from those services (including the compensation granted to cover the tariff obligations and the fees paid to the railway infrastructure manager).

(69) Thus, the overall compensation to discharge the PSOs imposed on rail freight services between the mainland and Sicily/Sardinia was calculated on the basis of Trenitalia's profit and loss statement registered for those services. More specifically, that profit and loss statement took into account the revenues derived from the transport of goods (including the compensation to cover the foregone revenues derived from the application of tariff obligations) as well as ancillary revenues. ([61]) On the costs side, the profit and loss statement took into account all the costs relating to the operation of rail freight transport services between the mainland and Sardinia/Sicily (calculated as unit cost per train/km), as well as the costs attributable to the sea crossing and manoeuvring of the wagons and the management of the train stations and their installations. The compensation included a profit, determined as the product of Trenitalia's weighted average cost of capital and capital employed.

(70) Lastly, the Second Contract also imposed the obligation to plan and coordinate all activities ancillary to the provision of all the rail freight transport services covered by the Second Contract (in particular, maintenance and overhaul of rolling stock, an optimum level of safety conditions, administrative and commercial activities in support of service management).

([60]) Italy no longer imposed under the Second Contract tariff obligations on rail freight transport of coal and steel within the European Coal and Steel Community (see recital (55)), on intermodal transport services on the Lyon-Torino route (see recital (56)) and on combined freight transport services which were *de facto* no longer operated as of 1 January 2004 (see recital (55)).

([61]) Ancillary revenue is revenue derived from goods or services other than a company's core business operation (in this case freight transport services).

(71) The Second Contract provided for the payment of the overall amount of compensation in the form of an all-in annual fee payable in two instalments (80 % of the amount paid yearly after submission by Trenitalia of its annual economic forecasts by 30 June of the year following the reference year and the remaining 20 % of the amount following the submission of the certified yearly accounts by Trenitalia). According to Article 5(2) of the Second Contract, Trenitalia had to send its yearly accounts – certified by auditors and drawn up in accordance with Article 5(3) of the 2003 Decree – for review to the MIT by 30 September of the year following the reference year. Within 45 days following the receipt of those accounts, the MIT had to verify them as well as the number of services effectively provided by Trenitalia.

(72) The Second Contract established the maximum amount of total annual compensation to be granted for the discharge of all the PSOs provided in the Second Contract for the years 2004-2006 based on the Ministry of Economy and Finance's budget forecast for the corresponding year. The total annual compensation granted could not in any case exceed the actual financial burden borne by Trenitalia for each year of the three-year period 2004-2006 as shown in the certified yearly accounts. Where the compensation paid exceeded the financial burden actually borne by Trenitalia, the MIT, following the submission of the yearly accounts by Trenitalia on 30 September of each year, subtracted the corresponding excess amount from the compensation payable ([62]).

(73) Article 9 of the Second Contract provided for a penalty of EUR 50 000 for non-compliance with any of the PSOs imposed on Trenitalia under the Second Contract, to be deducted from the compensation payable ([63]).

(74) Article 12 of the Second Contract extended the validity of the Second Contract until further notice of the MIT. Such notice had to be given at least 90 days in advance and could concern the termination of some or all of the PSOs covered by the contract. Under this article, Trenitalia continued to operate the rail freight transport services covered by the Second Contract beyond its expiry, until notice by the MIT. The compensation for any additional month of service could not exceed one-twelfth of the yearly compensation set for 2004. If legal provisions incompatible with the obligation to continue services were enacted, Trenitalia was entitled to suspend performance of the services rendered under the continuity clause, without prejudice to the compensation due for the services rendered up to that date, in accordance with the procedures outlined by Articles 4 and 14 of Regulation (EEC) No 1191/69.

(75) The total compensation received by Trenitalia under the Second Contract was EUR 613,7 million. The compensation for the year 2004 (EUR 118,8 million) was paid in 2007, after the contract was signed ([64]). As regards the compensation for the services provided in the subsequent years (namely the years 2005, 2006, 2007 and 2008), the payments took place between 2007 and 2009 in two instalments:

— 80 % of the sum was paid following a request introduced by Trenitalia to the MIT, accompanied by the submission of the annual evolution of the economic parameters used for monitoring the accuracy of the estimated compensation;

— 20 % of the sum was paid upon submission of the certified accounts.

([62]) See Article 4(2) of the Second Contract.

([63]) Ad hoc penalties were imposed in case of: failure to submit accounting data to the MIT; failure to comply with the service quality undertakings provided in Article 6(2) of the Second Contract; non-compliance with the service obligations concerning the maintenance of a specific list of installations open to the public for the freight service to and from Sardinia and Sicily.

([64]) The payment of the compensation for 2004 was set out in Article 5(4) of the Second Contract, in which it was acknowledged that for 2004 Trenitalia had complied with the PSOs laid down in Article 2(1) as set out in Annex 1 and that the obligations in Article 3 had been discharged. '*Therefore compensation shall be payable to the Company without further fulfilment of obligations*'.

3.2.3. *The Third Contract*

3.2.3.1. Background on the conclusion of the Third Contract

3.2.3.1.1. Phasing-out of the PSOs imposed by the Second Contract

(76) At the expiry of the Second Contract (31 December 2006), Trenitalia continued to operate the PSOs under Article 12 of the Second Contract.

(77) However, on 17 January 2008, Trenitalia alerted the MIT that the projected costs to discharge the PSOs under the Second Contract largely exceeded the amount of compensation to be paid by Italy for the year 2008 ([65]). In view of the substantial risks of uncompensated losses, Trenitalia indicated to the MIT that it would need to reduce the PSOs provided under the Second Contract, and in particular to suspend the services provided to/from Sardinia and Sicily as they were the most loss-making under the Second Contract.

(78) On 18 January 2008, the MIT took note of the substantial losses incurred by Trenitalia and agreed to review the perimeter of the PSOs in order to mitigate the risks of under-compensation incurred by Trenitalia for the year 2008, in particular regarding transport services to/from Sardinia.

(79) On 28 May 2008, the MIT requested Trenitalia to provide data on the discharge of the PSOs under the Second Contract, concerning in particular financial data (costs and revenues registered) and transport data (number of tons of goods transported, train/km operated, average distance, etc.). The Italian authorities intended to review the need for PSOs, following in particular the evolution of the rail freight market after its full liberalisation as of 1 January 2007 (see recital (23)).

(80) By letter of 27 October 2008, the MIT informed Trenitalia of its intention to review the scope of the PSOs imposed on Trenitalia as regards rail freight transport to Sardinia and that a new PSC applicable as of 1 January 2009 was necessary to take into account the modification of the scope of the PSOs. In that letter the MIT indicated that it had decided, together with the Sardinia region, to reorganise the transport of goods between Sardinia and the mainland by abandoning rail transport in Sardinia and relying only on road for the transport of goods on that island. ([66]) In addition, the MIT acknowledged that the rail freight services to Sardinia operated by Trenitalia under the conditions laid down by the Second Contract involved considerable costs.

(81) On 19 December 2008, Trenitalia provided the data requested by the Italian authorities. Based on those data, the Italian authorities evidenced a strong decrease in volumes transported between 2004 and 2007 (-84 % of tons transported) for the international services subject to the tariff obligations under the Second Contract ([67]). On that basis, Italy thus considered that the tariff obligations provided under the Second Contract and imposed on the international rail freight transport services between the port of Trieste and Hungary, and those through the port of Trieste Marittima were no longer relevant as the demand registered for those services drastically fell between 2004 and 2007.

([65]) Trenitalia indicated in its letter of 17 January 2008 to the MIT that the company had planned a total cost of EUR 149 million for the year 2008, while the Italian authorities had planned to pay for 2008 a compensation of EUR 92 million. Trenitalia also referred to the certified accounts for 2006 transmitted to the MIT, showing that Trenitalia incurred EUR 179 million of costs for the discharge of the PSOs under the Second Contract for the year 2006.

([66]) Under the Second Contract, for the transport of goods to/from Sardinia, Trenitalia would operate rail freight services on the mainland towards different ports on the mainland; then embark the wagons on the vessels and disembark them in Sardinia to continue the journey by train through the different train stations in Sardinia (and vice-versa). However, the Italian authorities had decided that Trenitalia would no longer need to embark trains on vessels, as the goods would be disembarked directly at the ports on the mainland, transported by sea to Sardinia where road transport carriers would pick up the goods and deliver them throughout the island.

([67]) I.e. international rail freight transport between the port of Trieste and Hungary, and international freight rail transport through the port of Trieste Marittima.

(82) Furthermore, as regards rail freight transport over distances in excess of 1 000 km, the Italian authorities noted that those services were overall concentrated on segments in the northern parts of Italy, given that those segments yielded much higher profits for Trenitalia. The latter had projected in its business plan for 2007-2011 to reorganise its freight services towards segments that were the most profitable, in particular following the opening up to competition of the rail freight services at national level as of 1 January 2007. That reorganisation of Trenitalia's rail freight activities thus led to a substantial reduction of the services provided in Southern Italy and the major islands (Sicily/Sardinia), in particular as of 2007. As a result, the Italian authorities considered that the tariff obligations over distances in excess of 1 000 km were no longer appropriate to foster rail freight traffic to Southern Italy.

(83) The MIT therefore no longer required Trenitalia to comply with the tariff obligations provided under the Second Contract as of 1 January 2009.

(84) Furthermore, following the reorganisation of the transport of goods between Sardinia and the mainland, the PSOs provided under the Second Contract regarding rail freight transport between Sardinia and the mainland were no longer effective as of 1 January 2009.

(85) As a result, Trenitalia remained only subject to the PSOs provided under the Second Contract relating to the provision of rail freight services to/from Sicily as of 1 January 2009, by virtue of the continuity clause contained in Article 12 of the Second Contract (i.e. obligation to operate manoeuvring and crossings).

3.2.3.1.2. The draft of the Third Contract of 4 March 2009

(86) In November 2008, the MIT and Trenitalia started to negotiate a new PSC.

(87) By letter of 26 February 2009, the MIT asked Trenitalia to maintain rail freight public services between Southern Italy and Northern Italy until the MIT and Trenitalia had defined the perimeter of the Third Contract. According to Italy, the continuation of those services was essential to ensure the constant flow of goods between Southern Italy and Northern Italy and thus keep an economic equilibrium between the regions of Italy.

(88) According to Italy, on 4 March 2009, when Trenitalia and the MIT exchanged a draft of the Third Contract, the parties had found an agreement on most of the terms and conditions of that contract. That draft provided that Trenitalia had to operate rail freight services to/from the regions of Abruzzo, Basilicata, Calabria, Campania, Molise, Apulia and Sicily (Article 4 of the draft contract and Annex 1 to that draft contract) and imposed on Trenitalia the obligation to guarantee a certain amount of services per year (12,8 million of train/km) ([68]). These services had to be provided on demand by any customer located in Italy (unless there was either a revenue per train/km lower than EUR 5,1 and/or a differential between costs and revenues per train/km exceeding EUR 16 per train/km) and by respecting certain levels of quality listed in Annex 2 to the draft Contract. The draft contract provided for a validity period from 1 January 2009 to 31 December 2013.

(89) The compensation covered the difference between the traffic revenue and associated costs related to the provision of the PSOs under the draft Contract ([69]). Trenitalia was entitled to an all-in annual fee (Article 6(6) of the draft contract) payable in two instalments (90 % of the amount paid following the submission of the relevant receipts to the MIT and the remaining 10 % of the amount following the submission of the annual report on the quantitative and qualitative transport services provided by Trenitalia). The compensation was calculated based on the FS Group industrial plan for 2007-2011 (article 6(3) of the draft contract). Trenitalia had to submit to both the MIT and the Ministry of Economy and Finance on a yearly basis the certified accounts with confirmation of the amount of revenues, costs and charges incurred by the company for the provision of the service obligations referred to in the draft Contract (article 6(7) of the draft contract).

([68]) The draft contract (article 5) also provided for the obligation imposed on Trenitalia to plan and coordinate all the activities necessary for the provision of the public service obligations (maintenance of the rolling stock, safety conditions, administrative and commercial support activities). It also required from Trenitalia to guarantee the accurate recording of data and information relating to the public service obligations provided under the draft Contract (article 6 of the draft contract)

([69]) The compensation for the year 2009 was established at EUR 93 million and to EUR 107 million for the year 2010 and 2011 (VAT excluded).

(90) The draft contract provided for penalties in case of non-compliance by Trenitalia of the quality standards required by the draft contract. Moreover, it was established that in case of interruptions and changes to the services due to exceptional events or events not attributable to Trenitalia, the compensation accorded to Trenitalia would be reduced in proportion of the amount of train/km not supplied.

(91) The terms and conditions of the draft Third Contract were further discussed and negotiated in the subsequent months. According to Italy, the outstanding issues under negotiation concerned the exact number of train/km to be supplied by Trenitalia yearly ([70]). In the meantime, Trenitalia discharged the PSOs negotiated with the MIT as defined by the draft contract of 4 March 2009, and provided a total of 14 million train/km for the year 2009.

3.2.3.1.3. The draft of the Third Contract of 29 October 2010

(92) On 29 October 2010, Trenitalia and the MIT finalised the draft Third Contract, which essentially reiterated the provisions of the draft contract of 4 March 2009 and at the same time introduced some revisions. Those revisions concerned the period of validity of the contract ([71]), the amount of train/km to be supplied by Trenitalia ([72]), the parameters for the calculation of the compensation ([73]) and the system of penalties ([74]).

(93) The content of the draft Third Contract of 29 October 2010 remained unchanged until the signature of the Third Contract by the MIT on 3 December 2012. That content is described in section 3.2.3.2.

(94) On 29 October 2010, the Director General of the MIT sent the finalised draft Third Contract to the cabinet of the Minister of Infrastructure and Transport, together with an accompanying note in which it pointed out that Trenitalia had provided the services since 1 January 2009 in accordance with the conditions contained in the finalised draft Third Contract.

(95) Following the agreement on the draft Third Contract of 29 October 2010, the Italian authorities adopted Decree-Law of 29 December 2010 n 225 (ratified by Law of 26 February 2011 n 11) authorising the Ministry of Economy and Finance to grant the compensation fixed by the annual budgetary law to Trenitalia for the provision of PSOs for 2009, calculated according to the parameters set in the draft Third Contract.

3.2.3.2. Content of the Third Contract

(96) The Third Contract (concluded on 3 December 2012 on the basis of the draft agreed between the MIT and Trenitalia on 29 October 2010) concerned rail freight services to/from Southern Italy, as specified in the first indent of recital (97). The Third Contract imposed on Trenitalia the obligation to guarantee a certain amount of services per year financed by the State within the limits of the available public funds ([75]). These services had to be provided on demand by any customer and by respecting certain levels of quality and efficiency listed in Annex 1 and 3 to the Third Contract ([76]). Differently from the First and Second Contract, the Third Contract did not cover rail freight transport services to and from the island of Sardinia and it did not include tariff obligations, Trenitalia being free to apply market prices ([77]).

([70]) Italy provided a letter of 22 April 2009 sent by Trenitalia to the MIT in which the company took act of the advanced negotiations of the draft contract and that the parties had to define the definitive amount of train/km (in a range between 9,4 and 13 million train/km) to be provided in accordance with the available budgetary funds for 2009-2011.

([71]) The draft of 29 October 2010 provided for a duration from 1 January 2009 to 31 December 2014 (i.e. a longer duration compared to the draft of 4 March 2009, which covered only until 31 December 2013).

([72]) The draft of 29 October 2010 provided for an amount of 11,9 million train/km to be operated instead of 12,8 million train/km.

([73]) The draft of 29 October 2010 provided that the parameters to determine the contract were established in Trenitalia's Economic and Financial Plan.

([74]) The system of penalties is more detailed in the draft of 29 October 2010 compared to the draft of 4 March 2009.

([75]) According to Article 4.4 of the Third Contract, Trenitalia had to guarantee the freight operations within the limits of the annual funds determined by the State budget and listed in the *ex ante* Economic and Financial Plan contained in Annex 2 to the Third Contract.

([76]) The level of quality included essentially an obligation of punctuality.

([77]) According to Article 4(5) of the Third Contract, Trenitalia was required to charge its customers 'tariff obligations strictly commensurate with market conditions, which can be structured in relation to the contracted quantities and should in any case be applied in a non-discriminatory manner'.

(97) According to Article 4 of the Third Contract, Trenitalia undertook:

— to provide 11,9 million train kilometres ([78]) of rail freight transport services, in conventional full trainload ([79]) or combined transport modes ([80]), to/from Southern Italy ([81]), including Sicily, in accordance with the Adriatic and Tyrrhenian geographical areas, to any operator that requests them, at a minimum level of efficiency, within the limit of the funds allocated to the public budget referred to in the business plan;

— to plan and coordinate all the activities necessary for the provision of the PSOs imposed by the Third Contract (maintenance of the rolling stock, safety conditions, administrative and commercial support activities);

— to guarantee the accurate recording of data and information relating to the PSOs provided under the Third Contract (the criteria for the preparation of the analytical regulatory accounts are regulated in detail in Annex 2 of the Third Contract).

(98) The Third Contract provided for a minimum efficiency level, below which Trenitalia could refuse to provide the requested service. Annex 1 to the Third Contract specified that Trenitalia had a duty to provide the service in all cases, unless there was a differential between costs and revenues per train/km exceeding EUR 19 per train/km and this difference was greater than 73 % of total costs.

(99) The compensation covered the difference between the traffic revenue and associated costs related to the provision of the PSOs under the Third Contract. Trenitalia was entitled to an all-in annual fee. The compensation was calculated based on Trenitalia's *ex ante* Economic and Financial Plan annexed to the Third Contract (Annex 2) ([82]). According to the provisions set in Annex 2 to the Third Contract the undercompensation for the initial years covered by the Third Contract should have been offset in subsequent years, so as to arrive at a situation of equilibrium over the entire period 2009-2014. Trenitalia had to submit to both the MIT and the Ministry of Economy and Finance on a yearly basis the certified accounts with confirmation of the amount of revenues, costs and charges incurred by the company for the provision of the PSOs referred to in the Third Contract ([83]).

([78]) According to Article 10 of the Third Contract, it was possible to revise the offer made to the client in response to its request referred in Annex 1 to the Third Contract, if there was a variance in the economic and volume factors provided in Trenitalia's business plan (which was at the basis of the economic and service parameters referred in the contract).

([79]) Annex 1 to the Third Contract specifies that the term '*conventional full trainload*' refers to rail transport carried out at the exclusive request of a customer or groups of customers based on pre-defined technical parameters of time, frequency, capacity and maximum length, agreed between the carrier and the customer and subject to an agreement with the customer.

([80]) Annex 1 to the Third Contract specifies that the expression '*combined transport*' indicates freight transport in which the lorry, trailer or semi-trailer, with or without a tow vehicle, swap body or container carry out the initial or final part of the journey by road and the other part by rail, without intermediate reloading.

([81]) Annex 1 to the Third Contract, entitled '*planned offer*', listed the following 42 one-way region (origin) / region (destination) connections: (1) Abruzzo/Abruzzo, (2) Abruzzo/Campania, (3) Abruzzo/Northern Italy, (4) Abruzzo/Apulia, (5) Basilicata/Calabria, (6) Basilicata/Northern Italy, (7) Basilicata/Apulia, (8) Basilicata/Sicily, (9) Calabria/Basilicata, (10) Calabria/Calabria, (11) Calabria/Campania, (12) Calabria/Northern Italy, (13) Calabria/Apulia, (14) Calabria/Sicily, (15) Campania/Basilicata, (16) Campania/Calabria, (17) Campania/Campania, (18) Campania/Northern Italy, (19) Campania/Apulia, (20) Campania/Sicily, (21) Molise/Apulia, (22) Northern Italy/Abruzzo, (23) Northern Italy/Basilicata, (24) Northern Italy/Calabria, (25) Northern Italy/Campania, (26) Northern Italy/Apulia, (27) Northern Italy/Sicily, (28) Northern Italy/Northern Italy, (29) Apulia/Abruzzo, (30) Apulia/Basilicata, (31) Apulia/Calabria, (32) Apulia/Campania, (33) Apulia/Molise, (34) Apulia/Northern Italy, (35) Apulia/Apulia, (36) Apulia/Sicily, (37) Sicily/Basilicata, (38) Sicily/Calabria, (39) Sicily/Campania, (40) Sicily/Northern Italy, (41) Sicily/Apulia, (42) Sicily/Sicily. As regards the Northern Italy/Northern Italy connections, Annex 2 specified that: 'The North-North lines are the "inputs" (Adriatic and Tyrrhenian respectively) to traffic of universal scope, or the proportion of trains required to carry out the service covered by the Contract, according to the organisation of the Cargo production network'.

([82]) In addition to the recording of data and information, Annex 2 included the business plan, the regulatory analytical accounting procedures and criteria to be used for the years 2009-2010 and 2011-2014.

([83]) Article 5(1)(e) of the Third Contract.

(100) According to Article 5(1)(e) of the Third Contract, Trenitalia had to send its yearly accounts – certified by auditors and drawn up in accordance with Article 5(3) of the 2003 Decree – for review to the MIT within 90 days from the approval of Trenitalia's financial statements.

(101) A detailed system of obligations, controls and penalties was included in the contract ([84]). Moreover, it was established that in case of interruptions and changes to the services due to exceptional events or events not attributable to Trenitalia, the compensation accorded to Trenitalia would be reduced in proportion of the train/km not supplied ([85]).

(102) The total compensation received by Trenitalia under the Third Contract was EUR 612,1 million. The compensation for the years 2009 and 2010 was paid to Trenitalia on 21 December 2010; whereas the compensation for the subsequent years (from 2011 to 2014) was paid to Trenitalia yearly in two instalments: (i) 90 % were paid in arrears each month on a pro rata basis; (ii) 10 % were invoiced as of April of the year following the reference year net of penalties ([86]).

4. **GROUNDS FOR INITIATING THE PROCEDURE**

4.1.1. *Existence of aid*

(103) In the opening decision, the Commission considered that the public service compensation for the discharge of PSOs in relation to rail freight transport constitutes State aid to the benefit of Trenitalia within the meaning of Article 107(1) TFEU.

(104) The Commission took the preliminary view that the compensation granted to Trenitalia under the three PSCs was directly financed from the State budget and was directly imputable to the Italian State as the contracts were signed by the MIT ([87]).

(105) As regards the existence of an advantage to the undertaking concerned, the Commission had doubts that the four conditions set forth in the *Altmark* judgment were satisfied.

(106) On the first *Altmark* condition relating to the entrustment of PSOs, the Commission had doubts on the existence of a market failure in respect of the three PSCs due to the presence of private operators in Southern Italy and the types of services operated by Trenitalia.

(107) The Commission had also doubts on the compliance with the second *Altmark* condition, concerning the *ex ante* determination of the parameters based on which the compensation was calculated, because Trenitalia started to carry out the services subject to PSOs prior to the conclusions of the PSCs.

(108) As regard the third *Altmark* condition, according to which the compensation must not exceed what is necessary to cover the costs incurred in the discharge of PSOs, the Commission did not have sufficient elements to conclude that there was no overcompensation.

([84]) Articles 8, 11 and 12 of the Third Contract.
([85]) Article 8(3) of the Third Contract.
([86]) See Article 9(3) of the Third Contract: 'A 90 % share of the annual fee can be invoiced in arrears each month on a pro rata basis. The remaining amount can be invoiced from April of the following year, net of any of the penalties referred to in Article 13'.
([87]) According to Article 38(2) of Law No 166/2002 of 1 August 2002, as amended by Law No 222/2007 of 29 November 2007, the entrustment of the PSCs of national interest falls within the tasks of the MIT.

(109) Finally, as regards the fourth *Altmark* condition ([88]), the Commission considered this condition not to be complied with, because Trenitalia was not chosen to offer the services pursuant to a public tender procedure for any of the three PSCs and the level of compensation was not based on the analysis of the costs incurred by a well-run undertaking. Concerning in particular the Third Contract, with regard to the study provided by Italy ([89]), the Commission noted that the study clearly stipulated that Trenitalia operated in a different operational and technical context, especially in Southern Italy, compared to other European rail freight transport service operators, and concluded that Trenitalia could not have been considered as efficient as its major European competitors.

(110) Accordingly, the Commission took the preliminary view that the three PSCs conferred on Trenitalia an advantage that the company could not have obtained under normal market conditions. Such advantage was in addition selective, as the Measures benefitted only Trenitalia.

(111) The Commission also took the preliminary view that the Measures were liable to distort competition on the Italian rail freight transport market, where Trenitalia competed at national and Union level with other railway undertakings, and to affect intra-Union trade, since the main rail freight transport service operators on the Italian market also operated at international level.

4.1.2. *Legality of the Measures*

(112) The Commission considered that the Italian authorities could not rely on the exemption from prior notification provided by Article 17(2) of Regulation (EEC) No 1191/69, since the public service compensation resulted from three PSCs rather than the unilateral imposition of PSOs. As the PSCs had not been notified to the Commission before their implementation, the compensation qualified as unlawful aid.

4.1.3. *Compatibility*

(113) In the opening decision, the Commission had doubts regarding the compatibility of the compensation paid in relation to the three PSCs with the internal market under both Regulation (EEC) No 1191/69 and Article 93 TFEU.

(114) The Commission questioned compliance with the requirements of Article 14 of Regulation (EEC) No 1191/69, because Trenitalia had started providing the services covered by the three PSCs in question before the formalisation of any agreement with the MIT.

(115) The Commission did not have sufficient elements to conclude that the services provided qualified as genuine and correctly defined services of general economic interest ('**SGEIs**'). The Commission considered that Italy exceeded the margin of discretion to define a PSO. In particular, the Italian authorities had not demonstrated that a market failure existed on all the routes identified in the Third Contract on which Trenitalia had to provide the PSOs. The Commission observed that rail freight transport was liberalised in Italy since 2003 and more than twenty companies, including several major European rail freight operators, were active on the Italian market and on parts of the routes covered by the Third Contract. In addition, the Italian authorities had not demonstrated why the specificities of Southern Italy claimed by the Italian authorities should have hindered these operators from providing the service in question on commercial terms.

([88]) This condition is deemed to be fulfilled if the recipients of the compensation have been chosen following a tender procedure, which allows for the selection of the tenderer capable of providing the services at the least cost or, failing that, the compensation has been calculated by reference to the costs of an efficient undertaking.

([89]) Study of 9 October 2012, '*Analisi del Contratto di Servizio Trenitalia alla luce delle disposizioni europee in materia di compensazione degli Oneri di Servizio Pubblico*', commissioned to Price Waterhouse Coopers Advisory S.p.A.

(116) Furthermore, the Commission considered that all three PSCs were established and signed after Trenitalia started providing the PSOs. It therefore had doubts that the parameters at the basis of the calculation of the compensation amounts were established in advance. As for the absence of overcompensation, the Commission considered that overcompensation could not be ruled out under the Third Contract (in the absence of information provided by Italy), while for the Second Contract, the Commission has doubts that Trenitalia actually provided the entirety of the PSOs under the Second Contract, so that the compensation paid to Trenitalia might have exceeded the costs actually supported by Trenitalia.

(117) Lastly, as regards the Third Contract, the Commission noted that the PSOs were not strictly limited to Southern Italy, but also covered lines to the North on which competing railway operators were also active. The Italian authorities had not demonstrated a market failure for a PSO in rail freight transport, so that any compensation granted to Trenitalia to provide such a broad service was likely to distort competition to an extent contrary to the common interest. The Commission had similar doubts regarding the First Contract and the Second Contract, as those contracts included PSOs on international routes, in particular to and from Trieste and to and from Hungary, that were also operated by domestic and international railway undertakings.

(118) The Commission therefore invited Italy and interested parties to submit all comments and the necessary information to enable it to assess whether the Measures could be considered compatible with the internal market.

5. **COMMENTS FROM ITALY**

5.1. **First Contract**

(119) In its observations of 24 June 2014, Italy considered that the compensation paid under the First Contract did not constitute State aid, because of the absence of distortion of competition and trade as well as the absence of any advantage granted to Trenitalia. Additional clarifications were provided by Italy in its observations of 5-15 February 2018 and of 23 May 2018.

5.1.1. *Distortion of competition and effect on Union trade*

(120) As regards the absence of distortion of competition, Italy argued that the Measures could not be qualified as aid, as they concerned obligations almost entirely consistent with pre-existing obligations put in place when the rail freight market was not yet liberalised at national level (i.e. before 22 October 2003). For the period between the liberalisation at national level (22 October 2003) and the end of the contract (31 December 2003), Italy considered that the compensation had no impact on competition at Union level, because the obligations relating to international transport did not concern other Member States ([90]). In any event, Italy considered that such obligations were so marginal that they could not financially enable Trenitalia to expand on foreign markets. In the alternative, according to Italy, if the compensation were considered to be aid, it qualified as existing aid, pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999, until the liberalisation at Union level (1 January 2007) ([91]).

(121) Moreover, Italy observed that the compensation paid under the First Contract had no effects on Union trade, since it was insufficient to cover the operating deficit recorded by Trenitalia for the provision of services under the First Contract. Moreover, Italy indicated that Trenitalia was an autonomous legal entity from the FS Group. It had a separate accounting system from that of the other companies of the FS Group as well as it kept separate accounts for its different activities (rail freight services and rail passenger services). In its observation of 23 May 2018, Italy clarified that, between 2000 and 2002, Trenitalia operated exclusively in sectors closed to competition (i.e. rail passenger transport and rail freight transport). It added that Trenitalia's subsidiaries active on liberalised markets (e.g. the company Passaggi SpA active on the travel agency market) kept separate accounting and that all the transactions carried out between these companies and Trenitalia were at market terms.

([90]) Hungary was not part of the Union until 1 May 2004 and traffic through the Port of Trieste could have been also towards/from extra-Union locations.

([91]) In its observation of 23 May 2018, Italy argued the absence of aid given the fact that, as of 15 March 2003, only international combined transports and international rail freight on the Trans-European railway network (and not international rail freight) were liberalized at Union level by Directive 2001/12/EC.

5.1.2. *Advantage*

(122) As regards the absence of an advantage granted to Trenitalia, Italy considered that the First Contract complied with all four *Altmark* conditions.

5.1.2.1. Existence of a genuine SGEI (first *Altmark* condition)

(123) According to Italy, with regard to the existence of genuine SGEIs, all the obligations covered by the First Contract qualified as genuine SGEI, even when they concerned international connections.

(124) On the one hand, the First Contract pursued several objectives in the public interest, covering transport ([92]), environmental ([93]), safety ([94]), economic and social cohesion ([95]) policies. Italy considered that the assessment of the economic and social reasons underlying the establishment of an SGEI is a discretionary prerogative of the authorities of the Member States and that the Commission's assessment in this respect is limited to the manifest error.

(125) On the other hand, nothing in the Commission practice allowed concluding that SGEIs could not exist on international routes ([96]). Moreover, the tariff obligation relating to the international routes concerned only transport carried out on the national territory, as the rate reduction was provided only for the national service route. In any event, the tariff obligation made up for a very small proportion of the total obligations entrusted to Trenitalia.

(126) In its observations of 5-15 February 2018, Italy considered that the obligations covered by the First Contract were falling within the definition of Article 2(1) of Regulation (EEC) No 1191/69, as they were obligations which Trenitalia, if it were considering its own commercial interests, would have not assumed or at least not to the same extent or under the same conditions.

(127) With regard to the entrustment of the service, Italy considered that the obligations imposed on Trenitalia had been identified clearly since the beginning of the First Contract. In fact, the legal basis of the obligations imposed on Trenitalia under the First Contract had to be found in pre-existing legislation, international agreements, or previous PSCs (covering the periods 1992-1993, 1994-1996 and 1997-1999).

5.1.2.2. The parameters on the basis of which the compensation is calculated are established in advance in an objective and transparent manner (second *Altmark* condition)

(128) Italy claimed that there was an absolute certainty from the outset as to the manner in which the compensation was going to be determined, as this had been agreed among the parties before the signature of the contract. Italy considered that the subsequent signing of the contract was merely a formalisation of the elements previously agreed among the parties and essentially acted as a certifier. As evidence, it adduced the fact that the parties' behaviour had been always in line with the terms and conditions of the contract, even if the latter was formally signed only at a subsequent stage.

([92]) To prevent the almost total 'desertification' of the rail freight transport activity in the south of Italy, thus avoiding an even more pronounced, and in fact almost total concentration in the road mode of freight traffic in these regions.

([93]) To provide a sustainable alternative to rail transport, thus avoiding a further increase of pollution and road congestion, which are already excessively high in Southern Italy, as well as incompatible with the tourist vocation of most areas concerned.

([94]) To reduce the level of road accidents.

([95]) To secure a connective fabric of rail transport, including the related infrastructures, in the Italian regions concerned, which, although with a minimal structure, should remain as homogeneous as possible to that existing in the rest of the peninsula.

([96]) Italy argued that the Commission's practice in the rail sector recognises that 'the fact that a transport service concerns a cross-border or international link is no obstacle to the possibility of operating it as part of a public service. The Commission points out in this respect that, even in sectors which are fully open to competition, services of general economic interest exist for international links'. It referred in particular to the Commission decision of 24 February 2010 concerning the public transport service contracts between the Danish Ministry for Transport and DanskeStatsbaner – Aid C 41/08 (former NN 35/08), notified under number C (2010) 975, in OJ L 7 of 11.1.2011, p.1, paragraph 265.

(129) Italy indicated that the State annual budget laws had defined annually the amounts of compensation to be paid to Trenitalia for the services carried out under the First Contract even before the signature of that contract, under the assumption that the contract was actually in place. In its observations of 5-15 February 2018, Italy clarified that the legal basis of the compensation paid to Trenitalia under the First Contract was: Article 12(5) of Law Decree No. 299/2001 with regard to the year 2000; Article 38(1) of Law No 166/2002 with regard to the year 2001; Annex IV to the First Contract with regard to the year 2002 and Article 10(3) of the First Contract with regard to the years 2003-2004.

5.1.2.3. Absence of overcompensation (third *Altmark* condition)

(130) According to Italy, the First Contract was conceived in a way to exclude any risk of overcompensation by specifying the services requested and the parameters to calculate the corresponding compensation. Italy considered that significant margins of under-compensation were reported in Trenitalia's account statements and that over-compensation of services never occurred.

(131) In its observations of 23 May 2018, Italy provided the amount of compensation paid to Trenitalia and Trenitalia's net costs under the First Contract, as summarised in Table 2.

Table 2

Compensation of Trenitalia's net costs under the First Contract

(EUR mln (VAT excluded))

	2000	2001	2002	2003
Contractual provision	48,2	118,8	118,8	118,8
Compensation paid	48,2	118,8	118,8	118,8
Trenitalia's net costs	48,2	185,4	166,5	156,5

5.1.2.4. The level of compensation (fourth *Altmark* condition)

(132) According to Italy, Trenitalia was a 'well-run' undertaking, in a position to show levels of costs which were in line with the competitors, and to provide services under economic conditions which were substantially similar to those that would derive from a competitive procedure. In this context, Italy considered Trenitalia's costs per train/km rather than the costs per tonne/km, because, according to Italy, the latter were influenced by factors that structurally affect the freight rail transport services in Southern Italy (such as the characteristics of the demand and of the network infrastructure), which explained the market failure.

5.1.3. *Legality*

(133) According to Italy, if the compensations were found to be aid, such aid was in any event exempted from prior notification under Article 17(2) of Regulation (EEC) No 1191/69. Italy brought forward that the obligations in question, although included in a PSC, were the result of decisions made by public authorities often dating back in time and imposed on it for reasons of environmental, security, transport and economic and social cohesion policies.

(134) Italy argued that, unlike the case examined by the Court in *Combus* ([97]), Trenitalia engaged in the provision of the transport services included in the contract under the explicit clause that Italy had to compensate the company for the losses incurred in the provision of such services. The compensation paid in this case is that agreed since the very beginning among Italy and Trenitalia and not an additional amount to the initial compensation.

(135) Last, the Italian authorities observed that over the course of the monitoring carried out by the Commission in respect of the application of Regulation (EEC) No 1191/69, Italy had regularly informed the Commission of the compensation granted for the provision of freight services under PCSs on the basis of Regulation (EEC) No 1191/69. Italy considered that, as the Commission never requested clarification on such compensation, the compensation paid under the PSCs for rail freight transport was covered by Article 17(2) of Regulation (EEC) No 1191/69.

5.1.4. *Compatibility*

(136) In the alternative, if the Commission were to conclude that the compensation paid under the First Contract constituted new aid subject to notification, Italy claimed that the aid was compatible with the internal market under Article 14 of Regulation (EEC) No 1191/69, which was the applicable substantive rule at the time the aid was paid ([98]).

(137) Italy argued that Article 14 of Regulation (EEC) No 1191/69 granted Member States the right to conclude PSCs, in order to 'provide adequate transport services to the community', and to grant a compensation for the provision of such services. In this context, according to Italy, the Commission has already determined that it will suffice to prove that the amount of compensation, that is, the price paid by the State, does not exceed the amount strictly necessary to cover the costs arising from the fulfilment of the PSO ([99]).

(138) Against this background, Italy claimed that the compensation paid under the First Contract was compatible with Regulation (EEC) No 1191/69, because it contained all the elements established in Article 14 of Regulation (EEC) No 1191/69 and covered only part of the costs incurred by Trenitalia to perform the services included in the contract.

(139) Furthermore, Italy did not exclude that the compensation could also comply either with Regulation (EEC) No 1107/70, which also implemented the provisions of Article 93 TFEU, or directly with Article 93 TFEU. Italy did not provide any justification with regard to the alleged compliance with Regulation (EEC) No 1107/70. With regard to Article 93 TFEU, on the one hand, Italy claimed that the compensation paid under the PSC concerned genuine SGEIs defined *ex ante*, it was granted solely in order to cover the additional net cost related to the SGEIs and did not cause any undue distortion of competition contrary to the common interest. On the other hand, Italy alleged that the compensation paid under the First Contract could in any event be deemed compatible with the internal market under the Community guidelines on State aid to railway undertakings ([100]), as the measure aimed at reducing external costs. In fact, according to Italy the First Contract was 'intend[ed] to encourage the modal shift to rail, as a mode generating lower costs compared with other transport modes such as road transport' ([101]).

([97]) Judgment of 16 March 2004, T-157/01, *DanskeBusvognmænd v Commission* ('*Combus*'), ECLI:EU:T:2004:76.

([98]) Italy referred to recital 40 of the judgment of the Court in the *Andersen* case (judgment of 20 March 2013, T-92/11, *Jorgen Andersen v Commission*, ECLI:EU:T:2013:143).

([99]) See decision of 26 November 2008 on State aid granted by Austria to Postbus in the district of Linz (OJ L 306, 20.11.2009, p. 26).

([100]) Communication from the Commission — Community guidelines on State aid for railway undertakings, OJ C 184, 22.7.2008, p. 13.

([101]) See point 98(b) of the Community guidelines on State aid to rail undertakings of 22 July 2008. In particular, these guidelines – providing guidance on the rules applicable to public funding in support of this type of undertaking – clarify that the costs eligible for this type of aid are 'the part of the external costs which rail transport makes it possible to avoid compared with competing transport modes'.

5.2. **Second Contract**

(140) In its observations of 24 June 2014, Italy considered, first, that the compensation paid under the Second Contract did not constitute State aid, because of the absence of any advantage granted to Trenitalia and of distortion of competition. Second, Italy claimed that, even assuming that the compensation constituted aid, the aid had to be considered existing aid under Article 1(b)(v) of Regulation (EC) No 659/1999. In the alternative, Italy claimed that the aid was compatible with the internal market because compliant with Article 14 of Regulation (EEC) No 1191/69 and exempted from notification under Article 17(2) of that Regulation.

5.2.1. *Advantage*

(141) Italy considered that the Second Contract complied with all four *Altmark* conditions. Notably, as for the First Contract, Italy argued that the obligations qualified as genuine SGEI and such obligations had been clearly defined from the outset, the compensation parameters had been established in advance in an objective and transparent manner and Trenitalia did not enjoy any overcompensation.

5.2.1.1. Existence of a genuine SGEI (first *Altmark* condition)

(142) In addition to the arguments already developed with regard to the First Contract (see recitals (123)-(125)), Italy argued that the scope of the PSOs entrusted to Trenitalia was correctly defined.

(143) With regard to the newly introduced obligation to operate ferry crossing and manoeuvring, Italy explained that this obligation consisted of unbundling and reassembling of trains, sea crossing of trains by ferry, loading and unloading operations. Even though the obligation to carry out this service was formally imposed on the infrastructure manager (Rete Ferroviaria Italiana - RFI), the compensation was paid to Trenitalia to cover the fees charged by RFI. Italy explained that the compensation was not opened to all potential providers of rail services to the islands (Sicily/Sardinia) because (i) these operators were not obliged by law to provide the service to anyone requesting it and (ii) these operators could factor the fees in their prices while Trenitalia had to apply tariffs set by law.

(144) Considering the lack of adequate transport services in Southern Italy, Italy considered justified not to carry out any public market consultation in order to determine the existence and scope of a public service need. In any event, Italy claimed that it was not obliged to carry out such type of consultation provided under the SGEI rules ([102]), because these rules came into force only in January 2012 and, in any event, do not apply to rail transport.

(145) With regard to the entrustment of the service, in addition to the arguments already developed for the First Contract (see recitals (127) and (128)), Italy argued that the Second Contract merely formalised a pre-existing relationship in place between Italy and Trenitalia since 2004, thus acting as a certifier providing legal certainty of pre-existing agreements. On the one hand, the Second Contract stood in continuity with the First Contract maintaining by large the obligations already set out in the latter, some of these obligations deriving from legislative acts and international treaties. On the other hand, the contract's essential components (i.e. services to be provided and remuneration) had been defined and agreed among the parties from the outset. In this respect, Italy pointed out that the annual State budget laws had established, before the signature of the contract, the yearly amounts of the compensation to be paid to Trenitalia for the public services operated during the time period covered by the Second Contract.

([102]) Communication from the Commission - European Union framework for State aid in the form of public service compensation (2011) (OJ C 8, 11.1.2012, p. 15).

5.2.1.2. The parameters on the basis of which the compensation was calculated were established in advance in an objective and transparent manner (second *Altmark* condition)

(146) As for the First Contract (see recital (128)), Italy claimed that there was an absolute certainty *ex ante* as to the manner in which compensation was going to be determined under the Second Contract and that the subsequent signing of the contract was merely a formalisation of these elements. As evidence, it adduced the fact that the parties' behaviour had been always in line with the terms and conditions of the contract, even if the latter was formally signed only at a subsequent stage.

(147) Italy indicated that the State annual budget laws had defined annually the amounts of compensation to be paid to Trenitalia for the services carried out under the Second Contract even before the signature of that contract, under the assumption that the contract was actually in place. In its observations of 5-15 February 2018, Italy indicated that the annual State budget laws had already established before the formal signature of the Second Contract the amounts of the compensation payable to Trenitalia for the public services operated ([103]).

5.2.1.3. Absence of overcompensation (third *Altmark* condition)

(148) Italy pointed out that the costs incurred by Trenitalia under the Second Contract were estimated on the basis of the costs borne by Trenitalia in 2004, i.e. the first year of the period governed by the Second Contract. The MIT relied on certified reporting statements, examined and approved by the Ministry itself, and verified by an auditing firm.

(149) According to Italy, the Second Contract excluded *ex ante* any risk of overcompensation by specifying the services requested and the parameters defined to calculate the compensation of the related statement of accounts. The compensation provided to Trenitalia for discharging the PSOs was aimed purely at reaching a financial balance (full compensation of the costs sustained for the operation of the service), without any overcompensation.

(150) In its observations of 23 May 2018, Italy provided the data on the amount of compensation paid to and the amount of Trenitalia's net costs under the Second Contract, as summarised below:

Table 3

Compensation of Trenitalia's net costs under the Second Contract

(EUR mln (VAT excluded))

	2004	2005	2006	2007	2008
Contractual provision	119,1	119,1	97,9	142,8	145,7
Compensation paid	118,8	118,8	97,7	142,8	145,5
Trenitalia's net costs	163,5	159,0	179,6	150,2	132,1

(151) Moreover, Italy claimed that Trenitalia had in place an effective separate accounting system segregating its market-based operations from those under the Second Contract. Trenitalia was operating rail freight services via its cargo division, which accounted for separately within the company's overall accounting plan. The services provided under market terms were reported separately from those provided under the PSC, by means of an analytical accounting method that: (i) allocated costs and receipts to the market services and the public services by means of a cost driver system; (ii) produced a financial reporting of the public services; (iii) was certified by an independent auditing firm.

([103]) For instance, as regards the compensation for the years 2004, 2005 and 2006, Article 4 of the Second Contract refers to the sums allocated in the relevant chapters of the national budget for 2004, 2005 and 2006 respectively.

5.2.1.4. The level of compensation (fourth *Altmark* condition)

(152) For the same reasons presented in relation to the First Contract (see recital (132)), Italy argued that Trenitalia was a well-run undertaking, in a position to show levels of costs which were in line with those of its competitors, and to provide services under economic conditions which were substantially similar to those that would derive from a competitive procedure.

5.2.2. *Distortion of competition and effect on intra-Union trade*

(153) Italy considered that the compensation established under the Second Contract for transport on international routes (i.e. international rail freight transport services between the port of Trieste and Hungary and international rail freight transport services through the port of Trieste Marittima) did not affect competition nor had an effect on trade. This was because the tariff obligations (and subsequent compensation) were established only for the national leg of the routes and made up a very small proportion of the total obligations entrusted to Trenitalia.

5.2.3. *Existing aid*

(154) In the alternative, if it were to be concluded that the compensation paid under the Second Contract constituted State aid, Italy indicated that the aid had to be considered existing aid until the full liberalisation of the rail freight market at Union level (1 January 2007). In this regard, Italy indicated that the Second Contract covered some of the obligations already included in the First Contract ([104]), which remained unaltered in their essential aspects. The only new obligations introduced under the Second Contract was that to maintain a specific list of installations open to the public for the freight service in Sardinia and Sicily.

5.2.4. *Legality*

(155) According to Italy, the aid did not have to be notified to the Commission. As in the case of the First Contract (see recitals (133) to (135)), Italy considered that the aid fell under the exemption from prior notification provided by Article 17(2) of Regulation (EEC) No 1191/69.

5.2.5. *Compatibility*

(156) In the alternative, if the Commission concludes that the compensation paid under the Second Contract constituted new aid subject to notification, Italy claimed that the aid was compatible with the internal market under Article 14 of Regulation (EEC) No 1191/69, which was the applicable substantive rule at the time the aid was paid.

(157) As in the case of the First Contract (see recital (138)), Italy argued that the Second Contract contained all the elements established in Article 14 of Regulation (EEC) No 1191/69 and covered only in part the costs incurred by Trenitalia to perform the services included in the contract.

(158) Last, Italy reiterated the argument, already developed for the First Contract, that the Second Contract could also be deemed compatible with the internal market either under Regulation (EEC) No 1107/70 or under Article 93 TFEU (see recital (139)). However, it did not provide any justification in this respect.

([104]) Notably, the tariff obligations on: (i) rail freight transport over distances above 1 000 km, (ii) international rail freight transport through the port of Trieste Marittima, (iii) international rail freight transport from the port of Trieste to Hungary and vice versa, and (iv) rail freight transport between the mainland and Sardinia, and the obligation to operate ferry crossing and manoeuvring for freight transport between the mainland and Sardinia/Sicily.

5.3. **Third Contract**

(159) In its observations of 24 June 2014, Italy considered that the compensation paid under the Third Contract did not constitute State aid because of the absence of any advantage granted to Trenitalia and of distortion of competition and effect on trade. In the alternative, Italy claimed that, even assuming that the compensation constituted aid, the aid was compatible with the internal market under Regulation (EEC) No 1191/69 implementing Article 93 TFEU, and therefore also fully consistent with Article 93 TFEU.

5.3.1. *Advantage*

(160) Italy considered that the Third Contract complied with all four *Altmark* conditions. Notably, as for the First Contract and the Second Contract, Italy argued that the obligations qualified as genuine SGEI, that such obligations had been clearly defined since the outset, that the compensation parameters had been established in advance in an objective and transparent manner and Trenitalia did not enjoy any overcompensation.

5.3.1.1. Existence of a genuine SGEI (first *Altmark* condition)

(161) In addition to the arguments already developed with regard to the First Contract (see recitals (123)-(126)) and the Second Contract (see recitals (142)-(144)), Italy considered that the Third Contract was necessary to cover the market failure which still affected Southern Italy in the period 2008-2009.

(162) According to Italy, private operators did not provide in Southern Italy rail freight transport services comparable to Trenitalia's services. The scarce interest of the market for these connections was due to the fact that rail freight transport in Southern Italy presented characteristics (in terms of demand volatility and infrastructural constraints) that did not ensure, even in the long term, an adequate profitability of the service.

(163) On the one hand, the infrastructure and configuration of the land in Southern Italy made rail freight transport services costly given to inadequate train modules, slopes of the lines, insufficient gauge and ferry costs. Allegedly, after the rail freight transport sector was opened to competition, the new entrant railway undertakings concentrated on traffic in Northern Italy, neglecting the rail links with Southern Italy whose coverage required a complex industrial and organisational structure, with high production costs ([105]).

(164) On the other hand, the peculiar imbalance in the geographical distribution of industrial clusters in Italy caused imbalanced traffic between the North and the South. First, Northern Italy attracted higher demand in terms of both volume and value ([106]). Second, rail services' supply in Southern Italy was affected by a considerable imbalance of trade between the inbound and outbound routes ([107]). Third, in the case of freight transport in Southern Italy, road transport was by far predominant and made the rail mode a price-taker for all types of goods with respect to which the road transport mode was an alternative ([108]). Notably, Trenitalia's competitors, in particular the integrated logistics operators, usually serviced Southern Italy by means of road transport ([109]).

([105]) Namely, the characteristics of the routes to/from Southern Italy required rolling stock more costly than that used for full trainload services on regular routes, like the international ones. Maintaining the requisite network of installations and providing adequate coverage of the national territory also involved a higher proportion of fixed costs.

([106]) Italy pointed out that the traffic in Southern Italy showed a lower percentage of combined transport than at national level (34 % versus 39 %) and a much larger share of agricultural and food products (17 % for traffic to/from the south, 9 % overall on a national scale).

([107]) Notably, the greater part of the rail flows of goods in Italy was one-way flows from the production centres in Northern Italy to consumption centres in Southern Italy. In the reverse direction, the most common journey was the return trips of empty wagons (which could not carry freight either because there were no goods to be sent or because the cargo was not compatible with the wagons).

([108]) This determined a lower degree of willingness to pay for the rail transport services, and hence lower rail freight transport market rates compared to the overall national transport.

([109]) Italy mentioned the case of DB Schenker and NordCargo which had terminals in Northern Italy called 'rail-ports' for making the modal switch from rail to road.

(165) Italy indicated that the Third Contract was intended to ensure a minimum network of services and not individual connections. The rationale was to ensure a minimal presence of a bundle of lines and connections distributed across Southern Italy, with their points of origin/termination: this would have allowed maintaining under economically sustainable conditions a rail modal alternative compared to the predominant road mode. This would have strengthened regional cohesion and territorial balance between Northern and Southern Italy. In particular, Italy considered that the obligations identified in the Third Contract pursued the following public interest objectives:

— *transport policy and safety*: to prevent the almost total 'desertification' of the rail freight transport activity in Southern Italy, thus avoiding the concentration in the road mode of freight traffic in these regions and limit the level of road accidents ([110]);

— *environmental and territorial policy*: to provide a sustainable alternative to road transport, thus avoiding a further increase of pollution and road congestion, which are already excessively high in Southern Italy, as well as incompatible with the tourist vocation of most areas concerned;

— *economic and social cohesion*: to secure a connective fabric of rail transport, including the related infrastructures, in the Italian regions concerned, which, although with a minimal structure, should remain as homogeneous as possible to that existing in the rest of the peninsula.

(166) In order to establish an approach fit to ensure the provision of freight services of a sufficient level of territorial coverage, the Third Contract redefined the scope of the obligations imposed on Trenitalia (compared to the Second Contract) with a focus on region/region connections ([111]). Italy excluded the need to carry out a public market consultation in order to demonstrate the existence of a public service requirement and to establish its scope correctly.

(167) With regard to the entrustment of the service, Italy claimed that the contract's essential components (i.e. services to be provided and remuneration) were defined and regulated from the outset and that the contract was concluded essentially to certify already existing legal and binding relationships and services.

5.3.1.2. The parameters on the basis of which the compensation is calculated are established in advance in an objective and transparent manner (second *Altmark* condition)

(168) As for the First Contract (see recital (128)) and the Second Contract (see recital (146)), Italy claimed that there was absolute certainty *ex ante* as to the manner in which compensation was going to be determined under the Third Contract and that the subsequent signing of the contract was merely a formalisation of these elements, which essentially acted as a certifier. As evidence, it adduced the fact that the parties' behaviour had been always in line with the terms and conditions of the contract, even if the latter was formally signed only at a subsequent stage.

(169) With particular regard to the Third Contract, Italy claimed that the legal framework governing the services in question (e.g. conditions of operation and accounting and reporting of the services for the purpose of compensation, scope and calculation of the compensation) were already laid down and applicable from the start of the periods covered by the contracts. According to Italy, there was absolute certainty *ex ante*, as to the manner in which compensation was determined, because the parameters (on the basis of which the compensation was calculated) were established in advance based on a financial business plan, taking into account the expected costs and revenues generated by the service provided.

([110]) In support of that argument, Italy mentioned the conclusions of the fact-finding investigation of the Ninth Parliamentary Committee, which stated that 'also for rail freight transport there is a public interest in concluding a public service contract, so as to encourage the use of alternative forms of transport to road transport, with obvious positive consequences for the environment and for transport safety'.

([111]) Mainly North/South connections and South/South connections. Northern Italy/Northern Italy connections were in principle not excluded, as long as they were necessary to deliver the service to Southern Italy by conveying traffic flows whose size was too small.

(170) As for the Second Contract, in its observations of 5-15 February 2018, Italy indicated that the annual State budget laws had already established before the formal signature of the Third Contract the amounts of the compensation payable to Trenitalia for the public services operated ([112]).

5.3.1.3. Absence of overcompensation (third *Altmark* condition)

(171) Italy argued that the compensation provided to Trenitalia for discharging the PSOs was aimed purely at a full compensation of the costs sustained for the operation of the service, without any overcompensation. In this respect, Italy pointed out that the contract excluded *ex ante* any risk of overcompensation by specifying the services requested and the criteria for the compensation that was calculated on a train/km per year basis. In fact, over-compensation of services never occurred, and significant margins of under-compensation were reported.

(172) In support of the above, Italy provided the data relating to Trenitalia's costs and compensation for the period 2009-2014 and the corresponding certified reporting statements, examined and approved by the MIT itself, and verified by an auditing firm. Italy indicated that Trenitalia had in place an effective separate accounting system segregating its market-based operations from those under the Third Contract.

(173) In its observations of 4 November 2015 and 23 May 2018, Italy further clarified the amount of compensation paid to Trenitalia and Trenitalia's net costs under the Third Contract, as summarised below.

Table 4

Compensation of Trenitalia's net costs under the Third Contract

(EUR mln (VAT excluded))

	2009	2010	2011	2012	2013	2014
Contractual provision	92,4	106,7	107	106,1	106,1	105,2
Compensation paid	92,4	106,6	102,5	106,0	103,6	101,0
Trenitalia's net costs	200,0	179,6	138,0	131,0	113,7	92,9

5.3.1.4. The level of compensation (fourth *Altmark* condition)

(174) As for the First Contract (see recital (132)) and the Second Contract (see recital (152)), Italy considered that Trenitalia was a well-run undertaking, in a position to show levels of costs which were in line with the competitors', and to provide services under economic conditions which were substantially similar to those that would derive from a competitive procedure.

(175) Italy referred to the study of 9 October 2012, concerning the Third Contract, commissioned to the advisor PriceWatersCooper ('**PWC**') and provided to the Commission before the opening decision (the '**PWC Study 1'**), in order to conclude that the compensation was determined on the basis of the analysis of Trenitalia's costs in line with European benchmarks. In particular, Italy argued that Trenitalia's rolling stock and average operating cost per train/km were in line with the costs reported by other European operators of similar size and providing similar services.

([112]) Italy referred to Article 2(4-quaterdecies) of Decree Law No 225 of 29 December 2010, (converted into Law No 10 of 26 February 2011) that authorised the Ministry of the Economy and Finance to pay Trenitalia the funds allocated by the State budget for the years 2009-2010 with regard to the PSOs applying to the rail transport sector, pending the final conclusion of the new service contract.

(176) The PWC Study 1 identified six railway undertakings ([113]) operating in the Union that it considered suitable for the establishment of a sample of undertakings with a size sufficiently comparable to that of Trenitalia. The study indicated that those six companies registered a yearly traffic above 25 million train/km and 10 billion of tonne/km in the years 2009 and 2010 ([114]). Furthermore, the study explained that those undertakings were equipped with adequate means of transport. To support that finding, the study estimated the number of tons transported per loaded wagon to estimate the average capacity effectively transported by a single wagon; the number of annual loading per wagon, demonstrating the effective use of the means of transport; and the average distance of the transport of one ton of goods (tonne/km transported) in order to identify the specificities of the railway network on which the undertakings operated ([115]). According to the PWC Study 1, the number of tons transported per loaded wagon registered by Trenitalia in 2009 (41 tons in 2009 and 2010) is in line with the peer's median (42 in 2009 and 44 in 2010), demonstrating that Trenitalia is adequately equipped in view of the traffic registered, and it is especially the case since the average distance of transport is longer in Italy (307 km in 2009 and 288 km in 2010) compared to the median of the sample (272 km in 2009 and 264 km in 2004).

(177) As regards the rolling stock, the PWC Study 1 indicated that it was not possible to obtain data on the rolling stocks exclusively used for the transport of goods. Therefore, the PWC Study 1 took into account the entire fleet used by the undertakings composing the sample and used both for the transport of passengers and goods. It concluded that Trenitalia's rolling stock was adequate compared to that used by the companies composing the sample: Trenitalia provided with one locomotive on average 69 000 train/km in 2009 (81 000 in 2010) whereas its competitors provided on average 56 000 train/km in 2009 and 53 000 train/km in 2010) ([116]).

(178) In view to demonstrate the operating efficiency of Trenitalia, the PWC Study 1 compared the average operating cost per train/km of the undertakings composing the sample and that of Trenitalia. According to the study, that metric (cost per train/km) is the most relevant to establish the efficiency of the railway undertakings, given that the metric operating costs per tonne/km does not give sufficient indication of the efficiency of the company. The PWC Study 1 claims that the metric operating costs per tonne/km can be biased by the specific characteristics of the demand (unbalance of the fluxes on a given route, types of goods transported, etc.) or of the railway network (maximum length of the trains, types of gauges used, etc.) which may affect in turn the offer of the railway undertakings.

(179) The analysis took into account the total operating costs of Trenitalia and the undertakings composing the sample (net of the amortisation costs and taxes), including both national and international activities and both passengers and freight activities. However, the PWC Study 1 excluded from the sample two companies (the Czech-based Ceske Drahy and the Polish-based Polskie Koleje Państwowe), as it considered that their average costs per employee (less than EUR 20 000) was far lower for those two companies than for the rest of the sample (EUR 50 000) and for Trenitalia.

(180) The PWC Study 1 concluded that:

— Trenitalia's operating costs per train/km ranged between EUR 22,1 and 22,5 per train/km, in line with that registered by ÖBB, DB and SNCF (ranging between EUR 21,8 per train/km and EUR 22,6 per train/km) ([117]);

([113]) The sample established by the study comprises the Austrian-based operator Osterreichische BundesBahnen (ÖBB), the German-based Deutsche Bahn AG (DB), the French-based SNCF, the Czech-based Ceske Drahy (CD), the Polish-based Polskie Koleje Państwowe (PKP) and the Swiss-based Schweizerische Bundesbahnen/Chemins de fers fédéraux suisses/Ferrovie Federali Svizzere (SBB/CFF/FFS).

([114]) The study indicated that other Union undertakings (Lietuvos geležinkeliai (LG) in Lithuania, Valtion Rautatiet (VR) in Finland and Latvijas dzelzceļš (LDz) in Latvia) reached similar levels in terms of yearly traffic but lower levels of tonne/km operated. In any event, the study indicated that those undertakings operated on a railway network that was much smaller and with larger gauge than the Italian railway network, and thus presented different characteristics. The study therefore excluded those undertakings from the sample.

([115]) An average longer distance reveals a large distribution of the capacities of the production on one territory, thus leading to lower annual volumes of goods transported.

([116]) Page 35 of the PWC Study 1.

([117]) Page 36 of the PWC Study 1. The study excluded SBB/CFF/FFS as the average operating costs per train/km exceeded EUR 30 per train/km.

— Trenitalia's average overall receipts (revenue per train/km) ranging between EUR 14,8 and 15,7 per train/km was below those registered by ÖBB, DB and SNCF (ranging between EUR 23,2 per train/km and EUR 18,7 per train/km) ([118]).

(181) Italy explained the lower receipts of Trenitalia by pointing at the substantially different market situation in which Trenitalia's competitors were operating (in terms of competition with other freight transport services and type of freight transported) ([119]). It indicated that the difference was also due to the non-homogeneous amount of freight transported on average per train (infrastructural constraints and imbalance of trade between the inbound and outbound routes in Southern Italy and volatile prices of the types of goods transported).

(182) According to Italy, the factors affecting the overall train/km cost of delivering the services covered by the Third Contract were: (i) the need to have an oversized rolling stock including locomotives and wagons; (ii) the difficulty of achieving optimum use of human resources and production assets, due to stringent speed limits; (iii) infrastructural and logistical constraints ([120]).

(183) In addition, and with specific regard to traffic to/from Sicily, Italy pointed out the following:

— The train length is especially limited in Sicily where, to enable loading on ferries to cross the Strait of Messina, it cannot exceed 400 m.

— The crossing of the Strait of Messina requires dedicated production structures to handle, load on the ferries and transport by sea the wagons travelling to and from the island and mainland Italy.

— The estimated cost of the shore-to-shore ferry transport of each train (including embarkation and disembarkation) is in the region of EUR 6 000. The cost increases when hazardous freight is transported to/from the island, as this requires a dedicated ferry trip, with a maximum of 4 wagons per trip.

(184) On the basis of the PWC Study 1, Italy concluded that:

— Trenitalia was adequately equipped with means of transport compared with Union undertakings of similar size;

— Trenitalia's operating costs per train/km are in line with its peers;

— Trenitalia's receipts are much lower (by 25 %) than its peers due to exogenous factors (structure of the land transport market and infrastructure constraints that affect prices).

([118]) Pages 38-39 of the PWC Study 1.

([119]) The study points out that those factors affect the price and the receipts. The market shares of the railway undertaking was 10 % in Italy in 2009 in the total land transport of goods, against 20 % in the sample. The average revenue per 100 tonne/km of Trenitalia was of EUR 3,60, the lowest of the sample (median of EUR 4,42).

([120]) In particular, Italy explained the following:

— Given the limited useable track length in stations, the permissible train length is less than that allowed by other Member States (where, as a rule, it ranges from 750 to 550 m).

— Given the maximum allowable axle load for trains in Southern Italy (20 tons per axle against a national and Union standard of 22,5 tons per axle), the absolute and specific weight of the goods that can be transported by rail is limited.

— Given the more stringent loading gauge limits than those applying in the rest of Italy and in the European rail network, very low flatcars are needed and the transport of the larger 'high cube' containers is not possible. This prevents also the development of the 'rolling highway' system needed for intermodal rail and road transport.

— Given the high rate of non-electrified railway lines, railway companies have to use both electrical and diesel locomotives, which causes production diseconomies and underuse of locomotives.

— Given the length of the train journeys, the average of departing trains per day is lower than that on other connections (Italy mentioned an average of 2 departing trains per day to/from Southern Italy compared to a normal average of 3,5 departing trains). As a consequence, the production network of non-travelling staff for ground operations is oversized and underutilised.

— Given the high cost of transferring rolling stock for the specific maintenance work that needs to be carried out at workshops in Central and Northern Italy, the maintenance network has inbuilt diseconomies.

(185) That difference between Trenitalia's receipts and those of its competitors is all the more major for the services compensated under the Third Contract that include services between Northern Italy and Southern Italy. Against that background, Italy considered that the doubts raised by the Commission in the opening decision appear to be the result of a misunderstanding. The Commission allegedly referred to the existence of greater costs per tonne/km transported on connections with Southern Italy, concluding that this could be the consequence of Trenitalia's lower efficiency level. However, according to Italy, what needs to be shown under the fourth *Altmark* requirement is that the beneficiary of the compensation is a well-run undertaking, and therefore in a position to show levels of costs which are in line with the competitors', and to provide services under economic conditions which are substantially similar to those that would derive from a competitive procedure. In that regard, the indicator to be taken into account is precisely the average operating cost per train/km, which properly reflects the unit cost of the service concerned.

(186) As for the indicator of the cost per tonne/km, Italy claims that it has no relevance for the purposes of applying the fourth *Altmark* requirement to the present case. That indicator has a different purpose: it aims at identifying comparative disadvantages factors that structurally affect the freight rail transport services between Northern Italy and Southern Italy, which are precisely the cause of the market failures and therefore of the public intervention in question. Italy claims that those factors have nothing to do with the efficiency of Trenitalia; quite the contrary, they are exogenous factors completely independent of Trenitalia but having the same impact on Trenitalia as they would have on any other operator.

5.3.2. *Distortion of competition and effect on intra-Union trade*

(187) Italy denied that the Third Contract caused any distortion of competition and had an effect on intra-Union trade.

(188) First, Italy claimed that, after the liberalisation of the rail freight market at national and Union level, competition in the market focused on the most profitable routes in Northern Italy and it did not concern traffic in Southern Italy.

(189) Moreover, Italy argued that the separate accounting system adopted by Trenitalia precluded any form of flow of public resources in favour of the undertaking's other activities. This was all the more true considering that the compensation was insufficient to cover the operating deficit recorded by Trenitalia in connection with the obligations imposed under the Third Contract.

5.3.3. *Legality*

(190) Italy considered that the exemption from prior notification provided by Article 17(2) of Regulation (EEC) No 1191/69 applied also to the compensations received by Trenitalia under the Third Contract, because the obligations in question, although included in a contract, were the result of decisions made by public authorities.

5.3.4. *Compatibility*

(191) In the alternative, if it were to be concluded that the compensation paid under the Third Contract constituted new aid subject to notification, Italy claimed that the aid was compatible with the internal market under Article 14 of Regulation (EEC) No 1191/69, given that the contractual relationship formalised by the said contract arose in 2009 and, therefore, while Regulation (EEC) No 1191/69 was still in force.

(192) With regard to the date of the signature of the Third Contract (3 December 2012), Italy considered that Regulation (EEC) No 1191/69 applied until 3 December 2012 included. As Article 10(1) of Regulation (EC) No 1370/2007, in force since 3 December 2009, provides that 'Regulation (EEC) No 1191/69 is repealed. Its provisions shall however continue to apply to freight transport services for a period of three years after the entry into force of this Regulation', Italy considered that the final date coincided with the end of the same day in December (i.e. 3 December) of the third year following the entry into force of Regulation (EC) No 1370/2007, i.e. 3 December 2012 ([121]).

([121]) Italy relied on Article 3(2)(c) of Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 laying down the rules applicable to time periods, dates and terms, according to which, where a time period is expressed in years, it shall end (*dies ad quem*) 'with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs'.

(193) In its observations of 24 June 2014, Italy made clear that the fact that the Third Contract was agreed and even signed under Regulation (EEC) No 1191/69 played an important role in the assessment of its compatibility with the internal market. For the future, Italy pointed out that the MIT intended to define properly the measures to be undertaken in support of rail freight transport and of its users.

(194) As in the case of the First Contract (see recital (138)) and the Second Contract (see recital (157)), Italy claimed that the Third Contract contained all the elements established in Article 14 of Regulation (EEC) No 1191/69 and covered only in part the costs incurred by Trenitalia to perform the services included in the contract.

(195) Last, Italy reiterated the argument, already developed with regard to the First Contract (see recital (139)) and the Second Contract (see recital (158)), that the Third Contract could also be deemed compatible with the internal market under Regulation (EEC) No 1107/70 or under Article 93 TFEU. However, it did not provide any justification in this respect.

5.4. **Economic continuity**

(196) As of 1 January 2017, Mercitalia Rail became the new owner of the Trenitalia's cargo division.

(197) In their submission of 11 April 2023 concerning the economic continuity between Trenitalia and Mercitalia Rail, the Italian authorities explained that, under Italian law, Mercitalia Rail was the legal successor to Trenitalia on the rail freight transport market in its quality of new owner of Trenitalia's cargo division.

(198) The Italian authorities explained however that such legal succession did not entail the transfer to Mercitalia Rail of repayment obligations that could stem from any finding of unlawful and incompatible aid granted to Trenitalia for the provision of rail freight transport services before the spin-off. In their view, such obligations remained with Trenitalia because not attributable to Trenitalia's cargo division ([122]). In that respect, in their reply of 11 April 2023 the Italian authorities indicated that: (i) if Trenitalia had had the intention to transfer those obligations to Mercitalia Rail, it would have expressly mentioned them in the spin-off act; (ii) at the time of the spin-off the Third Contract had already expired, and (iii) the spin-off was only meant as business reorganisation within the FS Group.

6. **COMMENTS FROM INTERESTED PARTIES**

6.1. **Community of European Railways and Infrastructure Companies**

(199) The Community of European Railways and Infrastructure Companies ('**CER**') represents 75 railway undertakings (among which the FS Group) and infrastructure companies from the Union, the candidate countries as well as from the Western Balkan countries, Norway and Switzerland.

(200) In its observations of 18 June 2014, CER considered that, under Regulation (EEC) No 1191/69, the imposition of PSOs and/or the conclusion of PSCs for the provision of rail freight transport could be justified in order to develop a sustainable economy, the regional cohesion and territorial balance and at the same time promoting the modal shift from road to rail freight transport.

(201) It pointed out that Regulation (EEC) No 1191/69, which was applicable to freight transport services until 3 December 2012, granted the Member States the possibility to fund and promote rail freight transport. It concluded that a service qualifies as SGEI where there is a risk that competing services would not cover a substantial part of the citizens' and consumers' needs.

([122]) Under Article 2 of the act of spin-off, all obligations and liabilities relating to facts or circumstances that arose before the spin-off and that were not attributable to the transferred business branch were to remain with Trenitalia.

6.2. **FerCargo**

(202) FerCargo represents 17 railway undertakings ([123]) (public companies as well as private companies) offering rail freight services in Italy.

(203) In its observations of 8 July 2014, FerCargo argued that the compensation accorded by Italy to Trenitalia reinforced the position of the latter on the rail freight market in Southern Italy to the detriment of the other freight railway undertakings that could provide rail freight services on that market.

(204) FerCargo did not take any position with regard to the First Contract. With regard to the Second Contract and Third Contract, FerCargo considered that the compensation constituted State aid in favour of Trenitalia, as the four *Altmark* criteria were not complied with, and the PSCs distorted competition and had an effect on trade. It pointed out that most of the companies operating on the Italian market belonged to international groups, i.e. Nordcargo (Deutsche Bahn), Schweizerische Bundesbahnen Cargo Italia (Schweizerische Bundesbahnen Cargo International), Rail Cargo Italia (Rail Cargo Austria), or operated across Member States (e.g. Rail Traction Company).

(205) In addition, FerCargo questioned the compatibility of the State aid with the internal market.

(206) First, FerCargo was not aware of any public consultation carried out by the Italian authorities in order to ascertain the need for rail freight transport services with the same scope and characteristics as those entrusted to Trenitalia. FerCargo complained that the Italian authorities did not take into account the growing number of operators, alternative to the incumbent, which started to operate in Southern Italy as of 2006. FerCargo claimed that its members could have ensured services comparable to those provided by Trenitalia in terms of continuity, regularity and frequency, capacity and rates, thus making the PSCs unnecessary. It mentioned that, before the conclusion of the Third Contract, in addition to Trenitalia there were already two companies operating on the connections Campania/Northern Italy ([124]) and Abruzzo/Northern Italy ([125]), and five companies that could have started operating on the connections Campania/Calabria ([126]), Molise/Apulia ([127]), Apulia/Basilicata ([128]), Campania/Apulia ([129]), Basilicata/Calabria ([130]), and within Campania ([131]), Calabria ([132]) and Apulia ([133]), because in possession of the necessary certification.

([123]) 1. Adriafer S.r.l., 2. Captrain Italia S.r.l., 3. Compagnia Ferroviaria Italiana S.p.A., 4. DB Cargo Italia S.r.l., 5. Dinazzano PO S.p.A., 6. Ferrotramviaria S.p.A., 7. Ferrovie della Calabria S.r.l., 8. FuoriMuro S.r.l., 9. GTS Rail S.p.A., 10. Hupac S.p.A., 11. InRail S.p.A., 12. Interporto Servizi Cargo S.p.A., 13. OceanoGate Italia S.p.A., 14. Rail Cargo Carrier – Italy S.r.l., 15. Rail Traction Company S.p.A., 16. SBB Cargo Italia S.r.l., 17. TUA (Sangritana) S.p.A.

([124]) In 2008, Rail Traction Company serviced one route on the connection Campania-Northern Italy.

([125]) Between 2009 and 2011, NordCargo serviced two routes on the connection Abruzzo/Northern Italy.

([126]) On the connection Campania/Calabria: Rail Traction Company could have serviced 1 route as of 2008; Compagnia Ferroviaria Italiana could have serviced 1 route as of 2009; GTS Rail could have serviced 1 route as of 2009 (the Commission notes however that this last piece of information finds no confirmation in GTS Rail's safety certificate for 2009 available at www.ansf.it, last accessed on 15.11.2023).

([127]) On the connection Molise/Apulia: Linea could have serviced 1 route as of 2009, GTS Rail could have serviced 2 routes as of 2009, NordCargo could have serviced 1 route as of 2009.

([128]) On the connection Apulia/Basilicata, Linea could have serviced 1 route as of 2009.

([129]) On the connection Campania/Apulia: Compagnia Ferroviaria Italiana could have serviced 1 route as of 2009; GTS could have serviced 1 route as of 2009 (the Commission notes however that this last piece of information finds no confirmation in GST's safety certificate for 2009 available at www.ansf.it, last accessed on 15.11.2023).

([130]) On the connection Basilicata/Calabria, GTS Rail could have serviced 2 routes as of 2009.

([131]) On the connection Campania/Campania: Rail Traction Company could have serviced 6 routes as of 2008; Compagnia Ferroviaria Italiana could have serviced 10 routes as of 2009; GTS could have serviced 2 routes as of 2009; NordCargo could have serviced 4 routes as of 2009.

([132]) On the connection Calabria/Calabria, GTS Rail could have serviced 5 routes as of 2009.

([133]) On the connection Apulia/Apulia: Linea could have serviced 3 routes as of 2009; GTS Rail could have serviced 10 routes as of 2009; NordCargo could have serviced 2 routes as of 2009.

(207) Second, it claimed that the obligations imposed on Trenitalia were 'inconsistent' with the purposes of the PSCs (i.e. the regional cohesion and equilibrium between Northern and Southern Italy). In this respect, it considered that the tariff obligations on international routes provided in the Second Contract financed the expansion of Trenitalia on the markets of other Member States. Moreover, it contested the way Italy had defined the PSOs under the Third Contract and the fact that the Third Contract did not specify the routes to be serviced by Trenitalia, but only the departing and arriving regions. It recalled that, on 21 December 2012, the Italian Interministerial Committee for Economic Planning ('CIPE') had expressed a positive feedback on the Third Contract subject to clarifications on the scope of the public service, on the costs compensated and on the level of remuneration accorded to Trenitalia. Moreover, it pointed out that, on 1 June 2009, the Italian Competition Authority had also called for clearer definition of the public services entrusted to Trenitalia considering the existence of competition within the rail transport mode and of intermodal competition from sea and road transport.

(208) Third, FerCargo claimed that, during most of the period covered by the Second Contract and the Third Contract, Trenitalia operated without act of entrustment and without a clear definition of the parameters of compensation. It denied that, pending the signature of the Third Contract, Trenitalia could rely on the continuity clause included in the Second Contract, as the two PSCs covered different obligations and different compensation methods applied.

(209) Fourth, FerCargo did not exclude possible overcompensation considering that the Second and Third Contracts did not mention that the compensation had to be calculated based on the costs of an efficient undertaking. In its view, in order to verify whether Trenitalia's costs were in line with the costs of a company operated in an efficient manner, the benchmark should have been made up of the existing competition, instead of railway companies operating on foreign markets. With particular regard to the Third Contract, FerCargo argued that the only qualitative parameter used to assess the service was punctuality and not an efficient cost management of the service. Furthermore, the level of compensation did not take into account the lower energy taxes paid by Trenitalia on electricity used by trains ([134]).

(210) Last, FerCargo claimed that Trenitalia did not keep separate accounts and that it used the margins made under the PSCs to finance an aggressive price policy in the commercial segment and increase Trenitalia's presence on the market. According to FerCargo, the unit cost declared by Trenitalia was exorbitant ([135]) compared to the data retained by the Commission in its decision on the Italian *Ferrobonus* scheme (SA.32603) ([136]) and the costs registered by Trenitalia's competitors ([137]). FerCargo argued that, on 1 June 2009, the Italian Competition Authority had already pointed out that compensation paid under a PSC not awarded by way of a transparent competitive tendering process, raises the question of possible cross-subsidization between market services and public services, where there is even a partial overlap between the two types of service.

(211) FerCargo concluded that the State aid is incompatible with the internal market, because, in its view, neither Article 93 TFEU nor Regulation (EEC) No 1191/69 were complied with.

6.3. **The FS Group**

(212) In its observations of 23 July 2014, the FS Group argued that the Third Contract did not qualify as State aid as it complied with the *Altmark* conditions. In this respect, it provided an additional study of July 2014 ([138]) (meant to complement the PWC Study 1 submitted by the Italian authorities), that aimed at showing compliance with the first and fourth *Altmark* criteria.

([134]) FerCargo referred to Italian Decree 22 May 1963 No. 730 and Law Decree 14 June 2014 No. 91.

([135]) EUR 24 train/km in 2009, EUR 26,1 train/km in 2010, EUR 24 train/km in 2011.

([136]) Decision of 16 December 2011 (OJ C/88/2012). In this decision, the average cost of rail freight in Italy was estimated at 10 EUR train/km (see recital 39 of the decision).

([137]) FerCargo referred to the costs of two of its members (Rail Traction Company and NordCargo). Notably, as regards Rail Traction Company, costs between EUR 9,5 train/km for services on the connection Campania/Northern Italy and EUR 9,27 train/km for the connection Campania/Calabria. As regards Nord Cargo, costs of EUR 11,7 train/km for long distance trains including also the costs of the rolling stocks that, according to FerCargo, Trenitalia should have had already fully covered.

([138]) PWC study of July 2014 – 'Contratto di servizio Trenitalia Cargo, Supporto per la risposta alla decisione CE, 27 March 2014'.

(213) With regard to the absence of any manifest error in the definition of the scope of the Third Contract, the FS Group considered that rail freight traffic to/from Southern Italy was affected by a market failure.

(214) In this regard, the FS Group pointed out that Trenitalia's competitors did not have a stable and widespread presence on the market and that, in the period 2007-2008, their market share was below 3 % even on the most profitable region/region connections, like those to/from Campania and Apulia. On these connections, however, Trenitalia's competitors were providing mostly combined transport (therefore, some goods that could be transported only via conventional transport, like steel and chemicals, were not provided by competitors) and mainly in one direction (South-North in the case of Apulia and North-South in the case of Campania). Moreover, at that time, in Southern Italy, competitors were servicing only a limited amount of railway stations and region/region connections compared to those covered by the Third Contract.

(215) According to the FS Group, the scarce interest of competitors for Southern Italy was because rail freight conventional traffic in those regions was characterised by volatile demand (that caused empty wagons and low frequencies). Moreover, given the different types of freight involved (steel, chemicals, automotive, other goods) the provision of the service required a high number of wagons. The FS Group explained that the contract represented 26-28 % of total rail freight services in Italy in terms of train/km but only 6-7 % in terms of tonnage (because the freight covered by the contract tended to travel over greater distances than the average Italian freight and the load factor of trains was lower on the routes concerned). In its view, the fact that the region/region connections covered by the Third Contract shared similar characteristics fully justified the choice made by the Italian authorities to define the SGEI in terms of region/region connections as a network of railway links (rather than as point-to-point connections) ([139]).

(216) The FS Group indicated that, in the absence of the Third Contract, it would have stopped to provide rail freight traffic in Southern Italy. The majority of freight traffic would have then shifted from rail to road. As an example, the FS Group referred to the case of Sardinia, where Trenitalia's rail freight traffic dramatically dropped ([140]) between 2008 and 2009, i.e. after Italy decided not to include the Region of Sardinia in the scope of the Third Contract following the expiry of the Second Contract on 31 December 2008. No other railway undertaking was servicing Sardinia at that time or entered that market after Trenitalia left.

(217) With regard to the fourth *Altmark* criterion, the FS Group supported Italy's view that Trenitalia's costs per train/km were in line with those of other undertakings operating at Union level (ÖBB, DB, SNCF), as indicated by the PWC Study 1 (see recital (175)), and therefore with the costs of a typical well-run undertaking. It considered that the cost-efficiency analysis had to be carried out at the level of the company providing the service (and not at the level of the PSC). For the purposes of the application of the fourth *Altmark* condition, it excluded any relevance to the data on revenues (given that the fourth *Altmark* criterion only refers to the 'costs' of a well-run undertaking) and, in any event, made clear that rail freight transport demand was characterised by a high degree of volatility that made revenues highly unpredictable.

([139]) The FS Group referred to the Commission decision of 24 February 2010 concerning *Danske Statsbaner* (SA.21143), where the Commission pointed out that '[…] the specific legislation in force in no way limits the possibility of entrusting service missions covering a set of lines in order to establish a coherent transport system, particularly with the concern of allowing a certain continuity of transport. No criteria are laid down concerning the profitability or otherwise of the individual lines concerned' and concluded that 'Denmark is not committing a manifest error of assessment by including one or more profitable lines in a public transport service contract, in so far as those lines are part of a coherent transport system' because '[i]n the absence of specific rules to the contrary, the Member State remains free to assess the scope of the public service that it wishes to entrust to an undertaking in order to establish an adequate transport system', see para 166 of Commission Decision of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)).

([140]) Trenitalia's offer dropped from 400 000 – 500 000 train/km per year to about 22 000 train/km in 2009 and continued to shrink in the subsequent years (about 5 000 train/km in 2010 and 3 000 train/km in 2011) until it disappeared in 2012.

7. COMMENTS FROM ITALY ON FERCARGO'S OBSERVATIONS

(218) In its observations of 20 November 2014, 4 November 2015, 5-15 February 2018, 23 May 2018 and 18-19 February 2019, Italy brought forward further arguments in reply of the observations submitted by FerCargo. These arguments focused mainly on the existence of an aid under the Second and Third Contracts.

7.1. **The Second Contract**

7.1.1. *Advantage*

(219) In its observations of 20 November 2014, Italy mainly reiterated the arguments presented in recitals (141) to (152) to contest FerCargo's allegations that the compensations paid to Trenitalia conferred an advantage to Trenitalia.

(220) In particular, Italy argued that the definition of the PSOs under the Second Contract was coherent and appropriate to guarantee the regional cohesion and the economic equilibrium of the Italian territory (i.e. to avoid an imbalance of the production and economic circuits between Northern Italy and Southern Italy). In addition, it also considered that the services performed by Trenitalia in the period 2004-2006 had been all previously agreed with the Italian authorities. As regards the period 2007-2008, Italy referred to Article 12 of the Second Contract (the '*continuity clause*'), under which Trenitalia continued to provide the services covered by the Second Contract until further communication from the Minister of Transport and Infrastructure.

(221) Italy pointed out that Trenitalia was the only rail operator able to deliver the service with the appropriate degree of geographical spread and reach. In support of its claim, it provided a study of 22 October 2014, commissioned to PWC (the '**PWC Study 2**'). That study, which concerned the Third Contract but assessed also the offer of Trenitalia's competitors in the period 2006-2008 in reply to Fercargo's allegation that the Italian authorities had not taken into account the growing number of operators which started to operate in Southern Italy as of 2006 (see recital (206)), showed that, until 2007, irrespective of the liberalisation of rail freight transport at national level, Trenitalia's competitors did not operate any service to and from Southern Italy ([141]). Still in 2008, the competitors' presence in Southern Italy was almost negligible, and totally absent in Sardinia and Sicily ([142]).

(222) In reply to FerCargo's allegation that the compensation paid under the Second Contract allowed Trenitalia to operate at a loss in order to eliminate its competitors (recital (210)), Italy pointed out that Trenitalia was not free to set its tariffs but was subject to the tariff obligations imposed by Italy ([143]). Moreover, Trenitalia was in the position of 'price taker' as rail freight transport prices were mostly determined by the rates of road transport. As regards Fercargo's claimed impossibility to replicate Trenitalia's offer, Italy considered unlikely that competitors were not able to replicate Trenitalia's offer, given that the freight railway companies in Italy declared an average cost that was less than half of Trenitalia's ([144]).

([141]) Although some companies – Rail Traction Company and NordCargo – applied for the safety certificate, at least for Campania, in 2006.

([142]) Railway companies other than Trenitalia provided a service starting from 2008 only linking the two industrial sites of Nola (in Campania) and Fossacesia (in Abruzzo).

([143]) Annex 1 to the Third Contract specified that Trenitalia had a duty to provide the service in all cases, unless there was a differential between costs and revenues per train/km exceeding EUR 19 per km, and unless this difference was greater than 73 % of total costs. These constraints established minimum tariff thresholds, below which Trenitalia could refuse to provide the service. Above these thresholds, Trenitalia had an obligation to provide the service to third parties, with the level of quality set in the Third Contract.

([144]) The PWC Study 2 highlighted that the average cost borne by Trenitalia for the provisions of services under the Third Contract was about EUR 22 per train/km in 2009-2010, while the average costs borne by other railway companies in the rail freight sector in Italy (notably operators with a size much smaller than that of Trenitalia) was in the order of EUR 10 per train/km. On that basis, Italy considered that Trenitalia's competitors were able to offer on the market prices similar to or lower than Trenitalia's.

(223) In reply to FerCargo's allegation of possible overcompensation (recital (209)), Italy claimed that the costs incurred under the Second Contract were not estimated on the basis of the First Contract but with reference to the costs borne by Trenitalia in 2004, which is the first year of application of the Second Contract. In order to calculate the compensation, the MIT relied on certified reporting statements, examined and approved by the MIT itself, and not on mere estimates.

(224) With regard to FerCargo's claim that the compensation did not take into account the lower energy taxes paid by Trenitalia on electricity used by trains (recital (209)), in its observations of 5-15 February 2018 Italy clarified that this tax reduction concerned all railway undertakings operating in Italy.

7.1.2. *Distortion of competition and effect on intra-Union trade*

(225) Italy considered irrelevant that the members of FerCargo are controlled or associated with leading European railway companies operating Alpine and cross-border routes. According to Italy, that circumstance in no way demonstrated that the compensation could have affected the services provided by those railway companies, which, on the contrary, recorded growing traffic volumes and expansion on international routes ([145]).

7.2. **The Third Contract**

(226) Italy reiterated the absence of distortion of competition and of an effect on intra-Union trade, as well as the absence of advantage granted to Trenitalia. As to the first aspect, Italy mainly reiterated the arguments exposed in recitals (187)-(189) and (225). As to the advantage, Italy provided extensive replies to FerCargo's claims on (i) absence of a genuine SGEI; (ii) lack of entrustment; and (iii) possible overcompensation.

7.2.1. *Existence of a genuine SGEI*

(227) In its observations of 24 June 2014, Italy clarified the reasons that led it to define the scope of the public service in terms of region/region connections rather than in terms of individual routes (recital (165)).

(228) In its observations of 20 November 2014, in reply to FerCargo's claim that there were a number of railway companies operating the routes included in the scope of the public service obligations (recital (206)), Italy argued that the Third Contract was necessary to cover a market failure.

(229) As a general remark, Italy pointed out that Trenitalia's competitors were providing their services on profitable routes in Northern Italy and through the Alpine passes (e.g. Brennero, Chiasso and Tarvisio) ([146]). According to Italy, on several occasions the administrations of the regions in Southern Italy had stressed the need for rail freight transport services in their regions ([147]).

(230) With specific regard to the market situation in 2008 (when the perimeter of the Third Contract was defined by the parties), Italy argued that the market offer of rail freight transport was not only insufficient but also inadequate.

([145]) According to Italy, traffic on the most profitable routes, both cross-border and those in the regions of Northern Italy closest to mountain passes, recorded over the period 2009-2013 a growth in the market share of the railway competing with Trenitalia ranging from 25 % to 42 %.

([146]) As example, Italy mentioned that DB Schenker (which in 2009 took over control of NordCargo) was present only in Northern Italy. In this regard, Italy referred also to the decision adopted in December 2008 by the Italian competition and market authority on the *Deutsche Bahn/NordCargo* concentration which stated that *'the operation involves routes connecting Northern Italy with Northern Europe'* (Decision of the Italian Competition Authority of 11 December 2008, case C9819, DEUTSCHE BAHN/NORDCARGO, published in the weekly Bulletin No 47/2008 of the Italian Competition Authority, published on 14.1.2009).

([147]) Italy mentioned the letters respectively of the Apulia Region of 9 July 2009, of the Abruzzo Region of 9 March 2010, of the Sicily Region of 20 February 2009 and of the President of the Municipal Council of Lamezia Terme (in the Calabria Region) of 26 February 2009.

(231) First, Trenitalia's competitors that started operating in Southern Italy in 2008 (the companies Rail Traction Company, Interporto Servizi Cargo and NordCargo) provided services only to/from two industrial sites (one in Campania, Nola, and one in Abruzzo, Fossacesia). In terms of type of traffic, these companies covered niche markets (shuttles for combined transport from Nola in the first case, trains carrying light road vehicles from the SEVEL ([148]) plant in Fossacesia in the second case). Therefore, their services were not comparable with the well-developed network of services for all types of freight flows operated by Trenitalia under the Third Contract. Moreover, the overall output of the three railway companies with active contracts on North/South connections accounted for only a tiny share of the overall freight traffic offer on those routes (on average less than 6 % of the offer in terms of train/km which Trenitalia had to develop to comply with the conditions of the Third Contract).

(232) Second, even though GTS Rail ([149]) and Interporto Servizi Cargo had set up small-scale freight rail transport services serving a few locations in Campania and Apulia (namely Nola and Bari), according to Italy this choice was dictated by the fact that these companies were cargo terminal and interport owner/managers and logistics operators, which decided to operate their own rail freight transport services between their facilities and their customers.

(233) Third, Trenitalia was the only railway undertaking holding a safety certificate valid for the entire Italian territory, whereas the new entrants held only safety certificates valid on selected connections given the very high costs of acquisition of such certificates. All the freight railway companies which hold a safety certificate for rail freight transport to/from one or some of the regions covered by the Third Contract, possessed, taken together, rolling stock and means of production that were inadequate for handling the volume required by the Third Contract (11,9 million train/km).

(234) In its replies of 23 May 2018, Italy clarified that the list of 42 one-way region/region connections mentioned in Annex 1 to the Third Contract ([150]) was not exhaustive. It merely recorded the connections for which user demand existed in 2009, at the time of the definition of the geographic scope of the Third Contract. However, the public service obligations undertaken by Trenitalia concerned the provision of rail freight transport services to any operator requesting them from/to the regions of Southern Italy mentioned in the contract (i.e. Abruzzo, Molise, Campania, Apulia, Basilicata, Calabria, Sicily). Therefore, Trenitalia was obliged to be ready to service also other connections, if demand arose ([151]). The total number of one-way region/region connections effectively covered by Trenitalia in the period 2009-2014 was 66, i.e. 33 region/region connections (roundtrip). This number does not take into account the connections between regions in Northern Italy, which were serviced only as long as they were necessary to optimise traffic to/from the regions in Southern Italy.

(235) In its replies of 18-19 February 2019, Italy provided a study (the '**PWC Study 3**'), which aimed at showing that the market situation in the years 2007-2009 was characterised by an insufficient offer of rail freight transport services in Southern Italy compared to the minimum offer required by the State. Notably:

— In the period 2007-2008, in addition to Trenitalia, only five railway undertakings (NordCargo BV, Rail Traction Company SpA, Linea Srl, Rail One SpA and Ferrovia Adriatico Sangritana SpA) were active in some of the regions covered by the Third Contract. In 2008, these companies together provided 883 000 train/km. In 2009, the number of Trenitalia's competitors increased from five to eight and together provided 1,4 million train/km (against the 14 million train/km provided by Trenitalia).

([148]) SEVEL S.p.A. (acronym of 'Società Europea Veicoli Leggeri') is an Italian automotive company which produces light commercial vehicles.

([149]) GTS Rail S.p.A. belongs to the group GTS S.p.A. and is one of the 17 railway undertakings represented by FerCargo.

([150]) See footnote [81].

([151]) The PWC Study 3 shows that Trenitalia provided services on all connections covered by the Third Contract at least during one year under the Third Contract. For example, on the Abruzzo/Basilicata connection, between 2009 and 2014, Trenitalia provided a total amount of services of 400 train/km (conventional transport mode) of which half in 2011 only on the North-South direction and the remaining half in 2014 only on the South-North direction.

— Between 2008 and 2009, at the time the parties defined the geographic scope of the contract ([152]), Trenitalia's competitors serviced only 14 region/region connections (roundtrip) compared to the 33 region/region connections (roundtrip) to be serviced on demand by Trenitalia under the Third Contract, including Sicily. Moreover, only on six of the serviced region/region connections (Campania/Northern Italy, Abruzzo/Northern Italy, Apulia/Northern Italy, Calabria/Campania, Basilicata/Northern Italy and Abruzzo/Apulia) competitors were providing a relevant amount of traffic (with a total offer above 60 000 train/km) and, even on these connections, their offer was not a perfect substitute to Trenitalia's offer. In fact, it covered only some of the routes available and/or concerned only one type of rail freight transport services or one type of product, or was operated only one way, without round trip. This market situation could hardly be considered an effect of the Second Contract, which, as regards the North-South routes on the Italian mainland, concerned only traffic above 1 000 km.

— On the very few region/region connections where there was possible overlap between Trenitalia's services and the competitors' services (in terms of routes, type of transport and products), either the competitors' offer was not sufficient to cover the entire traffic demand or it was too fragmented or unstable to be relied upon. As regards the alleged instability of the offer, Italy referred in particular to the offer provided on the Apulia/Northern Italy, Calabria/Campania and Basilicata/Northern Italy connections.

— Even though the competitors' offer saw a steady increase over the period 2009-2014, in 2014 the competitors together provided 2,3 million train/km (against the 10.9 million train/km provided by Trenitalia). Moreover, this increase in traffic focused mainly on three region/region connections (Abruzzo/Northern Italy, Campania/Northern Italy and Apulia/Northern Italy) out of the 33 to be serviced on demand by Trenitalia.

(236) Italy concluded that the provision of rail freight transport services – if left without proper support measures – was likely to concentrate in Northern Italy or on certain limited point-to-point links, without any guarantee of continuity, and to leave uncovered Southern Italy. In particular, Italy considered that, in the absence of the Third Contract, 80-90 % of the rail freight traffic provided by Trenitalia under the Second Contract would have disappeared, either to the benefit of road transport mode or at all (for instance with regard to some chemical and steel products for which there were no viable transport alternatives). According to Italy, this state of things was confirmed also by the rail infrastructure manager's report on the new entrants' path allocation requests and by the Italian Court of Auditors ([153]).

(237) As regards the Northern Italy/Northern Italy connections covered by the Third Contract, which FerCargo considered inconsistent with the scope of the SGEI (recital (207)), Italy explained that on these connections there was no new loading or servicing of new clients, but merely the continuity of North/South connections. These links were as necessary as the South/South connections to gather and optimise the traffic flows on the North/South connections. According to Italy, any different design of the service would have pushed up the cost of the service and required higher compensation.

(238) Last, Italy considered that the Italian Competition Authority, in its report of 1 June 2009, did not exclude the need for PSOs in the freight market, but rather addressed the related awarding methods. The MIT duly considered the Authority's remarks but ultimately concluded that Trenitalia was the only rail operator able to deliver the PSOs with the appropriate degree of geographical spread and reach ([154]).

([152]) The scope of the contract was discussed by the parties between November 2008 and March 2009.

([153]) In this respect, Italy mentioned that the Court of Auditors, in a Report of 22 February 2012, considered the provision of services at a loss by Trenitalia unjustified from an industrial perspective. The Court of Auditors acknowledged that 'in the freight transport sector, moreover, there is high intra modal competition, focused exclusively on the most profitable markets, mainly in Northern Italy; in fact, there are no rail freight services provided to the south of Rome other than by the FS Group'.

([154]) Note of the MIT of 23 July 2009.

7.2.2. *Entrustment of the service*

(239) In reply to FerCargo's allegation that Trenitalia operated under the Third Contract without act of entrustment (recital (208)), in its observations of 20 November 2014, Italy indicated that the obligations covered by the Third Contract had been established through a dialogue between Trenitalia and the competent Ministries (Ministry of the Economy and Finance and MIT). According to Italy, Trenitalia's economic-financial plans approved by the contracting public authority proved the existence of a public service mission and mandate given in advance.

(240) Moreover, in its replies of 18-19 February 2019, Italy clarified that the nature and the perimeter of the services to be provided by Trenitalia, the methodology to calculate the amount of compensation, the duration of the contract and the sanctions in case of non-compliance with the contractual obligations were agreed by the parties in October 2010.

(241) In particular, the scope of the contract (i.e. regions to be serviced and type of service) and the maximum amount of compensation had been informally agreed with Trenitalia since the beginning of 2009. As regards the total amount of services included in the perimeter of the contract (i.e. 11,9 million train/km per year), Italy explained that, in the discussions carried out between 2009 and 2010, this amount varied between a maximum of 13,1 million train/km per year and a minimum of 9,4 million train/km per year. The limit of 11,9 million train/km was agreed between the parties in October 2010. In the absence of clarity on the amount of rail freight services eventually requested under the Third Contract, in 2009 Trenitalia provided 14 million train/km.

(242) Italy argued that Trenitalia received compensation for these services only at the end of 2010 (on 21 December 2010) and only within the limit of 11,9 million train/km eventually agreed. As elements conforming the existence of a contractual relationship between Trenitalia and the State even before the signature of the Third Contract, Italy referred to a report of the Italian Competition Authority of 1 June 2009 and a public statement of July 2011 from the Minister for Transport in response to an interrogation from the Italian Parliament. The report considered the service contract related to the freight transport sector already in place even if not signed. The public statements made clear the amounts of compensation due to Trenitalia for the years 2009-2011, as indicated in the subsequently signed contract, and these amounts had been defined on the basis of a multi-year economic and financial plan.

7.2.3. *Absence of overcompensation*

(243) As regards FerCargo's claim of possible overcompensation (recital (209)), in its observations of 20 November 2014, Italy considered that European operators were the only possible sample against which to assess Trenitalia's costs. The existing competitors mentioned by FerCargo – i.e. railway companies with a tiny rolling stock (10-20 trains at the most) covering no more than 1-3 million train/km each – could not constitute a valid benchmark for assessing a public service obligation generating a much greater output (about 12 million train/km), delivered over a highly complex network of North-South routes. Italy provided in that regard the PWC Study 2, updating the PWC Study 1 (see recital (175)). The PWC Study 2 identifies at EUR 22 per train/km ([155]) the average cost per train/km sustained by Trenitalia for the provision of the services under the Third Contract and EUR 10,8 per train/km the average revenue for the provision of the services under the Third Contract ([156]).

(244) Italy argued that the compensation was strictly linked to the services provided. As Italy had already explained (recital (181)), the higher cost of the service compared to that provided by Trenitalia's competitors was dependent on the need to have sufficient rolling stock (adequate to the infrastructural and logistical constraints of the railway network in Southern Italy), human resources and production assets to provide rail freight transport services 'on demand'. Italy acknowledged that during the period covered by the Third Contract the number of Trenitalia's locomotives dropped, but denied that this reduction resulted in overcompensation, because it concerned locomotives barely used by Trenitalia due to technical obsolescence (low levels of efficiency and availability and the impossibility of obtaining spare parts).

([155]) Calculated as sum of the average costs per train/km for energy, toll, locomotive rental, machinists, and manoeuvring, wagons, overhead and ferry crossing. See pages 17, 22 and 23 of the PWC Study 2.

([156]) See page 24 of the PWC Study 2.

(245) Last, in its replies of 18-19 February 2019, Italy clarified that the methodology to calculate the compensation for the years 2009-2014 was essentially the same as that provided in the Second Contract ([157]). The only difference between the Second Contract and the Third Contract concerned the inclusion in the latter (notably since the final draft of October 2010) of the reference to Trenitalia's Economic and Financial Plan as basis to calculate the evolution of Trenitalia's costs and revenues over the duration of the contract.

8. **ASSESSMENT OF THE MEASURES**

8.1. **Existence of aid**

(246) A measure qualifies as aid within the meaning of Article 107(1) TFEU if it is imputable to the State and financed through State resources, it confers an advantage on its recipient and that advantage is selective, it distorts or threatens to distort competition and has the potential to affect trade between Member States.

(247) In view of Italy's observation that the compensation paid under the three PSCs did not constitute State aid because of the absence of distortion of competition and effect on intra-Union trade, the Commission will first assess the fulfilment of those conditions. The fulfilment of the other cumulative conditions laid down in Article 107(1) TFEU will subsequently be assessed only in respect of those PSOs for which the compensation paid is found to be liable to distort competition and affect trade between Member States.

8.1.1. *Distortion of competition and effect on intra-Union trade*

(248) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes ([158]). A distortion of competition within the meaning of Article 107 TFEU is thus assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ([159]).

(249) A possible distortion of competition is excluded if the following four cumulative conditions are met ([160]). First, the service is subject to a legal monopoly (established in compliance with Union law). Second, the legal monopoly excludes not only competition on the market, but also for the market. Third, the service is not in competition with other services. Fourth, if the service provider is active in another market that is open to competition, cross-subsidisation has to be excluded through separate accounts and assurance that public funding provided for the service subject to the legal monopoly cannot benefit other activities.

([157]) It consisted of the following three steps: (i) ex ante definition of the maximum amount of annual compensation taking into account the public resources available; (ii) final quantification of the compensation due based on the costs effectively borne by Trenitalia and the amount of capital employed, and (iii) recovery of the amounts paid in excess as deduction to the compensation of the subsequent year.

([158]) Judgment of 15 June 2000, *Mauro Alzetta a.o.*, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, ECLI:EU:T:2000:151, paragraph 80.

([159]) Judgment of 15 June 2000, *Mauro Alzetta a.o.*, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, ECLI:EU:T:2000:151, paragraphs 141 to 147; judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, ECLI:EU:C:2003:415, paragraph 82.

([160]) 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 (C/2016/2946) (OJ C 262, 19.7.2016, p. 1), point 188.

(250) The Commission notes that, at the time the First Contract was signed ([161]), the rail freight market was largely ([162]) closed to competition at both national and Union levels. In Italy, Trenitalia enjoyed a monopoly on the rail freight transport market and was not in competition with undertakings from other Member States, which were providing services on the respective national markets ([163]). This monopoly excluded also competition for the market, as on 18 October 2002, no national or Union rules (see recital (23)) required Member States to tender PSCs for the provision of rail freight transport services. The Commission notes that, before the national rail freight market was liberalised on 22 October 2003 (see recital (25)), the FS Group had a legal monopoly on the operation of the railway network managed by the State ([164]).

(251) As regards competition with other services, the Commission considers that, although in general terms rail freight service providers compete with road transport services providers, there is no full substitutability. Each mode of freight transport has different characteristics in relation to prices and cost structures, timing and geographic availability. In addition, only rail freight transport can fulfil certain requirements related to the type of goods transported (for example safety requirements for dangerous goods, volume/quantity, weight of the goods, or geographic location) and constitutes for some customers the only alternative ([165]).

(252) As regards possible cross-subsidization, in the light of what explained by Italy (see recital (121)), the Commission considers that no cross-subsidisation between the different activities of Trenitalia occurred. In fact, even though subsidiaries of the FS Group were active also on liberalised markets (see recital(121)), Trenitalia had a separate accounting system from that of the other companies of the FS Group and it also kept separate accounts for each of its different activities.

(253) Against this background, the Commission concludes that, at the time of the signature of the First Contract (18 October 2002), the compensation to be paid under that contract did not constitute State aid because it was not capable of distorting or threatening to distort competition. This consideration is not altered by the fact that, at the time of the signature of the First Contract, the market for combined international freight transport services was already open to competition. On the one hand, as explained in recital (56), the First Contract did not cover this type of service, because (a) the PSOs on combined land rail freight transport services concerned only national traffic, and (b) intermodal transport services on the Lyon-Torino route did not qualify as combined transport services ([166]). On the other hand, the existence of a separate accounting system for each of Trenitalia's activities precluded the transfer of any potential advantage received by Trenitalia under the First Contract in favour of activities carried out on that open market.

(254) However, in order to reach a conclusion on the existence of aid for the entire period of validity of the First Contract, the Commission has to consider the evolution of the internal market over the period from 1 January 2000 to 31 December 2003. In fact, the compensation paid under the First Contract does not constitute aid only as long as it concerns activities not liberalised.

([161]) The First Contract was signed on 18 October 2002 and it applied as of 1 January 2000.

([162]) The only market already open to competition at Union level was that of combined international freight transport services (see recital (23)).

([163]) International competition on the rail freight market was *de facto* prevented also by the diversity of existing national regimes, which constituted a significant barrier to entry. For instance, railway undertakings seeking access to the infrastructure of another Member State needed to have their rolling stock approved by the national certification body, needed to obtain a safety certificate issued by the national competent body and the drivers had to hold a certification for the network on which the rail service was carried out.

([164]) Notably Article 1 of Law 210/1985 provided that 'The entity "Ferrovie dello Stato" carries out in a cost-effective and efficient way and in compliance with Community law: (a) the operation of the railway network lines already managed by the "azienda autonoma Ferrovie dello Stato" (ndr which is the public entity predecessor of the FS Group) and the operation of the railway network lines that will be managed by the State; (b) the operation of the ferry services between railway terminals […]'.

([165]) In merger cases, the Commission has already considered that rail freight transport is a separate product market, see case COMP/M.5855 – DB/Arriva, 11 August 2010, recitals 144-145.

([166]) These services did not qualify as combined transport services because the part of the journey operated by road transport had no limit in length and could exceed the part of the rail journey (cf. footnote [57]). Under Article 1 of Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States (OJ L 368, 17.12.1992, p.38), the qualification of combined transport requires that the initial and/or final leg carried out by road is strictly limited (cf. footnote [11]).

(255) In the Alzetta case, the Union courts made clear that 'liberalisation is a precondition for the applicability of Treaty provisions on State aid in some specific sectors, such as the transport sector, which was initially closed to competition' ([167]). In this respect, however, a distinction has to be drawn between liberalisation that occurs due to the evolution of the internal market and liberalisation prescribed by Union law. According to Article 1(b)(v) of Council Regulation (EU) 2015/1589 ('the Procedural Regulation') ([168]) existing aid means among others 'aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the internal market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Union law, such measures shall not be considered as existing aid after the date fixed for liberalisation'.

(256) The Commission notes the following:

— At Union level, access to international rail freight services on the TERFN was liberalised as of 15 March 2003. Therefore, the compensation paid under the First Contract for this type of services did not constitute State aid until 14 March 2003 (included), whereas as of 15 March 2003 it would constitute new aid (since the liberalisation of those services was acted under Union law), provided the remaining cumulative conditions of Article 107(1) are complied with. This notably concerns the compensation for: (a) international rail freight transport services between the Italian port of Trieste and Hungary; and (b) international rail freight transport services through the port of Trieste Marittima.

— At national level, access to national rail freight services was liberalised as of 22 October 2003, i.e. before the liberalisation of that activity at Union level which occurred from 1 January 2007. Therefore, the compensation paid under the First Contract for that type of services did not constitute State aid until 21 October 2003 (included), whereas as of 22 October 2003 it would constitute existing aid (due to an evolution of the internal market), provided the remaining conditions of Article 107(1) are complied with. This concerns all the obligations included in the First Contract relating to rail freight transport services between the mainland and Sardinia/Sicily, rail freight transport services over distances exceeding 1 000 km, and combined land rail freight transport services.

— The obligation concerning rail transport of coal and steel within the European Coal and Steel Community was no longer effective as of 1 May 2002 and the obligation on intermodal transport services on the Lyon – Torino route was in force until 31 December 2001. As those obligations ceased to exist before the liberalisation of international rail freight transport services in the Union (taking effect as of 1 January 2006), the corresponding compensation paid to Trenitalia was not capable of distorting competition or affecting intra-Union trade, and therefore did not constitute State aid.

(257) For the above reasons, the Commission considers that the compensation paid under the First Contract, before 15 March 2003, for international rail freight transport services ([169]), and, before 22 October 2003, for national rail freight transport services ([170]), did not constitute aid, because it was not liable to affect trade and distort competition.

([167]) Judgment of 15 June 2000, *Mauro Alzetta a.o.*, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, ECLI:EU:T:2000:151, paragraph 144, confirmed by the Court of Justice in its judgment of 29 April 2004, C-298/00 P, *Italy v. Commission*, ECLI:EU:C:2004:240.

([168]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9), which replaces as of 14 October 2015 the Procedural Regulation.

([169]) Notably, international rail freight services on the TERFN (i.e., international rail freight transport services between the Italian port of Trieste and Hungary and international rail freight transport services through the port of Trieste Marittima) and the remaining international rail freight services which Trenitalia stopped providing before 15 March 2003 (i.e., rail transport of coal and steel within the European Coal and Steel Community and intermodal transport services on the Lyon – Torino route).

([170]) This concerns all the obligations included in the First Contract relating to rail freight transport between the mainland and Sardinia/Sicily, rail freight transport over distances exceeding 1 000 km, and combined land rail freight transport services.

(258) Conversely, the compensation paid under the First Contract as of 15 March 2003 for international rail freight transport services between the Italian port of Trieste and Hungary and international rail freight transport services through the port of Trieste Marittima was liable to affect trade and distort competition, and therefore qualifies as aid for the period 15 March 2003 – 31 December 2003 if the other cumulative criteria laid down in Article 107(1) TFEU are also fulfilled (see recitals (264) to (286)). Contrary to what was argued by Italy (recital (120)), the fact that Hungary was not a Member State at that time is irrelevant because the compensation paid affected or could have affected the provision of rail freight transport services by Union undertakings on the said international route. Furthermore, the alleged 'marginality' of those PSOs in proportion of the overall PSOs imposed under the First Contract (see recital (120)) is not relevant for the purpose of the aid assessment, given that aid is capable of affecting trade between Member States irrespective of the amount of compensation granted or the volume of activity concerned. The definition of State aid does not require that the distortion of competition or the effect on trade to be significant or material. The fact that those PSOs were limited compared to the overall amount of PSOs imposed on Trenitalia under the First Contract cannot in itself rule out a distortion of competition or an effect on trade, or the threat thereof. For aid to be considered to distort competition, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations ([171]).

(259) Furthermore, where a Member State grants a public subsidy to an undertaking for supplying transport services, the supply of those services, be they limited or substantial, may, by virtue of the subsidy, be maintained or increased with the result that undertakings established in other Member States have less of a chance of providing their transport services in the market in that Member State, thus affecting trade. In the present case, the maintained presence of Trenitalia (historic incumbent) through the payment of subsidies could deter new operators to enter on a new market, in particular in the context where those new operators would have had to build a market position following the opening up to the competition of international freight services on the TERFN. In the same vein, the fact that the compensation was insufficient to cover the operating deficit recorded by Trenitalia for the provision of services under the First Contract does not exclude a potential effect on trade and distortion of competition. The compensation, as minimal as it may be, allowed Trenitalia to maintain or increase its activities on the market, thereby reducing the possibility for the competitors to provide rail freight transport services on that market.

(260) As regards the compensation granted under the First Contract as of 22 October 2003 for national rail freight transport services ([172]), that compensation qualifies as aid for the period 22 October 2003 – 31 December 2003 if the other cumulative criteria laid down in Article 107(1) TFEU are also fulfilled (see recitals (264) to (286)).

Table 5

First Contract: Distortion of competition and effect on intra-Union trade

Compensation for	1.1.2000 –14.3.2003	15.3.2003 – 21.10.2003	22.10.2003 – 31.12.2003
International rail freight transport services on the TERFN	No aid	Possible distortion	Possible distortion
National rail freight transport services	No aid	No aid	Possible distortion

([171]) Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 55.

([172]) This concerns all the obligations included in the First Contract relating to rail freight transport services between the mainland and Sardinia/Sicily, rail freight transport services over distances exceeding 1 000 km, and combined land rail freight transport services.

(261) With regard to the First Contract, the Commission will assess exclusively the compensation paid that was liable to distort competition and affect intra-Union trade. Therefore, any reference to the First Contract will concern only the compensation of: (i) international rail freight transport services between the Italian port of Trieste and Hungary in the period 15 March 2003 – 31 December 2003; (ii) international rail freight transport services through the port of Trieste Marittima in the period 15 March 2003 – 31 December 2003; and (iii) national rail freight transport services in the period 22 October 2003 – 31 December 2003.

(262) As regards the Second Contract and the Third Contract (signed respectively on 27 March 2007 and 3 December 2012), the Commission notes that they were concluded after the rail freight market had been fully liberalised at Union level (1 January 2007). It is undisputed that, at that time, Trenitalia competed at national and Union level with other railway undertakings on the rail freight transport market. Therefore, contrary to what argued by Italy (recitals (153) and from (187) to (189)), the compensations received under the Second Contract and the Third Contract were liable to distort competition within this market irrespective of the limited volume of services or the amount of compensation involved and of the fact that Trenitalia kept a separate accounting system for its activities.

(263) Moreover, since undertakings from other Member States were operating ([173]) or could have operated rail freight transport services on the Italian market, the public service compensations received by Trenitalia under the Second Contract and Third Contract have also affected intra-Union trade. Contrary to what argued by Italy (recital (225)), for the purpose of categorising a national measure as State aid, it is necessary only to examine whether that aid is liable to affect such trade and to distort competition and not whether a real effect on trade between Member States and actual distortion of competition occurred. Therefore, the fact that at that time Trenitalia's competitors recorded growing traffic volumes and expansion on international routes is not sufficient to conclude that the Second Contract and the Third Contract involved no State aid. On the contrary, that expansion could have been even more important in *the absence of the Second Contract and Third Contract*.

8.1.2. *State resources and imputability to the State*

(264) The compensation granted to Trenitalia under the First Contract, Second Contract and the Third Contract was directly financed from the State budget (see recitals (129), (145) and (170)). Moreover, those contracts were entrusted by the competent Ministries, and each of the contracts provided that the State would compensate Trenitalia for the provision of the PSOs carried out under those contracts (see recitals (59), (71), (72) and (99)). Therefore, the Measures are directly imputable to the State.

8.1.3. *Economic advantage*

(265) Compensations in respect of PSOs granted to an undertaking do not constitute an economic advantage if four cumulative conditions, set out in the *Altmark* judgment, are met. Those conditions are the following:

— First, the recipient undertaking must actually have PSOs to discharge and these obligations must be clearly defined.

— Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.

— Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of PSOs, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

([173]) See for example footnote [109] (DB Schenker).

— Fourth, where the undertaking which is to discharge PSOs, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant revenues and a reasonable profit for discharging the obligations.

(266) Due to the cumulative nature of the four *Altmark* criteria, if any of these criteria is not fulfilled, the compensation will be deemed to constitute an advantage in the meaning of Article 107(1) TFEU.

(267) In the present case, the Commission considers that the fourth *Altmark* criterion is not fulfilled for all three PSCs, contrary to the claim of the Italian authorities.

(268) On the one hand, the beneficiary of the three PSCs was not chosen following a public tender procedure that allowed for the selection of the tenderer capable of providing the service at the least cost to the community ([174]). On the other hand, Italy's arguments that the level of compensation under the three PSCs was based on the costs of an efficient typical undertaking are not supported by evidence showing that the fourth *Altmark* criterion is complied with.

(269) As regards the First Contract and the Second Contract, Italy argues, without submitting any evidence serving its claim, that Trenitalia was a well-run undertaking, in a position to show levels of costs which were in line with the competitors', and to provide services under economic conditions which were substantially similar to those that would derive from a competitive procedure (recitals (132) and (152)).

(270) Italy made similar arguments concerning the Third Contract. To support those arguments, Italy provided two PWC studies dated of 9 October 2012 and 22 October 2014 (see recitals (175) and (243)) allegedly demonstrating that Trenitalia's averaging operating costs per train/km were in line with Union undertakings of a similar size, providing similar services and adequately equipped with means of transport (see recitals (180) to (186)). The FS Group provided a study dated July 2014 merely summing up some observations on the approach taken by the Commission in the opening decision as to the assessment of the fourth *Altmark* criterion (see recital (217)).

(271) The Commission observes that when the SGEI is not assigned under a tendering procedure and no generally accepted market remuneration exists for a given service, the fourth Altmark criterion requires first and foremost to identify a typical undertaking, well-run and adequately provided with means of transport ([175]).

(272) The identification of a '*typical undertaking, well-run and adequately provided with means of transport*' allows to calculate the amount of compensation necessary to discharge the assigned public service task in a way that avoids the high costs of an inefficient undertaking.

([174]) Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest; OJ C 8, 11.01.2012, p. 4, pt 65.

([175]) Reference cannot be made to the costs of an undertaking that enjoys a monopoly position or receives public service compensation granted on conditions that do not comply with Union law, as in both cases the cost level may be higher than normal, see point 74 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest ('SGEI Communication') (OJ C 8, 11.1.2012, p. 4).

(273) The Court clarified that 'one of the approaches which may be used to assess whether the fourth condition is satisfied is to calculate the compensation to be granted to an undertaking awarded a public service contract on the basis of an average of the costs incurred by undertakings which have provided, for several years, in a free market, a comparable service to the public service at issue in the main proceedings, the relevant revenue received by those undertakings to discharge their public service obligations and, where appropriate, the profits made by them in respect of that service' ([176]).

(274) In that respect, the Commission first notes that the approach mentioned in recital (273) is however not relevant in this case, because the compensation granted to Trenitalia could not be calculated on the basis of an average of the costs incurred by undertakings which had provided, for several years, in a free market, a comparable service to the public services at issue.

(275) Second, for the Measures under investigation, the Commission observes that, on the basis of the available evidence, it results that Italy established Trenitalia's costs under the PSCs by reference to Trenitalia's past or projected performances only. For the First Contract, the compensation received by Trenitalia was based on the costs actually borne by Trenitalia in 2000 and 2001 for the discharge of the PSOs imposed under the First Contract, and by reference to the actual costs incurred by Trenitalia in 2001 for the years 2002 and 2003 (recitals (58)-(59)). For the Second Contract, the compensation received by Trenitalia was based on the costs borne by Trenitalia in 2004 for the discharge of the PSOs imposed under the Second Contract (recital (223)). As indicated in recital (99), the level of compensation for the Third Contract was determined on the basis of Trenitalia's ex ante Economic and Financial Plan, i.e. only on the basis of Trenitalia's projected costs for the discharge of the PSOs under the Third Contract.

(276) As regards Italy's argument that Trenitalia is a well-run undertaking (see recital (174)), the Commission recalls that the fourth *Altmark* criterion is not meant to demonstrate that the beneficiary *itself* is 'well-run' and in a position to show levels of costs which are in line with the competitors' or to provide services under economic conditions which are substantially similar to those that would derive from a competitive procedure ([177]). Moreover, in relation to whether the historic costs of the services provided under previous awards could be taken into account, in *SAD Trasporto Locale SpA*, the Court clarified that, 'the criteria of the "typical undertaking, well run and adequately provided with the requisite means" does not preclude, per se, a calculation based on the historic costs of the service provided by the outgoing operator or relating to the previous award, provided, however, that the outgoing operator can be considered, in the light of the methods of accounting and financial analysis normally used to that end, as being a typical and well-run undertaking' ([178]).

(277) The Commission considers that the data provided by Italy do not allow to conclude that Trenitalia's cost structure corresponded to that of a typical and well-run undertaking.

(278) To start with, the three PSCs were concluded in the absence of any supporting study showing that Trenitalia could be considered, in the light of the methods of accounting and financial analysis normally used to that end, as being a typical and well-run undertaking.

([176]) Judgment of 19 October 2023, *Sad Trasporto Locale SpA*, C-186/22, ECLI:EU:C:2023:795, paragraph 39. This approach however is subject to two cumulative conditions. First, 'the number of undertakings operating on the market and taken into account are sufficiently significant so that, since the particular situation of a given undertaking should not be subject to a disproportionate weighting, such an average can be considered to be statistically robust and, therefore, representative of the standard provided for by the fourth condition set out in the judgment of 24 July 2003, Altmark Trans and Regierungspräsidium Magdeburg (C-280/00, ECLI:EU:C:2003:415)'. Second, 'only undertakings that are able immediately to discharge their public service obligations and can therefore be considered as being adequately provided with the requisite means to be able to meet the public service requirements can be taken into account for the purposes of such a calculation' (paragraphs 40 and 41).

([177]) In its judgment of 24 September 2015, *TV2/Danmark / Commission*, the General Court ruled that: 'the Court of Justice in no way suggested that, where the recipient of the compensation was not chosen in a public procurement procedure, it would be possible, in order to satisfy that condition, to show that the recipient itself was "well run and adequately provided"' (see Judgment of 24 September 2015, *TV2/Danmark / Commission*, T-674/11, ECLI:EU:T:2015:684, paragraph 131).

([178]) Judgment of 19 October 2023, *Sad Trasporto Locale SpA*, C-186/22, ECLI:EU:C:2023:795, paragraph 44.

(279) As regards the Third Contract, the Commission observes also that the PWC Study 1 and the PWC Study 2 do not establish that the level of compensation under the Third Contract was determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means of transport would incur to discharge the PSOs. Those studies identify three companies (ÖBB, DB, SNCF), out of the six considered suitable for the establishment of a sample of undertakings with a size sufficiently comparable to that of Trenitalia, whose costs were considered comparable to Trenitalia's costs (recitals (180) and (217)), but do not explain why Trenitalia or those companies could be considered typical and well-run undertakings. Overall, the PWC Study 1 and PWC Study 2 only provided a comparison of the total average operating costs per train/km incurred by Trenitalia and other Union undertakings of similar size and providing similar services (see recital (175)). However, the similar size of those undertakings to that of Trenitalia does not give any indication on whether they are typical and well-run undertakings. As for the similar services, the two PWC Studies (PWC Study 1 and PWC Study 2) only assessed the overall average costs for providing rail freight services, without establishing whether those services were similar to those under the PSOs imposed on Trenitalia.

(280) Furthermore, the fourth *Altmark* criterion requires analysing the costs of an undertaking adequately provided with the resources necessary to discharge the PSOs. As regards the Third Contract, the two PWC Studies (PWC Study 1 and PWC Study 2) do not show that the undertakings composing the sample were adequately provided with the means to discharge the PSOs imposed under the Third Contract. As acknowledged by Italy itself (see recitals (182) and (183)), the Italian railway network presented a substantial number of specific characteristics that required to verify whether the undertakings composing the sample were adequately provided to discharge the PSOs requirements defined under the Third Contract in light of those characteristics. This was all the more required in the present case since those specific characteristics constitute one of the reasons for the conclusion of the Third Contract (see recitals (162) and (186)). That demonstration therefore cannot be limited to the determination of the average capacity of transport of goods of the Union undertakings (see recital (176)), without taking into account those specific characteristics. Furthermore, the two PWC Studies (PWC Study 1 and PWC Study 2) do not contain elements that allow the Commission to determine whether the Union undertakings composing the sample were adequately provided with the necessary rolling stock to carry out the obligations under the Third Contract. Those PWC Studies simply provided an overall performance of the rolling stocks per undertaking (see recital (177)), used for both passenger and freight services, without providing information on the adequacy of such rolling stocks to perform the PSOs imposed under the Third Contract.

(281) In addition, the Commission notes that the two PWC Studies (PWC Study 1 and PWC Study 2) do not provide an appropriate analysis of the costs that such undertakings would borne to operate the PSOs imposed by Italy. Those studies took into account the entire geographical ([179]) and material ([180]) perimeter of the activities provided by the six railway undertakings composing the sample (out of which only three railway undertakings, namely ÖBB, DB, SNCF, had costs comparable to Trenitalia's costs) and not only the activities covered by the Third Contract, as required by the fourth *Altmark* criterion. Because of the aggregate nature of those data, it was not possible to carve-out the costs to be attributed to each specific type of activity that an efficient and cost-effective undertaking active in the rail freight sector would have incurred to discharge the PSOs covered by the Third Contract. ([181]) Moreover, contrary to FS Group's claim that the cost-efficiency analysis had to be carried out at the level of the company providing the service (see recital (217)), the Commission observes that the costs to be taken into consideration for the purposes of that analysis are only the direct costs necessary to discharge the PSO and an appropriate contribution to the indirect costs common to both the activities subject to the PSO and other activities ([182]). In addition, the studies only compared the overall operating costs per train/km (see recital (179)) and were silent on the level of efficiency as such, and hence on the costs themselves. The Commission observes that this comparison is not conclusive, because, as pointed out also by Italy (recitals (181) and (182)), the train/km cost of delivering the services covered by the Third Contract as well as the level of receipts were highly dependent on the specific characteristics of the rail freight transport service in Southern Italy.

([179]) The PWC studies did not identify a specific perimeter, but provided figures on the general coverage of the French territory by SNCF, the Austrian territory by ÖBB and the German territory by DB Schenker.

([180]) The PWC study established the average operating costs per train/km on the basis of the overall activities of the undertakings, i.e. the transport of passengers and freight.

([181]) See for example judgment of 12 July 2019, *Syndicat Transport Ile de France (STIF-IDF)*, T-738/17, ECLI:EU:T:2019:526, paragraph 64.

([182]) See point 74 of the SGEI Communication.

(282) In conclusion, the Commission finds that Italy did not show that Trenitalia could be considered, in the light of the methods of accounting and financial analysis normally used to that end, as being a typical and well-run undertaking, and therefore that the level of compensation received by Trenitalia for the discharge of the PSOs under the three PSCs was in line with the compensation that would have been requested by a typical well-run undertaking to provide a comparable service to that of the PSOs covered by those PSCs.

(283) Consequently, the Commission concludes that the Italian authorities have not demonstrated that the fourth *Altmark* criterion is fulfilled. Therefore, the compensations granted under the First Contract, the Second Contract and the Third Contract conferred an advantage on Trenitalia that the company would not have obtained under normal market conditions.

8.1.4. *Selectivity*

(284) A measure is regarded as selective if it creates differences between undertakings, which, with regard to the objective of the measure, are in a comparable situation, and therefore is liable to place certain undertakings in a more favourable situation than that of others. In case of individual aid, the Court considers that the identification of an economic advantage is in principle sufficient to support the presumption that the advantage is selective ([183]).

(285) In the present case, Italy granted public service compensation to Trenitalia in the form of an individual aid conferring an advantage to the latter. This compensation was granted to the detriment of other freight competitors, which were, or could have potentially been, in competition with Trenitalia in the rail freight sector. As the public service compensation granted under the First Contract, the Second Contract and the Third Contract was liable to favour Trenitalia's situation compared to that of its competitors, it was as such selective.

8.1.5. *Conclusion on the existence of aid*

(286) On the basis of the above, the Commission considers that the public service compensation included in the First Contract (for the provision of (i) international rail freight transport services between the Italian port of Trieste and Hungary, (ii) international rail freight transport services through the port of Trieste Marittima as of 15 October 2003, and (iii) national rail freight transport services as of 22 October 2003), in the Second Contract and in the Third Contract constitutes State aid to Trenitalia within the meaning of Article 107(1) TFEU.

8.2. **Qualification of the aid as existing aid or new aid**

(287) Italy argues that the compensation paid under the First Contract and the Second Contract qualifies as existing aid, because it concerned obligations almost entirely consistent with pre-existing obligations, which were put in place when the rail freight market was not yet liberalised, neither at national level nor at Union level (recitals (120) and (154)). In particular, according to Italy, these obligations had been introduced by Ministerial Decree 1-T/1990 ([184]), Law 440/1989 ([185]) or previous PSCs ([186]).

([183]) Judgment of 4 June 2015, C-15/14 P, *Commission v MOL*, ECLI:EU:c:2015:362, paragraphs 59 and 60; judgment of 28 September 2023, C-320/21P, *Ryanair DAC v Commission*, ECLI:EU:C:2023:712, paragraph 104.

([184]) As regards the tariff obligations on rail freight transport services between the mainland and Sardinia and on international rail freight transport services through the port of Trieste Marittima.

([185]) As regards the tariff obligations on international rail freight transport services from the port of Trieste to Hungary and vice versa.

([186]) As regards the tariff obligations on transport over distances greater than 1 000 km.

(288) As regards the First Contract (2000-2003), the Commission considers the following:

— The compensation paid between 22 October 2003 and 31 December 2003 for national rail freight transport services ([187]) qualifies as existing aid under Article 1(b)(v) of the Procedural Regulation following the liberalisation of the market. Indeed, at the time that compensation was paid it did not constitute aid because it was not capable of distorting or threatening to distort competition. Subsequently (as of 22 October 2003), the compensation for national freight transport services became an existing aid due to the evolution of the internal market (notably the liberalisation of the market at national level) and without having been altered by Italy. Existing aid can only be the subject of a decision finding it incompatible as to the future. As the PSOs imposed on Trenitalia for the provision of national rail freight transport services were in force until 31 December 2003, there is no need for the Commission to assess its possible compatibility in the present decision.

— The compensation paid between 15 March 2003 and 31 December 2003 for international rail freight transport on the TERFN ([188]) qualifies as new aid because the market of rail freight transport was liberalised at Union level as of 15 March 2003.

(289) As regards the Second Contract (2004-2008), the Commission observes that that contract provided for a compensation covering the discharge of the PSOs listed in recitals (65) to (67) and (70). Those PSOs concerned both international (on the TERFN) and national rail freight transport services.

(290) As regards the PSOs concerning international rail freight transport services (i.e., the international rail freight transport services between the Italian port of Trieste and Hungary as well as international rail freight transport services through the port of Trieste Marittima), as indicated in recital –, the compensation paid to Trenitalia for those services qualifies as new aid as of 15 March 2003; it therefore qualifies as new aid under the Second Contract.

(291) As regards the PSOs concerning national rail freight transport services (i.e. relating to the provision of rail freight services to/from Sardinia, Sicily, and long-distance services above 1 000km), the Commission notes that those services were liberalised at Union level as of 1 January 2007. Italy argues that the aid must be considered existing aid under Article 1(b)(v) of the Procedural Regulation until the full liberalisation of the rail freight market at Union level, on 1 January 2007. However, the Commission observes that the total amount of compensation granted for those services under the Second Contract was paid after that date as it was paid only after the signing of the Second Contract on 27 March 2007 (see recital (75)). Therefore, the aid under the Second Contract qualifies in its entirety as new aid ([189]).

(292) In any event, the Commission observes that the aid under the Second Contract does not meet the conditions set in Article 1(b)(v) of the Procedural Regulation since Italy - contrary to what it argued (see recital (154)) - substantially altered the aid initially granted under the First Contract. In that respect, the Commission observes the following:

— the Second Contract modified the scope of the PSOs imposed on Trenitalia by adding (i) additional public service obligations relating to the provision of rail freight services to/from Sardinia and Sicily (recital (67)) and (ii) ancillary obligations related to each of the public service obligations listed in recital (66). It also removed from the scope of the Second Contract certain PSOs previously contained in the First Contract (recital (62));

([187]) This concerns all the obligations included in the First Contract relating to rail freight transport between the mainland and Sardinia/Sicily, rail freight transport over distances exceeding 1 000 km, and combined land rail freight transport services.

([188]) This concerns international rail freight transport services between the Italian port of Trieste and Hungary and international rail freight transport services through the port of Trieste Marittima.

([189]) Article 1(b)(v) of the Procedural Regulation states that '**aid which** is deemed to be an existing aid because it can be established that **at the time it was put into effect** it did not constitute an aid, and subsequently became an aid due to the evolution of the internal market and without having been altered by the Member State'. See also judgment of 15 June 2000, *Mauro Alzetta a.o.*, joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, ECLI:EU:T:2000:151, paragraph 144-145; and judgment of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt*, joined cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, paragraph 190.

— the Second Contract introduced a different compensation mechanism in respect of the compensation for rail freight transport services between the mainland and Sardinia/Sicily (recitals (68));

— the Second Contract introduced new modalities for the payment of the aid to Trenitalia (recital (71)) that were absent from the First Contract.

(293) The elements described at recital (292) show that the modifications introduced with the Second Contract were not of a purely formal or administrative nature. Those modifications substantially altered the aid granted by Italy under the First Contract. Therefore, the aid under the Second Contract does not qualify as existing aid pursuant to Article 1(b)(v) of the Procedural Regulation.

(294) As regards the Third Contract, the Commission observes that national and international rail freight transport services were liberalised at Union level since 1 January 2007 (recital (23)), i.e. before the Third Contract was signed. The Commission also notes that the scope of the Third Contract considerably differed from the scope of the First and Second Contracts: all tariff obligations were abandoned and the service obligations provided in previous PSCs were substituted by a comprehensive service obligation covering rail freight transport to/from Southern Italy (see section 3.2.3.1.1). Therefore, the compensation granted under the Third Contract qualifies in its entirety as new aid.

Table 6

Conclusion on the qualification of State aid as existing or new

State aid Measures	State aid assessment
First Contract	**No aid**: compensation for (a) international rail freight transport services before 15.3.2003; (b) national rail freight transport services before 22.10.2003. **Existing aid**: compensation for national rail freight transport services as of 22.10.2003. **New aid**: compensation for international rail freight transport services on the TERFN as of 15.3.2003.
Second Contract	**New aid**
Third Contract	**New aid**

8.3. **Lawfulness of the aid**

(295) Pursuant to Article 108(3) TFEU, Member States must notify any plans to grant or alter aid and may not put the proposed measures into effect until the notification procedure has resulted in a final decision, with exception of those categories of State aid that have been exempted from notification. Pursuant to Article 1(f) of the Procedural Regulation, any new aid put into effect in contravention of Article 108(3) TFEU constitutes unlawful aid.

(296) Italy did not notify any of the Measures to the Commission. The Commission will therefore examine whether the Measures, which qualify as new aid under Article 107(1) TFEU (see recitals (288) to (294)), were exempted from notification under the applicable State aid rules. This requires first to identify the applicable State aid rules for such exemption in the present case.

8.3.1. *Relevant legal framework*

(297) As explained in recitals (30) to (33), Regulation (EEC) No 1191/69 laid down the applicable rules concerning the obligations inherent in the concept of a public service in transport by rail (both for passenger and freight). Regulation (EEC) No 1107/70 further regulated the granting of aid (not covered by Regulation (EEC) No 1191/69) for transport by rail, road and inland waterway. Both regulations were repealed by Regulation (EC) No 1370/2007 that entered into force on 3 December 2009. However, Article 10(1) of Regulation (EC) No 1370/2007 provided that Regulation (EEC) No 1191/69 remained applicable to freight transport services for a period of three years after the entry into force of Regulation (EC) No 1370/2007. Since rail freight transport services are not covered by Regulation (EC) No 1370/2007, Article 93 TFEU should be applied to assess the compatibility of aid granted for the discharge of PSOs in the area of rail freight transport. Those aid measures are assessed directly under Article 93 TFEU after 3 December 2012.

(298) In its judgment *Andersen* ([190]), which concerned passenger transport, the Court, when ruling on the temporal application of Regulation (EC) No 1370/2007 and Regulation (EEC) No 1191/69, indicated that the relevant date for determining the legislation applicable for the compatibility assessment of the compensation granted under a PSC awarded in the land transport sector is the date when the compensation was paid. The Court also indicated that the aid paid to a public transport undertaking on the date at which Regulation No 1191/69 was still in force and which complied with the conditions laid down in that regulation fell within the scope of a situation definitively existing before the entry into force of Regulation No 1370/2007.

(299) The Commission observes that the *Andersen* judgment as well as the other judgments rendered so far by Union Courts on the temporal application of Regulation (EEC) No 1191/69 make reference to Regulation No 1370/2007, since the contracts examined in those cases concerned passenger transport by rail and road.

(300) As a result, where aid is paid in connection with a PSC which was concluded when Regulation No 1191/69 was still in force, the Commission must examine that aid in the light of the conditions laid down in Regulation No 1191/69 for the compensation that was paid when Regulation No 1191/69 was still in force, i.e. before the entry into force of Regulation No 1370/2007 on 3 December 2009 for passenger transport services by rail and road; and for a period of three years after the entry into force of Regulation No 1370/2007 for freight transport services by rail and road. However, for measures that fall within the scope of application of Regulation No 1370/2007, the Commission must examine in the light of Regulation No 1370/2007, and subject to the rules laid down in that regulation, both the legality and the compatibility with the internal market of the aid paid from the date on which that regulation entered into force ([191]). For measures which are not covered by Regulation No 1370/2007, the Commission will have to examine the compatibility of the compensation awarded based on the rules applicable at the time that compensation was paid.

(301) As regards freight transport services, the Commission recalls that, pursuant to Article 10(1) of Regulation (EC) No 1370/2007, the provisions of Regulation (EEC) No 1191/69 continued to apply to rail freight transport services for a period of three years after its entry into force (i.e. until 3 December 2012). Therefore, the Commission considers that, in the present case, the rules applicable to the aid paid to Trenitalia until 3 December 2012 are those laid down by Regulation (EEC) No 1191/69. For aid paid to Trenitalia after that date, Article 93 TFEU constitutes the applicable legal basis in the absence of any other applicable secondary legislation governing the grant of State aid for the discharge of PSOs in freight transport services by rail.

(302) The Commission must now assess whether those two legal basis (Regulation (EEC) No 1191/69 and Article 93 TFEU) provide for an exemption from the notification obligation laid down in Article 108(3) TFEU of the Measures to which they respectively apply.

([190]) Judgment of 6 October 2015, *European Commission vs Andersen*, C-303/13P, EU:C:2015:647, paragraphs 51-55.
([191]) Judgment of 29 November 2018, *Aziende riunite filovie ed autolinee Srl (ARFEA) v European Commission*, T-720/16, ECLI:EU:T:2018:853, paragraph 158.

8.3.2. *Exemption from the notification obligation under Regulation (EEC) No 1191/69 for aid paid to Trenitalia before 3 December 2012*

(303) Article 17(2) of Regulation (EEC) No 1191/69 states that '*compensation paid pursuant to that regulation*' is exempted from the State aid notification obligation.

(304) According to the principles laid down by the Court in the *Andersen* ([192]) judgment, the Commission considers that Article 17(2) of Regulation (EEC) No 1191/69 covers compensation paid until 3 December 2012 for PSOs in freight transport services by rail complying with the conditions laid down in that Regulation.

(305) According to Article 1(5) of Regulation (EEC) No 1191/69, 'the competent authorities of the Member States may maintain or impose the public service obligations referred to in Article 2 for urban, suburban and regional passenger transport services. The conditions and details of operation, including methods of compensation, are laid down in Sections II, III and IV'. Even though Article 1(5) refers only to passenger transport services, the definition of PSO contained in Article 2 of Regulation (EEC) No 1191/69 as well as Article 5(1) of Regulation (EEC) No 1191/69 (which is part of Section II) refer both to passenger and freight transport. Therefore, the Commission considers that Regulation (EEC) No 1191/69 allowed Member States to maintain or impose PSOs also for the freight transport services, and to provide compensation for these PSOs ([193]).

(306) As a result, aid paid to an operator for PSOs on a date when Regulation No 1196/69 was still in force and that complied with the conditions laid down in that Regulation was exempted from the notification obligation. Conversely, aid paid when Regulation No 1191/69 was still in force but which did not comply with the conditions laid down in that Regulation, was not exempted from the notification obligation ([194]). Therefore, Italy did not have to notify under Article 108(3) TFEU the compensations paid to Trenitalia under the three PSCs as long as those compensations complied with Regulation (EEC) No 1191/69. Conversely, aid paid to Trenitalia until 3 December 2012 that did not comply with the conditions laid down in Regulation No 1191/69 was not exempted from the notification obligation. Therefore, given that Italy did not notify any of the Measures under assessment, the conclusion that the Commission will reach as regards compliance with the rules laid down in Regulation (EEC) No 1191/69 of the aid paid to Trenitalia until 3 December 2012 (see recitals (401) and (439)) will affect also the legality of that aid.

8.3.3. *Exemption from the notification obligation under Article 93 TFEU for aid paid to Trenitalia after 3 December 2012*

(307) Article 93 TFEU does not provide for any exemption from the obligation of Member States to notify State aid to the Commission pursuant to Article 108(3) TFEU ([195]).

(308) As a result, Italy ought to notify aid paid to Trenitalia after 3 December 2012 to the Commission in compliance with Article 108(3) TFEU, which Italy failed to do.

([192]) Judgment of 6 October 2015, *European Commission vs Andersen*, C-303/13P, ECLI:EU:C:2015:647, paragraph 52.

([193]) This interpretation is not contradicted by the fact that Council Regulation (EEC) No 1893/91 of 20 June 1991 amending Regulation (EEC) No 1191/69 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway introduced the possibility for Member States to conclude PSCs for providing adequate transport services. According to the case-law (Judgment of 3 April 2014, *CTP — Compagnia Trasporti Pubblici SpA v Regione Campania and Provincia di Napoli*, joined cases C-516/12 to C-518/12, ECLI:EU:C:2014:220; and Judgment of 6 October 2015, *European Commission vs Andersen*, C-303/13P, ECLI:EU:C:2015:647), PSCs are another way of regulating the transport services to be provided and may contain PSOs.

([194]) See Judgment of 11 July 2018, T-186/15, *CSTP Azienda della Mobilità SpA c. Commission*, ECLI:EU:T:2018:431, paragraph 120; and Judgment of 4 March 2020, C-587/18P, *CSTP Azienda della Mobilità SpA c. Commission*, ECLI:EU:C:2020:150, paragraph 51.

([195]) See Judgment of the Court of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg*, Case C-280/00, ECLI:EU:C:2003:415, paragraph 95; and Judgment of the Court of 7 May 2009, *Antrop*, Case C-504/07, ECLI:EU:C:2009:290, paragraph 23.

8.3.4. *Conclusion*

(309) The compensations paid under the First Contract (insofar as the measures constituted new aid), the Second Contract and the Third Contract until 3 December 2012 were exempted from prior notification, provided they complied with the relevant provisions of Regulation (EEC) No 1191/69. Therefore, the conclusion that the Commission will reach as regards compliance with the rules laid down in Regulation (EEC) No 1191/69 of the aid paid to Trenitalia until 3 December 2012 will affect also the legality of that aid for the reasons explained in recital (306).

(310) The compensations paid under the Third Contract after 3 December 2012 had to be notified to the Commission pursuant to Article 108(3) TFEU. Since Italy failed to notify them, those compensations constitute unlawful aid.

8.4. **Compatibility of the aid**

8.4.1. *Legal basis of assessment*

(311) Article 93 TFEU is included under Title VI 'Transport', whose provisions exclusively apply to transport by rail, road and inland waterway. Article 93 TFEU provides that 'aids shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.'

(312) The Measures consisted in the compensation granted to Trenitalia for the discharge of PSOs for national and international rail freight services.

(313) Article 93 TFEU allows the grant of compensation for the discharge of PSOs in the field of freight transport by rail. As indicated in recitals (29) to (33), Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70 provided the applicable rules to assess the compatibility of compensation paid for the discharge of PSOs, up until Regulation (EC) 1370/2007 repealed those regulations. Regulation (EC) 1370/2007 entered into force on 3 December 2009; it however provided for a period of three years during which Regulation (EEC) 1191/69 continued to apply to freight transport services (Article 10(1) of Regulation (EC) 1370/2007).

(314) According to Article 9(2) of Regulation (EC) 1370/2007, Member States could continue to grant compensation for the discharge of PSOs not covered by that Regulation without prejudice to Articles 93, 106, 107 and 108 TFEU.

(315) Contrary to what Italy argued (recital (139)), the Community guidelines on State aid to railway undertakings ([196]) are not applicable to the present case. The said guidelines deal with the application of Article 93 TFEU with regard, among others, to aid for the needs of transport coordination. This type of aid pursues a different objective than the aid for the discharge of PSOs, because it is meant to tackle the shortcomings of rail freight transport compared to different modes of transport (for instance, in terms of external costs). The Commission notes that, in the current case, the objective of the PSCs was to guarantee the provision of rail freight transport services on the Italian territory, irrespective of any transport coordination need. Notably, the compensation agreed under the PSCs covered the net costs of the PSOs entrusted to Trenitalia, which did not fall under any of the definitions of eligible costs set out in the Community guidelines on State aid to railway undertakings.

(316) In determining the applicable rules against which to assess the compatibility of aid put into effect by Member States for the discharge of PSOs under Article 93 TFEU, the Union courts ruled that the compatibility of the compensation has to be assessed based on the legislation in force at the time the aid was paid ([197]).

([196]) Communication from the Commission — Community guidelines on State aid for railway undertakings (OJ C 184, 22.7.2008, p. 13).

([197]) Judgment of 6 October 2015, C-303/13P, *Jorgen Andersen*, ECLI:EU:C:2015:647, paragraph 54; Judgment of 11 July 2018, T-185/15, *Buonotourist Srl c. Commission*, ECLI:EU:T:2018:430, paragraph 216; Judgment of 11 July 2018, T-186/15, *CSTP Azienda della Mobilità SpA c. Commission*, ECLI:EU:T:2018:431, paragraph 216; Judgment of 29 November 2018, *Aziende riunite filovie ed autolinee Srl (ARFEA) v European Commission*, T-720/16, ECLI:EU:T:2018:853, paragraph 132.

(317) As indicated in recital (313), the rules on public services in freight rail transport were provided for by Regulation (EEC) No 1191/69 until 3 December 2012, by Regulation (EEC) No 1107/70 until 3 December 2009 and by Article 93 TFEU after 3 December 2012.

(318) The scope of Regulation (EEC) No 1191/69 is defined as follows in Article 1(1) of that regulation:

'1. This Regulation shall apply to transport undertakings which operate services in transport by rail, road and inland waterway. Member States may exclude from the scope of this Regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services'.

(319) Article 2(5) of Regulation (EEC) No 1191/69 clarifies that:

'For the purposes of this Regulation, "tariff obligations" means any obligation imposed upon transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions.

The provisions of the foregoing subparagraph shall not apply to obligations arising from general measures of price policy applying to the economy as a whole or to measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or of part thereof.'

(320) In the present case, the services provided under the three PSCs (and for which Italy granted compensation to Trenitalia) are national and international rail freight transport services operated by Trenitalia, a transport undertaking providing transport by rail. The First Contract, the Second Contract and the Third Contract therefore concerned a transport undertaking operating in the sectors falling within the scope of Regulation (EEC) No 1191/69.

(321) As for the scope of Regulation (EEC) No 1107/70, Article 1 of that regulation stated that it applies to aid granted for transport by rail, road and inland waterway, insofar as such aid relates specifically to activities within that sector. The tenth recital of that regulation indicated that '[…] it is […] necessary to specify the cases and the circumstances in which Member States may take co-ordination measures or impose obligations inherent in the concept of a public service which involve the granting of aids under Article 77 of the Treaty <Article 93 TFEU> not covered by the aforesaid Regulation <(EEC) No 1191/69>'. Moreover, Article 3 of Regulation (EEC) No 1107/70 that provided that '[w]ithout prejudice to the provisions of [...] Regulation (EEC) No 1191/69 [...] Member States shall neither take coordination measures nor impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article <93 TFEU> except in the following cases or circumstances' listed in Article 3(2) of Regulation (EEC) No 1107/70. This Article covered notably 'compensation for public service obligations imposed on <transport undertakings > by the State or public authorities and covering either tariff obligations not falling within the definition given in Article 2(5) of Regulation (EEC) No 1191/69; or transport undertakings or activities to which that Regulation does not apply'. It follows that Regulation (EEC) No 1107/70 applied only where Regulation (EEC) No 1191/69 was not applicable.

(322) The Commission also notes that unlike Regulation (EEC) No 1191/69, Regulation (EEC) No 1107/70 was not mentioned in any of the measures among the relevant provisions regulating the contracts.

(323) Lastly, Italy did not explain why it considered Regulation (EEC) No 1107/70 applicable to the Measures.

(324) In light of the above, the Commission concludes that, since the Measures under investigation fell under the scope of Regulation (EEC) No 1191/69, Regulation (EEC) No 1107/70 was not applicable in the present case. Italy may therefore not invoke that latter regulation as an alternative legal basis for assessment (recitals (139), (158) and (195)).

(325) Therefore, the Commission will assess the compatibility of the aid paid under the First Contract ([198]), the Second Contract and the Third Contract until 3 December 2012 under Regulation (EEC) No 1191/69 and the compatibility of the aid paid under the Third Contract after 3 December 2012 under Article 93 TFEU.

8.4.1.1. Compatibility of the aid under Regulation (EEC) No 1191/69

(326) According to Article 1(4) of Regulation (EEC) No 1191/69, Member States may conclude PSCs with a transport undertaking 'in order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger'.

(327) The provisions applicable to PSCs are detailed in Section V of Regulation (EEC) No 1191/69. This section consists of a single article (Article 14), which provides that '[a] public service contract shall mean a contract concluded between the competent authorities of a Member State and a transport undertaking in order to provide the public with adequate transport services' and specifies what such a contract may ([199]) and shall ([200]) cover.

(328) Article 14 of Regulation (EEC) No 1191/69 is built on the concept of '*adequate transport services*' ([201]). In this respect, the Commission notes that Article 1(4) of Regulation (EEC) No 1191/69 allows Member States to conclude PSCs with a transport undertaking in order to ensure adequate transport services taking into account, among others, social and environmental factors.

(329) The Court made clear that Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70 listed exhaustively the circumstances in which the authorities of the Member States could grant aid under Article 93 TFEU ([202]), and that the compatibility of compensation payments falling within the scope of Regulation (EEC) No 1191/69 must be assessed in accordance with the provisions laid down by that regulation ([203]).

(330) In previous decisions ([204]) the Commission assessed the compatibility of PSCs on the basis of the said Article 14 together with general principles derived from the Treaty, the case-law and the Commission decision-making practice in other fields. Those principles, developed under Article 106(2) TFEU, essentially require, on the one hand, the existence of an entrustment act, and, on the other hand, the absence of overcompensation ([205]).

([198]) Only the part of the compensation paid under the First Contract that constitutes new aid, namely (a) international rail freight transport between the Italian port of Trieste and Hungary; and (b) international rail freight transport services through the port of Trieste Marittima.

([199]) See Article 14(1) of Regulation (EEC) No 1191/69 – '[…] A public service contract may cover notably: - transport services satisfying fixed standards of continuity, regularity, capacity and quality, - additional transport services, - transport services at specified rates and subject to specified conditions, in particular for certain categories of passenger or on certain routes, - adjustments of services to actual requirements'.

([200]) See Article 14(2) of Regulation (EEC) No 1191/69 – 'A public service contract shall cover, inter alia, the following points: (a) the nature of the service to be provided, notably the standards of continuity, regularity, capacity and quality; (b) the price of the services covered by the contract, which shall either be added to tariff revenue or shall include the revenue, and details of financial relations between the two parties; (c) the rules concerning amendment and modification of the contract, in particular to take account of unforeseeable changes; (d) the period of validity of the contract; (e) the penalties in the event of failure to comply with the contract'.

([201]) Judgment of 17 September 1998, *Kainuun Liikenne Oy*, C-412/96, ECLI:EU:C:1998:415, paragraphs 33 and 34.

([202]) Judgment of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, Case C-280/00, ECLI:EU:C:2003:415, paragraph 108.

([203]) Judgment of the Court of 7 May 2009, *Antrop*, Case C-504/07, ECLI:EU:C:2009:290, paragraph 32.

([204]) Commission decisions in cases N 332/2008, DK, Compensation to long-distance bus operators for discounts given to certain types of passengers using long distance bus services (OJ C 46, 25.2.2009, p. 8); N 409/2008, CZ, N 410/2008 and N 411/2008, Acquisition and modernisation of rail rolling stock, vehicles for urban transport and vehicles for regional transport (OJ C 106, 8.5.2009, p. 17); C 3/08, CZ, Public Service Compensation for Southern Moravia Bus Companies, (OJ L 97, 16.4.2009 p. 14); C 16/2007, Austria, Public service contract of Postbus in the Lienz district (OJ L 306, 20.11.2009, p. 26); N 495/2007, CZ, Programme d'acquisition et de modernisation de materiel roulant ferroviaire, (OJ C 152, 18.6.2008, p 21); N 350/2007, CZ, Acquisition of buses, (OJ C 140, 6.6.2008, p. 2).

([205]) See the Communication from the Commission, European Union framework for State aid in the form of public service compensation ('**SGEI Framework**'), (OJ C 8, 11.1.2012, p.15). Even though the SGEI Framework is not applicable to the land transport sector (see point 8), it may provide guidance on some principles underlying SGEIs.

(331) As regards the existence of an entrustment act, the settled case-law provides that undertakings entrusted with the operation of SGEIs must have been assigned that task by an act or several acts of a public authority, the form of which may be determined by each Member State ([206]). These acts must provide a clear and precise identification of the activities covered by the public service remit and the conditions under which such activities have to be performed. The entrustment must exist before any compensation is paid.

(332) As regards the absence of overcompensation, the amount of compensation must not exceed what is necessary to cover the net cost of discharging the PSOs, taking into account the relevant receipts and a reasonable profit ([207]). In previous decisions, the Commission has noticed that by establishing in advance a compensation ceiling the public authorities in principle ensured that future compensation payments could not exceed the losses incurred by the operator entrusted with the SGEI ([208]).

(333) It follows that, as regards the application of Articles 1(4) and 14 of Regulation (EEC) No 1191/69 to PSCs in the rail freight transport sector and the general principles deriving from the Treaty, the Commission will verify whether:

— the public transport service was entrusted by one or more acts of a public authority;

— the object of the PSC is covered by Article 14(1) of Regulation (EEC) No 1191/69;

— the act of entrustment specified (a) the nature of the service to be provided (that is the '*adequate transport services*' identified by the Member State in respect of the standards of continuity, regularity, capacity and quality), (b) the price of the service and details of financial relations between the two parties, (c) the rules concerning amendment and modification of the contract, (d) the period of validity of the contract, (e) the penalties in the event of failure to comply with the contract;

— the amount of compensation did not exceed what was necessary to cover the costs incurred in discharging the PSOs, taking into account the relevant receipts and a reasonable profit.

8.4.1.2. Compatibility of the aid under Article 93 TFEU

(334) For freight transport services, after 3 December 2012, Article 93 TFEU has become directly applicable as the legal basis for establishing the compatibility of aid not covered by Regulation (EC) No 1370/2007 ([209]). That provision constitutes a *lex specialis* in relation to the general rules applicable to State aid ([210]).

([206]) In the judgment of 21 March 1974, *BRT and Société belge des auteurs, compositeurs et éditeurs*, 127/73, ECLI:EU:C:1974:25, paragraph 22, the Court held that an undertaking which invokes Article 106(2) TFEU in order to rely on a derogation from the rules of the Treaty must be entrusted by the Member State with the operation of an SGEI.

([207]) See by analogy judgment of 11 July 2014, *DTS Distribuidora de Television Digital / Commission*, T-533/10, ECLI:EU:T:2014:629, paragraph 117. See also C 16/2007, Austria, Public service contract of Postbus in the Lienz district (OJ L 306, 20.11.2009, p. 26).

([208]) See N 495/2007, CZ, Programme d'acquisition et de modernisation de materiel roulant ferroviaire, (OJ C 152, 18 June 2008, p 21), recitals 80-81.

([209]) In the Commission notice on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road (2023/C 222/01), the Commission recalled that 'Regulation (EC) No 1370/2007 does not apply to freight transport services. Freight transport services can only be qualified as services of general economic interest when the Member State concerned establishes that there is a genuine need for such services that is not, or not sufficiently, met by the market (see Section 2.2.3). If Member States wish to establish support measures for rail freight transport services which do not fulfil the conditions defined in the Altmark judgement and constitute State aid, they must notify those measures to the Commission pursuant to Article 108(3) TFEU'.

([210]) Judgment of 24 July 2003, *Altmark*, C-280/00, ECLI:EU:C:2003:415, paragraph 34.

(335) State aid that represents the reimbursement for the discharge of certain obligations inherent in the concept of a public service in rail freight transport can be found compatible with the internal market pursuant to Article 93 TFEU ([211]). In the application of Article 93 TFEU, the Commission verifies the absence of overcompensation as well as the necessity, appropriateness and proportionality of the aid. The Commission verifies also that the aid does not cause any undue distortion of competition.

(336) For the purpose of the assessment of the compensation paid to Trenitalia under the Third Contract after 3 December 2012, the Commission will apply by analogy the principles set out for the assessment of SGEIs. As regards Article 106(2) TFUE, the case-law ([212]) indicates that the following conditions must be satisfied. First, the service at issue should be a genuine SGEI. Second, the undertaking must be entrusted with the operation of a genuine SGEI by one or more acts of a public authority. Third, the measure must be proportionate. Last, the derogation from the Treaty provisions must not affect the development of trade to an extent contrary to the interests of the Union.

(337) Therefore, under Article 93 TFEU, in order to assess the compatibility of aid granted for the discharge of certain obligations inherent to the concept of public service, the Commission will verify whether:

— the public service is a genuine SGEI;

— the SGEI was entrusted by one or more acts of a public authority;

— the amount of compensation did not exceed what was necessary to cover the costs incurred in discharging the PSOs, taking into account the relevant receipts and a reasonable profit;

— the obligations and related compensation do not cause any undue distortions of competition.

8.4.2. *The First and Second Contracts*

(338) As the compensation paid under the First Contract and Second Contract was entirely paid before 3 December 2012, the compatibility of the aid paid under these contracts is assessed under Regulation (EEC) No 1191/69 and the general principles deriving from the Treaty (see recital (333)).

8.4.2.1. Entrustment of the public transport service

(339) *As regards the First Contract*, signed on 18 October 2002, the aid examined in the present section concerns the compensation for the application of tariff obligations on international rail freight transport services on the TERFN operated by Trenitalia from 15 March 2003 until 31 December 2003.

(340) *As regards the Second Contract*, the Commission observes that that contract was signed on 27 March 2007 and covered the period from 1 January 2004 to 31 December 2006. The Commission observes that Trenitalia had started providing the services identified under that contract before the signature of the Second Contract.

([211]) see Judgment of 12 October 1978, *Commission of the European Communities v Kingdom of Belgium*, 156/77, ECLI:EU:C:1978:180, paragraph 10.

([212]) A summary of the conditions to be met under Article 106(2) can be found for instance in the judgment of 24 September 2015, *Viasat Broadcasting UK* v *Commission*, T-125/12, ECLI:EU:T:2015:687, paragraph 61.

(341) For the reasons explained in section 8.3.1 on '8.3.1. Relevant legal framework', according to the Union Courts, the relevant date for determining the legislation applicable for the compatibility assessment of the compensation granted under a PSC awarded in the land transport sector is the date when the compensation was paid. The Commission notes that the aid assessed in this section was paid entirely after the signature of the relevant PSC. The compensation under the First Contract was paid in 2003 and 2005 (see recital (61)), and the compensation under the Second Contract was paid entirely after the signature of that contract (see recital (75)) ([213]). This means that at the time of the payment of the compensations, the PSOs as well as the conditions under which the PSOs had to be discharged and the methodology to calculate the compensation had already been defined by an entrustment act (the First Contract as regards the compensation for the application of tariff obligations on international rail freight transport services on the TERFN operated by Trenitalia from 15 March 2003 until 31 December 2003 and the Second Contract as regards the compensation for the PSOs identified under that contract). Therefore, Italy paid the compensation against the provision of PSOs clearly identified and known to Trenitalia ([214]).

(342) The Commission therefore considers that, in light of the specific circumstances described in the present section, Italy entrusted the PSOs to Trenitalia for the period covered by the First Contract and the Second Contract.

8.4.2.2. The object of the PSCs is covered by Article 14(1) of Regulation (EEC) No 1191/69

(343) According to Article 14(1), second paragraph, of Regulation (EEC) No 1191/69, a PSC may cover notably:

— transport services satisfying fixed standards of continuity, regularity, capacity and quality;

— additional transport services;

— transport services at specified rates and subject to specified conditions, in particular for certain categories of passenger or on certain routes;

— adjustments of services to actual requirements.

(344) The Commission observes that the list provided under Article 14(1) of Regulation (EEC) No 1191/69 mentioned in recital (343) is not exhaustive. This does not mean however that Member States' discretion in the identification of the content of PSCs under Regulation (EEC) No 1191/69 was without limits. The first paragraph of Article 14(1) of Regulation (EEC) No 1191/69 clarifies that PSC is 'a contract concluded between the competent authorities of a Member State and a transport undertaking in order to provide the public with adequate transport services'. The elements listed under Article 14(1), second paragraph, of Regulation (EEC) No 1191/69 are meant to identify a set of requirements that render transport services as 'adequate', provided that the PSC also satisfies the mandatory conditions set out in Article 14(2) of Regulation (EEC) No 1191/69.

([213]) See Article 5(4) of the Second Contract and Trenitalia's balance sheets of 2007, page 33. As regards the aid for 2005, also paid in 2007, Article 5(5) of the Second Contract provided for payment to Trenitalia subject to the auditing by the Ministry of the certified accounts for 2005, to be sent to the Ministry within 30 days from the date of the signature of the contract. As regards the aid for the years 2006 and 2007, also paid in part in 2007, these payments were authorised by Article 9 of Law Decree No 159 of 1 October 2007. This provision allowed the Ministry of Economy and Finance to provide the compensation to Trenitalia for the public service obligations carried out under PSCs.

([214]) That circumstance differs from the case *Fallimento Traghetti del Mediterraneo* (judgment of the Court of 10 June 2010, *Fallimento Traghetti del Mediterraneo SpA*, C-140/09, ECLI:EU:C:2010:335) in which the Member State had paid compensation to the undertaking entrusted with the discharge of PSOs without defining *de facto* or *de jure* those PSOs. Thus, the Member State paid the undertaking without having defined *ex ante* the nature of the PSOs for which compensation ought to be paid, nor the parameters to calculate the related costs of the PSOs and the corresponding amount of compensation.

(345) The First Contract covered tariff obligations, obligations to operate and the obligation to plan and coordinate ancillary activities. These types of PSOs fall under the categories identified in Article 14(1) of Regulation (EEC) No 1191/69. Notably, as explained below, the tariff obligations (see recitals from (346) to (352)) as well as the obligations to operate (see recitals from (353) to (357)) fall under the category of 'transport services at specified rates and subject to specified conditions, in particular for certain categories of passenger or on certain routes'. As regards the obligation to plan and coordinate all activities ancillary to the provision of PSOs provided by the Second Contract, the Commission considers that this obligation falls within the category of 'additional transport services' that may be covered by a PSC under Article 14(1) of Regulation (EEC) No 1191/69.

(346) As regards the tariff obligations, the First Contract concerns, for the part which constitutes new aid, the obligation on Trenitalia to provide (i) international rail freight transport services on the routes between the port of Trieste and Hungary, and (ii) international rail freight transport services through the port of Trieste Marittima. In addition, the Second Contract covers the obligation of Trenitalia to provide rail freight transport services at specified rates on the national routes (iii) between the mainland and Sardinia and (iv) exceeding 1 000 km.

(347) The Commission considers that the obligations indicated in points (i), (iii) and (iv) fall within the category of 'transport services at specified rates and subject to specified conditions, in particular […] on certain routes', which may be covered by a PSC under Article 14(1) of Regulation (EEC) No 1191/69. Those obligations all met the conditions to be 'at specified rates' and 'subject to specified conditions' because they identified the tariff discount applicable and the routes concerned by the discount.

(348) By contrast, the tariff obligation on international rail freight transport services through the port of Trieste Marittima does not fall under any of the categories listed in Article 14(1) of Regulation (EEC) No 1191/69 for the following reasons.

(349) First, neither the First Contract nor the Second Contract specified the conditions under which the international rail freight transport services through the port of Trieste Marittima had to be operated. Both contracts referred vaguely to international routes passing through that port, except for the ones between Hungary and Italy that were already subject to a different tariff obligation under both contracts, without providing any information on the scope of the routes covered, their origin and destinations (for e.g. whether it concerned routes within the Union or outside the Union) or the distance taken into account. The tariff obligation encompassed all 'international routes', the sole point of reference being those routes passing through the port of Trieste Marittima. As explained by Italy (see recital (125)), the rate reduction was provided only for the national part of the route, and, according to Trenitalia's certified accounts, the compensation was calculated exclusively on the basis of the number of wagons transiting in import/export through the port of Trieste Marittima from the neighbouring Austrian rail network managed by the Austrian-based operator Osterreichische BundesBahnen (ÖBB). As there was no link between the tariff obligation and the actual route effectively serviced by Trenitalia nor was the service subject to any specific condition beside the tariff obligation, the Commission considers that the tariff obligation on transport through the port of Trieste Marittima does not satisfy the notion of 'transport services at specified rates and subject to specified conditions' that may be covered by PSCs under Article 14(1) of Regulation (EEC) No 1191/69.

(350) Second, that tariff obligation cannot be covered by any other of the indents of Article 14(1) of Regulation (EEC) No 1191/69, recalled in recital (343). As regards the first indent, concerning 'transport services satisfying fixed standards of continuity, regularity, capacity and quality', in the absence of any specific conditions applying to the provision of international rail freight transport services through the port of Trieste Marittima, that tariff obligation did not contribute to the provision of transport services satisfying fixed standards of continuity, regularity, capacity and quality. As regards the second indent, concerning 'additional transport services', that tariff obligation does not constitute an additional transport service, since the contracts did not identify the main transport service that the tariff obligation was complementing. As regards the fourth indent, concerning 'adjustment of services to actual requirements', that tariff obligation did not constitute an adjustment to an actual requirement, since none of the contracts specified the requirement in question.

(351) Last, there is no indication that that tariff obligation, even though not falling under the categories identified in the second paragraph of Article 14(1) of Regulation (EEC) No 1191/69, was in any event necessary to provide 'adequate transport services' under the first paragraph of Article 14(1) of Regulation (EEC) No 1191/69. As mentioned in recital (326), under Article 1(4) of Regulation (EEC) No 1191/69, Member States may conclude PSCs with a transport undertaking 'in order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning'. Yet, social or environmental factors, or town and country planning, played no role for the purposes of defining the tariff obligation on international rail freight transport services through the port of Trieste Marittima.

(352) For the above reasons, the Commission considers that the tariff obligation on transport through the port of Trieste Marittima falls outside of the scope of Article 14(1) of Regulation (EEC) No 1191/69. As the compatibility of compensation payments falling within the scope of Regulation (EEC) No 1191/69 must be assessed in accordance with the provisions laid down by that regulation and that regulation listed exhaustively the circumstances under which Member States could grant aid under Article 93 TFEU (see recital (329)), obligations which are not covered by Article 14(1) of Regulation (EEC) No 1191/69 cannot be considered compatible with Regulation (EEC) No 1191/69.

(353) As regards the obligations to operate covered by the Second Contract, notably the obligation to operate ferry crossing and manoeuvring for freight transport between the mainland and Sardinia/Sicily and the obligation to operate a certain number of stations in Sardinia and Sicily, the Commission considers that these obligations fall within the category of 'transport services satisfying fixed standards of continuity, regularity, capacity and quality', under Article 14(1) of Regulation (EEC) No 1191/69.

(354) First, Trenitalia could not interrupt or suspend the provision of those services. ([215]) In its replies of 15 February 2018, Italy made clear that Trenitalia had to provide rail freight transport services to/from the stations identified in the contract to all clients requesting them. The fact that Trenitalia had to guarantee the constant availability of rail freight transport services to/from the said stations in Sardinia and Sicily ensured the potential provision of continuous rail freight transport services to these islands.

(355) Second, as regards the regularity of the services, the Commission notes that, under the Second Contract, Trenitalia was obliged to operate train stations in Sardinia and Sicily and to provide rail freight transport services according to the specific timetables and characteristics of the stations, which were described in Annex 1 to the Second Contract. Therefore, access to the service had to be guaranteed on a regular basis to all potential users.

(356) Third, Trenitalia was obliged to provide the services covered by the contract with the characteristics described in Annex 1 of the contract ([216]), and to maintain the level of quality of those services ([217]). Annex 1 detailed the name of the stations in Sardinia and Sicily to be serviced along with the operating hours and the type of service to be provided ([218]), taking into account the infrastructural characteristics of the stations. Annex 2 provided the general conditions for rail freight transport, applicable to all users. In addition, Trenitalia was required:

(a) to plan and coordinate all activities ancillary to the provision of these services, such as ordinary and supplementary maintenance and periodic overhauls of rolling stock, an optimum level of safety conditions, the administrative and commercial activities in support of service management (Article 3(1) of the Second Contract);

([215]) Except in emergencies or circumstances outside the control of the company, which are not avoidable using normal diligence, in cases of force majeure laid down by law or in the cases stipulated by the authorities for reasons of public order and public safety. In such case, however, any changes to or interruption of the service had to be communicated to the MIT without delay and the services had to be restored as soon as possible, see Article 7(1) and 7(4) of the Second Contract.

([216]) Article 2(2) of the Second Contract.

([217]) Article 2(4) of the Second Contract. Trenitalia could modify the services referred to in Annex 1 only with previous approval of the MIT, see Article 2(5) of the Second Contract. As from 2006, Trenitalia and the MIT could agree to exclude from the service obligations under this contract those installations which, in 2005, experienced a reduction in traffic of 30 % or more with respect to 2004 or a significant increase in their financial burdens associated with operation (see Article 2(7) of the Second Contract). The Commission considers that these provisions were essentially meant to safeguard the economic equilibrium of the contract and did not affect the continuity of the service.

([218]) E.g. handle of dangerous goods, transport of live animals, transport of vehicles.

(b) to produce a report on the quantity and quality of these services, with reference, *inter alia*, to punctuality of trains, service reliability, customer feedback (Article 6(1) of the Second Contract), and to improve the quality of the service to customers by providing at least the elements identified in Article 6(2) of the Second Contract (e.g. transport monitoring services, electronic waybill, traffic statistics, customer service assistance).

(357) Last, as regards the fixed standards of capacity of the service, the Commission considers that, in order to comply with the above obligations, Trenitalia had to ensure the constant availability of a rail freight transport capacity commensurate to potential users' demand. Italy explained that the contract did not impose on Trenitalia the provision of any predetermined minimum or maximum amount of capacity in order to keep the system flexible enough to adapt to the fluctuation of demand.

(358) Against this background, the Commission considers that the PSOs covered by the First Contract, for the part constituting new aid, and by the Second Contract were covered by Article 14(1) of Regulation (EEC) No 1191/69, with the exception of the tariff obligation on international rail freight transport through the port of Trieste Marittima.

(359) In conclusion, the First Contract and the Second Contract did not comply with Article 14(1) Regulation (EEC) No 1191/69 for the part concerning the tariff obligation on international rail freight transport through the port of Trieste Marittima. Therefore, the compensation paid under the First Contract and the Second Contract in respect to the said tariff obligation qualifies as incompatible aid.

8.4.2.3. Elements specified in the act of entrustment

(360) Under Article 14(2) of Regulation (EEC) No 1191/69 'A public service contract shall cover, inter alia, the following points: (a) the nature of the service to be provided, notably the standards of continuity, regularity, capacity and quality; (b) the price of the services covered by the contract, which shall either be added to tariff revenue or shall include the revenue, and details of financial relations between the two parties; (c) the rules concerning amendment and modification of the contract, in particular to take account of unforeseeable changes; (d) the period of validity of the contract; (e) the penalties in the event of failure to comply with the contract'.

(a) Nature of the service to be provided (Article 14(2)(a) Regulation (EEC) No 1191/69)

(361) Both the First Contract and Second Contract listed the rail freight transport services to be provided by Trenitalia and detailed the conditions applying to them. ([219])

(362) With regard to the *tariff obligations*, the Commission considers that the nature of the tariff obligation was properly identified in the case of the PSOs on international rail freight transport services between the Italian port of Trieste and Hungary and on rail freight transport services on the national routes between the mainland and Sardinia and exceeding 1 000 km. In fact, under both the First Contract and the Second Contract, Trenitalia was required to transport the freight transiting on specific routes at the rates specified in that contract. These reduced rates were the same for all service users and had to be applied on a continuous and regular basis, irrespective of the amount of freight transported or any efficiency consideration. In terms of quality of the service, both contracts required Trenitalia to comply with the standards of safety, punctuality of the trains, service reliability and customers' feedback identified in the report prescribed by Article 7 of the First Contract and Article 6 of the Second Contract.

([219]) Annex 4 of the First Contract and Annex 1 of the Second Contract.

(363) By contrast, the same considerations do not apply as regards the tariff obligation on international rail freight transport services through the port of Trieste Marittima given the absence of any prior definition, even only in terms of origin/destination, of the routes concerned by the tariff obligation. The Commission observes that the service provided was identified in terms of number of wagons transiting in import/export through the port of Trieste Marittima irrespective of their origin/destination. The number of wagons handled at a port, alone, does not provide any information about the nature of the service to be provided, in terms of continuity, regularity, capacity and quality. These are features that can be meaningfully assessed only in respect of comparable transport services, which is not the case where the rail freight services are not subject to any specific condition, e.g. in terms of points of origin/destination served, that could make them comparable.

(364) As regards the *obligations to operate covered by the Second Contract*, the same considerations developed in recitals (354)-(357) apply. Notably, in respect of the obligation to operate ferry crossing and manoeuvring for freight transport between the mainland and Sardinia/Sicily and the obligation to operate a certain number of stations in Sardinia and Sicily. The Second Contract contained all the required elements identifying the nature of the service to be provided in terms of continuity, regularity, capacity and quality. The same is true also with regard to the obligation to plan and coordinate all activities ancillary to the provision of public service obligations provided by the Second Contract. Indeed, that ancillary obligation was subject to the same conditions of continuity, regularity, capacity and quality applicable to the underlying main transport services.

(365) Against this background, the Commission considers the following:

— As regards the tariff obligation on international rail freight transport through the port of Trieste Marittima, the First Contract and the Second Contract did not identify the nature of the transport services, in respect of the standards of continuity, regularity, capacity and quality, and therefore did not comply with Article 14(2) Regulation (EEC) No 1191/69.

— As regards the tariff obligation on international rail freight transport services between the Italian port of Trieste and Hungary covered by the First Contract and the Second Contract, the tariff obligations on rail freight transport services on the national routes between the mainland and Sardinia and on the national routes exceeding 1 000 km covered by the Second Contract, and the obligations to operate covered by the Second Contract, the nature of the transport services was sufficiently defined in both contracts, in respect of the standards of continuity, regularity, capacity and quality. These elements were apt at ensuring the provision to the public of adequate rail freight transport services. Therefore, as regards those PSOs, the First Contract and the Second Contract complied with Article 14(2) Regulation (EEC) No 1191/69.

(366) In conclusion, as the First Contract and Second Contract do not properly identify the nature of the service that had to be provided under the tariff obligation on international rail freight transport through the port of Trieste Marittima, the compensation paid under the First Contract and the Second Contract in respect to that tariff obligation did not comply with Article 14(2)(a) Regulation (EEC) No 1191/69 and therefore constitutes incompatible aid, without it being necessary to check the fulfilment of the other requirements laid down in Article 14(2) of that Regulation. This conclusion is without prejudice of the finding that the First Contract and the Second Contract satisfied the remaining conditions of Article 14(2) of Regulation (EEC) No 1191/69, as explained in recitals from (367) to (381).

(b) Price of the services covered by the contract (Article 14(2)(b) Regulation (EEC) No 1191/69)

(367) The First and Second Contract specified the amount of compensation to be paid to Trenitalia for the provision of the services, i.e., the price of the services and the methodology applied for its calculation ([220]).

([220]) See Annex 4 of the First Contract and Article 2 and Annex 1 of the Second Contract.

(368) *As regards the tariff obligations*, the compensation to be paid to Trenitalia covered the difference between the expected revenue from the application of the standard rate and the tariff imposed by the State (see recital (54)-(56)).

(369) In particular, the Commission observes the following:

— As regards international rail freight transport between the port of Trieste and Hungary, the First Contract and Second Contract provided a price equal to the difference between the actual income derived from the application of the tariff obligation (namely, a 15 % discount for transits through Austria and a 50% discount for transits through former Yugoslavia (Slovenia and Croatia) and the expected gain from the application of the ordinary rate.

— As regards rail freight transport over distances exceeding 1 000 km, the Second Contract provided a price equal to the difference between the amounts that would have been obtained by applying the theoretical kilometre fare and the amounts effectively obtained by applying the kilometre fare, which continues to decrease even after 1 000 km.

— As regards rail freight transport between the mainland and Sardinia, under the Second Contract, the difference between the expected revenue from the application of the standard rate and the tariff indicated in the contract on traffic to/from Sardinia was one of the elements taken into account in the quantification of the compensation calculated on the basis of Trenitalia's profit and loss statements.

(370) As regards *the obligations to operate* under the Second Contract (i.e., the obligation to operate rail freight transport between the mainland and Sardinia/Sicily, the obligation to operate at a certain number of train stations in Sardinia/Sicily and the obligation to operate activities ancillary for the provision of the rail freight transport services), the compensation was calculated on the basis of Trenitalia's profit and loss statements.

(371) As indicated in recitals (71) to (72), the Second Contract included specific rules governing (a) the payment of the compensation and (b) the recovery of amounts paid in excess of the yearly actual burden borne by Trenitalia indicated in the certified accounts reviewed by the MIT. The compensation could not exceed the maximum amounts indicated in Article 4(1) of the contract ([221]), with the additional safeguard provided in Article 4(2) of that contract, according to which 'the total annual compensation granted may not in any case exceed the actual financial burden borne by the Company for each year of the three-year period 2004-2006'. There were also dedicated provisions governing the payment of the services performed by Trenitalia after the expiry of the contract (see recital (74)).

(372) The Commission considers the First Contract and Second Contract to be in line with Article 14(2)(b) of Regulation (EEC) No 1191/69, which requires the contract to indicate the price of the services covered by the contract and details of financial relations between the two parties.

(c) Rules concerning amendment and modification of the contract (Article 14(2)(c) Regulation (EEC) No 1191/69)

(373) Under the First Contract, the MIT had the right to amend or modify the public service obligations covered by that contract, and the corresponding methodology to calculate the compensation ([222]). Conversely, Trenitalia was entitled to suspend the provision of the services, if the said amendments/modifications or enacted legal provisions were incompatible with the obligation to continue services ([223]). In any event, Trenitalia was under the duty to give prior notification to the MIT of any amendment of the service ([224]) and could terminate the provision of some or all services provided under the First Contract giving not less than 30 days' prior notice ([225]).

([221]) I.e., for 2004, EUR 142 828 104 (inclusive of VAT); for 2005, EUR 142 828 104 (inclusive of VAT); for 2006, EUR 117 521 500 (inclusive of VAT).

([222]) According to Article 10(1) of the First Contract, such amendment/modification had to be carried out on the basis of studies and investigations, having regard to the process of liberalisation of the rail freight transport market and on the basis of studies and in-depth investigations.

([223]) Article 10(4) of the First Contract.

([224]) Article 10(5) of the First Contract.

([225]) Article 10(2) of the First Contract.

(374) As regards the Second Contract, the amendment and modification of the contract could occur only in agreement with the MIT. The services referred in Annex 1 to the Second Contract could be modified by Trenitalia subject to the approval by the Ministry giving at least 60 days' notice ([226]); moreover, the number of stations to be serviced as from 2006 could be reduced in agreement between the parties, subject to specific conditions ([227]). Moreover, the terms and quantities of the services subject to public service obligations could be reviewed by the parties, if the compensation effectively available was eventually lower than the amounts allocated in the national budget ([228]). Last, as regards the services performed by Trenitalia beyond the expiry of the contract, Trenitalia was entitled to suspend compliance with the obligations covered by the Second Contract if legal provisions were enacted, which were incompatible with the obligation to continue services ([229]).

(375) On that basis, the Commission considers that the First Contract and Second Contract fulfilled the requirement laid down in Article 14(2)(c) of Regulation (EEC) No 1191/69, that required the inclusion in the PSC of rules concerning amendment and modification of the contract.

(d) Period of validity of the contract (Article 14(2)(d) Regulation (EEC) No 1191/69)

(376) The First Contract covered the period from 1 January 2000 to 31 December 2001 and included a continuity clause (Article 10) extending its validity until the conclusion of a new PSC or until communication from the MIT to Trenitalia of the termination of the First Contract.

(377) The Second Contract covered the period from 1 January 2004 to 31 December 2006 and included a continuity clause (Article 12) extending its validity until further notice of the MIT. Such notice had to be given at least 90 days in advance and could concern the termination of some or all of the PSOs covered by the contract.

(378) The Commission considers the First Contract and Second Contract to be in line with Article 14(2)(d) of Regulation (EEC) No 1191/69, that required the inclusion in the PSC of rules concerning the period of validity of the contract.

(e) Penalties (Article 14(2)(e) Regulation (EEC) No 1191/69)

(379) In case of non-compliance with the First Contract, Trenitalia was subject to a penalty up to EUR 250 000 for each infringement of any obligation imposed by the contract on Trenitalia (see recital (60)).

(380) In case of non-compliance with the Second Contract, Trenitalia was subject to a system of penalties that were to be deducted from the compensation payable (see recital (73)). First, the Second Contract provided for a specific penalty of EUR 50 000 for non-compliance with each of the following obligations: service quality obligations, scheduled frequencies or assign a minimum staff to the stations which were subject to service obligations ([230]), including delay in the transmission of reports on the level of quality of the transport services covered by the contract ([231]). Second, the Second Contract provided for a general penalty of EUR 50 000 for each failure or inadequacy on the part of Trenitalia in respect of the rest of the obligations under the contract ([232]). Furthermore, the MIT had the possibility to terminate the contract in case of particularly serious failures or inadequacies.

(381) The Commission considers the First Contract and Second Contract to be in line with Article 14(2)(e) of Regulation (EEC) No 1191/69, according to which the PSC has to cover the penalties in the event of failure to comply with the contract.

([226]) Article 2(5) of the Second Contract.
([227]) Article 2(7) of the Second Contract: in case of a substantial increase or a traffic reduction of 30% or more from 2004 to 2005 on a route covered by a tariff obligation, the parties could decide to remove the route from the scope of the public service transport.
([228]) Article 4(4) of the Second Contract.
([229]) Article 12(3) of the Second Contract.
([230]) Article 9(3), and 9(4) of the Second Contract.
([231]) Article 9(2) of the Second Contract.
([232]) Article 9(5) of the Second Contract.

8.4.2.4. Proportionality of the compensation

(382) As regards the amount of compensation, based on the general principles, which flow from the Treaty, the Commission assesses whether the compensation did not exceed what was necessary to cover the costs incurred in discharging the PSOs, taking into account the relevant receipts and a reasonable profit.

The First Contract

(383) Under the First Contract, the costs were calculated for each PSO imposed by the contract. The compensation covered only the costs incurred in discharging the PSOs, without allowing for any profit margin. Annex 4 of the First Contract contained a detailed methodology of the calculation of the costs generated by each PSO and quantified these costs for the first year of the contract (the year 2000).

(384) With specific regard to the tariff obligation for international rail freight transport between the port of Trieste and Hungary, as explained in recital (55), the costs corresponded to the foregone tariff revenue. They were determined as the difference between the normal tariffs that Trenitalia would have applied absent the contract and the lower tariffs effectively applied by Trenitalia based on the contract. For instance, the costs borne by Trenitalia in the year 2000 because of the said tariff obligation were quantified in the First Contract as follows (value in Italian Lire – ITL and correspondent value in EUR) ([233]):

Table 7

Methodology applied to determine the compensation under the First Contract for transport between the port of Trieste and Hungary

	Port of Trieste – Hungary (via Austria)			Port of Trieste – Hungary (via ex Jugoslavia)			**C + F Total foregone tariff revenue**
	A - Revenues from fare applied	B - Theoretical revenues from fare	C =B-A Total foregone tariff revenue	D - Revenues from fare applied	E - Theoretical revenues from fare	F = E-D Total foregone tariff revenue	
Italian Lire - ITL	908 061 000	1 068 307 000	160 246 000	822 460 065	1 644 920 130	822 460 065	**982 706 065**
Correspondent value in EUR	468 974,37	551 734,52	82 760,15	424 765,17	849 530,35	424 765,17	**507 525,33**

(385) The Commission considers that the methodology outlined at recitals (383) and (384) ensured that the compensation paid to Trenitalia under the First Contract was limited to the actual financial burden borne by the latter over the entire duration of the contract. Indeed, the imposition of tariff obligations led to a reduction of revenues for Trenitalia. Italy therefore applied the correct methodology by determining the compensation as the difference between the revenues from the fares imposed under the First Contract, and the revenues deriving from the fares that Trenitalia would have imposed absent that contract. Furthermore, the Italian authorities obliged Trenitalia to provide the financial accounts relating to the discharge in 2001 of the PSOs as certified by an independent accounting expert (see recital (58)). The compensation for any additional month of service could not exceed one-twelfth of the yearly compensation set for 2001 (see recital (59)).

(386) It follows that the compensation paid under the First Contract did not exceed the costs related to the discharge of the PSOs provided by that contract.

([233]) Exchange rate: 1 EUR = 1 936,27 ITL; 1 ITL = 0,000516457 EUR.

The Second Contract

(387) The Second Contract largely retained the methodology applied under the First Contract with regard to the determination of the compensation granted to Trenitalia for the tariff obligations imposed for international rail freight transport services between the port of Trieste and Hungary and on national rail freight transport services over distances exceeding 1 000 km. Annex 1 of the Second Contract outlined the methodology of the calculation of the costs generated by each PSOs and quantified these costs by reference to the first year of the contract (the year 2004). The compensation covered only the costs incurred in discharging the PSOs, without allowing for any profit margin.

(388) Table 8 and Table 9 show the methodology applied to determine the compensation under the Second Contract for the tariff obligations imposed on (a) international rail freight transport between the port of Trieste and Hungary and (b) rail freight transport over distances exceeding 1 000 km, and in particular the costs borne by Trenitalia in the year 2004.

Table 8

Methodology applied to determine the compensation under the Second Contract for transport between the port of Trieste and Hungary

Full wagons			Empty wagons			**C + F Total foregone tariff revenue (EUR)**
A - Revenues from fare applied (EUR)	B - Theoretical revenues from fare (EUR)	C =B-A Total foregone tariff revenue (EUR)	D - Revenues from fare applied (EUR)	E - Theoretical revenues from fare (EUR)	F = E-D Total foregone tariff revenue (EUR)	
73 318	146 637	73 318	28	56	28	73 346

Table 9

Methodology applied to determine the compensation under the Second Contract for routes above 1 000 km

A - Average fare applied (EUR per tonne/ km)	B - Average theoretical fare (EUR per tonne/km)	C - Average distance (km)	D - Tonnes transported	E = A*C*D Revenues from fare applied (EUR million)	F = B*C*D Theoretical revenues from fare (EUR million)	G = F – E Total foregone tariff revenue (EUR million)
0,0619	0,0716	1 322	2 342 104	191,7	221,6	29,9

(389) As per the First Contract, the Commission considers that that methodology ensured that the compensation paid to Trenitalia under the Second Contract was limited to the actual financial burden borne by the latter over the entire duration of the contract for the same reasons outlined in recital (385). Furthermore, Italy paid a compensation that was lower than the total costs resulting from the application of those tariff obligations.

(390) As regards the costs related to the PSOs on rail freight transport between the mainland and Sardinia (both the tariff obligation and the service obligation) ([234]), they were compensated on the basis of Trenitalia's profit and loss statements.

([234]) Namely, the obligations to: (a) operate ferry crossing and manoeuvring for freight transport between the mainland and Sardinia; (b) maintain a specific list of train stations and their installations open to the public for freight service in Sardinia; (c) to plan and coordinate all activities ancillary to the provision of the rail freight transport services to/from Sardinia.

(391) The same methodology to calculate the compensation, based on Trenitalia's profit and loss statement, applied also to the obligations concerning traffic to and from Sicily.

(392) The compensation calculated on the basis of that methodology included a profit, determined as the product of Trenitalia's weighted average cost of capital and capital employed.

(393) Italy estimated the compensation for the PSOs imposed on rail freight transport to/from Sardinia and Sicily to be paid under the Second Contract based on the costs borne by Trenitalia in the year 2004 as detailed in the table below.

Table 10

Methodology applied to determine the compensation under the Second Contract for transport to/from Sardinia and Sicily

(EUR)

Trenitalia's profit and loss statement	Sardinia	Sicily
A – Total revenues	7 674 289	89 236 087
B – Total costs	35 481 686	179 404 951
A-B	[27 807 397]	[90 168 864]
C - Return on capital invested	2 733 433	11 729 022
D - Tax on the cost of labour	-	1 003 737
Total revenue / loss (A-B-C-D)	[30 540 830]	[102 901 623]

(394) The Commission notes first that the costs relating to the PSOs imposed on rail freight services from/to Sardinia/Sicily were calculated as unit costs per wagon-km. The Commission considers that that metric is appropriate in the rail freight sector to estimate the cost of transport of goods by rail, as it allows to capture the costs of a unit wagon per kilometre operated regardless of the amount of goods transported. ([235]) As such, the methodology allows to estimate the average costs of the wagons used by Trenitalia to operate the rail freight services to/from Sardinia and Sicily.

(395) Secondly, the Italian authorities were able to estimate the incremental costs linked to the discharge of the PSOs between the mainland and Sicily/Sardinia on the basis of a specific profit and loss statement, which contained all the revenues and costs specifically allocated to those services. An independent accounting expert reviewed the allocation drivers of the costs, as well as the accounts and the services effectively operated by Trenitalia. Those elements were also verified by the Italian authorities and by the Commission (see recital (71)).

(396) Lastly, the account certificates provided by the Italian authorities to the Commission show that the compensation paid to Trenitalia in regard of those services did not exceed the costs borne by the latter to discharge the PSOs between the mainland and Sicily/Sardinia. Italy paid a compensation that was lower than the total costs resulting from the application of those PSOs. For that reason, it is unnecessary to verify whether the reasonable profit calculated by the Italian authorities was appropriate or not, since in any event, Trenitalia did not register any profits while discharging those PSOs.

([235]) The Second Contract did not provide for an obligation to transport a minimum volume of goods or specific types of goods.

(397) As regards the overall compensation paid to Trenitalia under the Second Contract, the data provided by Italy confirm that this compensation did not exceed the actual financial burden borne by Trenitalia over the entire duration of the contract. Table 3 details the total amount of Trenitalia's net costs under the Second Contract and the total amount of compensation granted and paid to Trenitalia under that contract. These data show that Trenitalia was compensated only for the services effectively carried out, which were certified by an independent accounting expert and verified by the Italian authorities (notably, the compensation paid in 2004, 2005, 2006 and 2008 was less than the amounts indicated in the contracts) and that the compensation did not manage to cover Trenitalia's net costs in their entirety.

(398) The fact that Trenitalia's cost per train/km was higher compared to that of other competitors or even to the average cost per train/km registered in Italy ([236]) has no bearing on that conclusion. First of all, the level of efficiency of an undertaking is not a relevant element to take into account when assessing whether Italy overcompensated Trenitalia for the discharge of the PSOs under the Second Contract. Secondly, the cost per train/km did not concern the PSOs in question, but the overall costs per train/km of Trenitalia (comprising both commercial services and services under PSOs). The same conclusion applies to the average cost per train/km registered in Italy, which is a data that concern the entire traffic of rail freight services provided in Italy. Therefore, the data provided by Fercargo (see recital (210)) offer no relevant element of comparison to estimate the costs to discharge of the PSOs under the Second Contract and do not show that Trenitalia was overcompensated for the discharge of those PSOs.

(399) Moreover, the Second Contract expressly provided for a claw-back mechanism in case of overcompensation. According to Article 4(3) of the Second Contract, where the compensation granted exceeded the costs actually borne by Trenitalia for the discharge of the PSOs under the Second Contract, the corresponding amount had to be subtracted from the compensation payable.

(400) Against this background, the Commission takes the view that the overall compensation received by Trenitalia under the First Contract and the Second Contract did not go beyond what necessary to cover the net cost of discharging the PSOs, and therefore was proportionate.

8.4.2.5. Conclusion

(401) For the above reasons, the Commission concludes that all the obligations included in the First Contract (for the part constituting new aid) and in the Second Contract (with the exception of the tariff obligation on international transport through the port of Trieste Marittima, see recitals (352) and (366)) comply with Article 1(4) and 14 of Regulation (EEC) No 1191/69 and the general principles of the Treaty. Therefore, the compensation paid to Trenitalia under the First and Second Contract qualifies as compatible State aid (with the exception of the payments made in relation to the tariff obligation on international transport through the port of Trieste Marittima, which qualifies as incompatible State aid).

8.4.3. *The Third Contract*

(402) The Commission notes that the terms and conditions of the Third Contract were agreed on 29 October 2010 (see recital (95)) and the contract was signed on 3 December 2012. Therefore, the Third Contract was concluded when Regulation No 1191/69 was still applicable (see recitals (300) and (301)). The Commission notes also that the compensation under the Third Contract was paid between 2010 and 2016. Therefore, in light of the principles laid down by Union Courts (see recital (316)), the compatibility of the aid paid under the Third Contract will be assessed, until 3 December 2012, under Regulation (EEC) No 1191/69 and the general principles deriving from the Treaty and, after 3 December 2012, under Article 93 TFEU.

([236]) See recital 39 of SA.32603 (2011/N), Subsidy scheme 'Ferrobonus' for combined transport (OJ C 88, 24.3.2012, p. 1).

8.4.3.1. Compatibility of the payments made until 3 December 2012 under Regulation (EEC) No 1191/69 and the general principles deriving from the Treaty

8.4.3.1.1. Entrustment of the public transport service

(403) On the basis of the evidence provided, it results that the Italian authorities and Trenitalia agreed the terms and conditions of the Third Contract on 29 October 2010, which was signed on 3 December 2012 (recital (95)). That contract covered the period from 1 January 2009 to 31 December 2014.

(404) The Commission observes that Trenitalia had started providing the services identified under that contract as of 1 January 2009, before the signature of the Third Contract (3 December 2012), and that Italy paid the first instalments of the compensation under the Third Contract on 21 December 2010 (see recital (102)), therefore before the signature of the Third Contract.

(405) However, the Commission observes that Italy provided evidence showing that all substantial elements of the Third Contract had been agreed upon by Trenitalia and the MIT on 29 October 2010.

(406) As explained in recital (92), the final draft of the Third Contract sent on 29 October 2010 by the Director General of the MIT for the signature of the competent Minister and the Third Contract signed on 3 December 2012 are substantially identical. They contain identical provisions concerning the nature of the services to be provided ([237]), the price of the service ([238]), the rules for the amendment and modification of the contract ([239]), the period of validity of the contract (2009-2014) ([240]) and penalties ([241]). Moreover, that draft already contained all elements relating to the calculation of the compensation ([242]). Besides, it is precisely that final draft of the Third Contract that motioned the adoption of the budgetary law authorising the Italian authorities to pay to Trenitalia compensation for the year 2009 on 21 December 2010 for the PSOs that had been provided under the Third Contract (see recital (95)).

(407) Furthermore, the draft of the Third Contract agreed by the parties on 29 October 2010 defined in a clear and precise manner the nature of the PSOs to discharge as well as the conditions under which Trenitalia had to provide them before any payment was made.

(408) In addition, the Commission notes that between 1 January 2009 and 29 October 2010, Trenitalia did operate the PSOs with indication given by the public authorities on the nature of the PSOs and the conditions under which to provide them, based on the negotiations of the Third Contract. On the basis of the factual elements described in section 3.2.3.1, it can be concluded that Trenitalia and the MIT intensively discussed the scope and the nature of the PSOs to be provided already as of November 2008. The draft contract exchanged between the parties on 4 March 2009 (which constituted the sixth version discussed so far on that date) already defined the core elements as to the scope and the nature of the PSOs to be discharged, as well as the conditions under which Trenitalia would operate them (see recital (88)) ([243]).

([237]) Articles 4, 5 and Annex 1 of the draft, subsequently Articles 4, 5 and Annex 1 of the Third Contract.
([238]) Article 9 and Annex 2 of the draft, subsequently Article 9 and Annex 2 of the Third Contract.
([239]) Articles 7, 8, 10(2), 11 and Annex 5 of the draft, subsequently Articles 7, 8, 10(2), 11 and Annex 5 of the Third Contract.
([240]) Article 6(1) of the draft, subsequently Article 6(1) of the Third Contract.
([241]) Article 13 and Annex 3 of the draft, subsequently Article 13 and Annex 3 of the Third Contract.
([242]) Notably, along with the rules on the methodology of calculation of the compensation, Annex 2 of the draft Third Contract provided Trenitalia's Economic and Financial Plan detailing the internal rate of revenue applied to the contract, the operating costs, the revenues and the amount of funds allocated in the State budget used as cap of the compensation, the content of the final version of the draft Third Contract did not change until the formal conclusion of that contract on 3 December 2012.
([243]) The scope of the public service covered an obligation for Trenitalia to operate rail freight services, under certain quality standards (notably punctuality) and upon demand by any customers, from/to the regions of Southern Italy. Only the exact number of train/km to be provided and the minimum financial efficiencies required to operate the PSOs differed from the final version of the draft Third Contract.

(409) Therefore, in 2009 as well as in 2010, Trenitalia did not operate without any mandate on the scope and the nature of the PSOs. Only the minimum number of train/km to be operated and the minimum financial efficiencies required to operate the PSOs changed between the draft Third Contract of 4 March 2009 and the draft Third Contract of 29 October 2010. In that regard, the Commission notes that the scope of those conditions was reduced in the draft contract of 29 October 2010 compared to the draft contract of 4 March 2009 ([244]). This means that Trenitalia operated more PSOs in the course of 2009 than what was ultimately agreed by the parties on 29 October 2010 (see recital (91)). Moreover, Italy only paid an amount of compensation corresponding to the number of train/km agreed on 29 October 2010 (i.e. 11,9 million train/km) and in accordance with the financial parameters established in the draft Third Contract of 29 October 2010, disregarding the additional PSOs operated by Trenitalia in 2009 ([245]). In addition, it is noteworthy that the MIT considered that Trenitalia discharged all the PSOs in 2009 in accordance with the requirements of the draft Third Contract agreed on 29 October 2010, confirming that the scope and nature of the PSOs were *de facto* sufficiently clear and precise for Trenitalia already in 2009 (see recital (94)).

(410) The Commission therefore considers that Italy entrusted Trenitalia with the operation of PSOs for the period covered under the Third Contract to Trenitalia.

8.4.3.1.2. Object of the public service contract

(411) The Third Contract entrusted Trenitalia with the obligation to operate rail freight transport services to and from the Southern regions of Italy (including Sicily but not Sardinia). In particular, Trenitalia was obliged to provide rail freight transport services in conventional full trainload or combined transport modes, depending on users' demand in the geographic area identified by the contract in terms of region/region connections.

(412) Trenitalia was required to provide these services to any operator that requested them, according to the criteria specified in Annex 1 to that contract ([246]), and within the yearly amount of train/km (11,9 million) – the 'planned offer' – specified in Article 4(1) and Annex 1 of the Third Contract for the years 2009-2014 ([247]). According to Article 11 of the Third Contract, the planned offer could be revised by the parties for the period 2012-2014; however, the parties did not make use of this clause.

(413) The Third Contract imposed on Trenitalia specific quality objectives (in terms of punctuality), specified in Annex 3 to the contract ([248]). The quality indicator values referred to in Annex 3 were based on methods and criteria agreed with the MIT. ([249]) Trenitalia had to submit to the MIT an annual report on the service and quality provided, accompanied by appropriate and complete documentation related to the services actually performed and all elements necessary for verifying compliance with the contractual obligations, including the quality objectives ([250]).

(414) In addition, Trenitalia was required to plan and coordinate all activities ancillary to the provision of these services, such as ordinary and extraordinary maintenance and regular inspections of rolling stock, an optimal level of safety conditions, the administrative and commercial activities in support of service management ([251]).

([244]) Under the draft of 4 March 2009, Trenitalia had to provide a minimum of 12,8 million train/km, while that number was reduced to 11,9 in the draft contract of 29 October 2010.

([245]) 14 million train/km effectively operated in 2009 minus 11,9 million train/km agreed on 29 October 2010 = 2,1 million train/km provided by Trenitalia in 2009 that were left uncompensated.

([246]) Notably to any operator that, for the region/region connections covered by Annex 1, asked for rail freight transport services satisfying '*a minimum level of efficiency*', that is a differential between costs and revenues per train/km for the service requested exceeding EUR 19 per train/km and greater than 73 % of the total costs. These provisions were essentially meant to safeguard the economic equilibrium of the contract and did not affect the continuity of the service.

([247]) Article 7(3) of the Third Contract makes clear that the parties mutually acknowledged that the planned offer for the years 2009-2014 corresponded to Annex 1 to the Third Contract.

([248]) Article 4(6) of the Third Contract.

([249]) Article 5(1)(a) of the Third Contract.

([250]) Article 5(1)(c) of the Third Contract.

([251]) Article 4(2) of the Third Contract.

(415) The Commission notes that the Third Contract intended to ensure a minimum network of services and not individual connections, that is, a minimal presence of a bundle of lines and connections distributed across Southern Italy, with their points of origin/destination. This obligation to provide services '*on demand*' ensured that the offer of rail freight transport services reflected users' demand in terms of regularity and capacity. Moreover, the contract provided for specific standards of quality of the service ([252]).

(416) Against this background, the Commission considers that the PSOs covered by the Third Contract fall within the category of 'transport services satisfying fixed standards of continuity, regularity, capacity and quality', under Article 14(1) of Regulation (EEC) No 1191/69.

8.4.3.1.3. Elements specified in the entrustment act

(a) Nature of the public service to be provided (Article 14(2)(a) Regulation (EEC) No 1191/69)

(417) As explained in recitals (411)-(416), the Third Contract identified the standards of continuity, regularity, capacity and quality of the rail freight transport services entrusted to Trenitalia.

(418) The Commission notes that these services took into account, among others, social and environmental factors. As mentioned in recital (326), under Article 1(4) of Regulation (EEC) No 1191/69, Member States may conclude PSCs with a transport undertaking 'in order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning'. As Italy explained (recital (165)), the Third Contract aimed at ensuring the provision, under economically sustainable conditions, of a rail modal alternative compared to the predominant road mode. It pursued not only a transport policy objective but also objectives of environmental and territorial policy and of economic and social cohesion. In fact, it was meant to strengthen regional cohesion and territorial balance between Northern and Southern Italy, while providing a sustainable alternative to road transport. The Third Contract clearly identified the regions of departure and destination to be served by Trenitalia as part of the PSOs to discharge, which is sufficient to consider that the requirements laid down in Articles 1(4) and 14(2)(a) of Regulation (EEC) No 1191/69 are met.

(419) For the above reasons, the Commission concludes that the nature of the public transport services to be provided under the Third Contract was sufficiently defined in accordance with Article 14(2)(a) of Regulation (EEC) No 1191/69, read in conjunction with Article 1(4) of the same regulation.

(b) Price of the services covered by the contract (Article 14(2)(b) Regulation (EEC) No 1191/69)

(420) The Third Contract specified the amount of compensation granted to Trenitalia for the provision of the services, i.e., the price of the services to be provided and the methodology applied for its calculation.

(421) The maximum amount of annual compensation was defined taking into account the public resources available and the expected evolution of Trenitalia's costs and revenues over the duration of the contract identified in Trenitalia's Economic and Financial Plan (Annex 2 to the contract). The actual compensation paid to Trenitalia covered the difference between the traffic revenue and associated costs related to the provision of the PSO, verified on an *ex post* basis (see recitals (99) and (100)).

([252]) Annex 3 to the Third Contract.

(422) The Third Contract included specific rules governing the payment of the compensation (see recital (99)) and recovery of amounts paid in excess of the yearly actual burden borne by Trenitalia reflected in the certified accounts transmitted to the MIT. In any event, the compensation could not exceed the maximum amounts indicated in Article 9(1) of the contract (for the years 2009-2011) or determined in accordance with Article 11 of the contract (for the years 2012-2014), and should have remained within the limits of the funds allocated in the public budget referred to in Annex 2 of the contract. The Commission notes that Trenitalia received compensation for the services provided in 2009 and 2010 on 21 December 2010 and only within the limit of 11,9 million train/km agreed in October 2010 ([253]).

(423) The Commission therefore considers that the Third Contract contained the elements required by Article 14(2)(b) of Regulation (EEC) No 1191/69, according to which the contract must indicate the price of the services it covers and details of financial relations between the two parties.

(c) Rules concerning amendment and modification of the contract (Article 14(2)(c) Regulation (EEC) No 1191/69)

(424) The amendment and modification of the contract could occur only in agreement between the parties.

(425) Any change in the planned offer, by way of deficit or excess greater than 1 % of the total amount of train/km provided by the Third Contract, had to be proposed by Trenitalia to the MIT ([254]). The planned offer could be revised by the parties also in case of variance between the envisaged and incurred operating cost of more than 10 % (in excess or deficit) of the total costs referred in Annex 2, provided that this variance was not due to Trenitalia's behaviour ([255]). Any interruptions and changes to the services due to events attributable to Trenitalia entailed a reduction of the compensation proportional to the non-supplied train-kilometres ([256]). If necessary, within six months from the date of registration of the contract, the parties could decide to update the planned offer and the conditions of economic-financial balance of the contract for the period 2012-2014; such update had to be in accordance with the formula provided in Annex 5 to the Third Contract ([257]). This clause was never used.

(426) The Commission considers that the Third Contract complies with Article 14(2)(c) of Regulation (EEC) No 1191/69 that required the inclusion in the PSC of rules concerning the amendment and modification of the contract.

(d) Period of validity of the contract (Article 14(2)(d) Regulation (EEC) No 1191/69)

(427) The Third Contract covered the period from 1 January 2009 to 31 December 2014 and included a clause (Article 6(2)) extending its validity (under the same terms and conditions) for a maximum of 12 months, if the MIT so required at the latest six months before the expiry of the contract.

(428) The Commission considers that the period of validity of the contract was clearly identified, in line with Article 14(2)(d) of Regulation (EEC) No 1191/69.

(e) Penalties (Article 14(2)(e) Regulation (EEC) No 1191/69)

(429) In case of non-compliance with the Third Contract, Trenitalia was subject to a system of penalties to be deducted from the compensation to be paid (see recital (101)).

([253]) Trenitalia was not compensated for the services provided in 2009 in excess to that threshold (14 million train/km instead of 11,9 million train/km).
([254]) Articles 7(1) and 7(2) of the Third Contract.
([255]) Article 10(2) of the Third Contract.
([256]) Article 8(4) of the Third Contract.
([257]) Article 11 of the Third Contract. Annex 5 provided for specific formula applicable to the potential revision of the economic equilibrium of the contract in order to ensure that the compensation remained proportionate to the costs borne by Trenitalia.

(430) In case of infringement of the contractual obligations, Article 13 of the Third Contract provided for penalties of varying amounts according to the seriousness of the infringement. Articles 13(7) to 13(14) set out the different penalty amounts in relation to specific infringements. For each infringement not specifically mentioned in the said clauses, Article 13(15) provided for a penalty of an amount no greater than EUR 50 000 euros. A specific penalty for failure to comply with the quality objectives was provided for in Annex 3.

(431) The Commission considers that the above-mentioned provisions comply with Article 14(2)(e) of Regulation (EEC) No 1191/69, according to which the PSC has to cover the penalties in the event of failure to comply with the contract.

8.4.3.1.4. Proportionality of the compensation

(432) As regards the amount of compensation, the Commission must verify whether the compensation did not exceed what was necessary to cover the costs incurred in discharging the PSOs, taking into account the relevant receipts and a reasonable profit (see recital (382)).

(433) The Commission notes that Annex 2 to the Third Contract contained detailed tables regarding the incremental costs borne by Trenitalia for the discharge of the public services obligations. The Economic and Financial Plan included in that Annex 2 quantified the planned amount for each type of incremental cost item for each year of the duration of the Third Contract, with a total cap amount of compensation established for each year of the duration of the Third Contract.

Table 11

Methodology to calculate the compensation under the Third Contract – excerpt of Trenitalia's Economic and Financial Plan included in Annex 2 of the Third Contract

(EUR mln)

		2009	2010	2011	2012	2013	2014
A1	Eligible capital reimbursement and remuneration costs	38,9	39,2	39,4	39,6	40,0	40,3
A2	Capital reimbursement and remuneration costs	38,9	39,2	39,4	39,6	40,0	40,3
b1.1	Tolls	32,9	32,9	32,9	32,9	32,9	32,9
b1.2	Train Circulation	22,6	19,1	17,1	16,2	16,2	16,2
b1.3	Fleet Management	14,0	11,3	10,0	9,3	9,3	9,3
b1.4	Driving	58,1	47,0	39,8	36,7	36,7	36,7
b1.5	Trains hunting and formation	56,6	42,1	36,5	33,8	33,8	33,8
b1.6	Maintenance	32,7	26,4	22,8	21,1	21,1	21,1
b1.7	Commercial costs	6,1	4,9	4,2	3,9	3,9	3,9
b1.8	Staff (Industrial, Commercial and Support)	26,0	21,1	18,2	16,8	16,8	16,8

(EUR mln)

		2009	2010	2011	2012	2013	2014
b1.9	Unabsorbed costs	*	21,1	10,9	10,4	10,4	10,4
b1.10	Interest cost on severance payment	*	*	3,7	3,7	3,7	3,7
b1.11	Tax on the cost of labour	2,0	1,9	1,8	1,8	1,8	1,8
B1	Eligible operating costs	251,1	227,9	197,9	186,5	186,5	186,5
b2	Ineligible operating costs (economic principle)	*	*	*	*	*	*
b3	Provisions for restructuring charges	*	*	*	*	*	*
b4	Asset write-downs	*	*	*	*	*	*
B2	Included operating costs	251,1	227,9	197,9	186,5	186,5	186,5
C1	**TOTAL ELIGIBLE COSTS**	**290,0**	**267,0**	**237,3**	**226,2**	**226,5**	**226,8**
C2	**TOTAL COSTS INCLUDED FOR REMUNERATION**	**290,0**	**267,0**	**237,3**	**226,2**	**226,5**	**226,8**
d1	Traffic revenues	116,4	124,2	131,8	140,1	140,1	140,1
d2	Ancillary revenues						
d2	Service contract fees borne by the State	92,4	107,0	107,0	107,0	107,0	107,0
d4	Combined transport incentives	*	*	*	*	*	*
d5	Fees (allocation integration, net of VAT)	*	*	*	*	*	*
d6	Service contract fees borne by the Regions	*	*	*	*	*	*
d3	'C' quota from previous years	5,9	0,6	*	*	*	*
D	**TOTAL COVERING REVENUE**	**214,8**	**231,8**	**238,8**	**247,1**	**247,1**	**247,1**

(434) *For the cost items*, to start with, it is apparent from Table 11 that all the costs items listed therein were directly linked to the discharge of the PSOs under the Third Contract. Italy took into account all eligible operating costs, which relate to the direct operations of rail freight services operated by Trenitalia to discharge the PSOs under the Third Contract. Italy also took into account the costs of capital borne by Trenitalia, concerning in particular the amortisation and depreciation of the assets used to discharge those PSOs. Furthermore, the annual certifications provided by the independent accounting expert assessed that Trenitalia used the correct parameters to allocate the costs directly linked to the PSOs provided under the Third Contract and those linked to the operation of the commercial freight activities of the Trenitalia's cargo division (see recital (100)). The Commission reviewed those certifications.

(435) *For the revenues*, the Commission considers that Trenitalia's Economic and Financial Plan took into account all the relevant revenues, to the exception of possible ancillary revenues ([258]). Trenitalia effectively registered ancillary revenues during the execution of the Third Contract, and those revenues should have therefore been taken into account in the incremental revenues. Nevertheless, the Commission notes that, even by including those ancillary revenues effectively registered during the execution of the Third Contract (about EUR 6 million per year, i.e. EUR 30 million over the duration of the Third Contract), the total projected incremental revenues in Trenitalia's Economic and Financial Plan would still remain far below the total projected incremental costs (see lines d1 and C2 of Table 11). Therefore, the non-inclusion of ancillary revenues in the parameters to determine the amount of compensation does not affect the assessment of the proportionality of the compensation (labelled as 'service contract fees borne by the State' in Table 11 and Table 12) granted under the Third Contract, since that compensation did not exceed the total costs borne by Trenitalia to discharge the PSOs provided under the Third Contract. Table 12 shows that in Trenitalia's Economic and Financial Plan, Italy estimated that Trenitalia would incur a total net loss of EUR 47,53 million for the discharge of PSOs under the Third Contract, taking into account the corresponding compensation.

Table 12

Projected net results of Trenitalia under the Third Contract

(EUR mln)

	2009	2010	2011	2012	2013	2014	Total
Eligible costs	290,0	267,0	237,3	226,2	226,5	226,8	1 473,80
Service contract fees borne by the State	92,4	107,0	107,0	107,0	107,0	107,0	627,40
Traffic revenues	116,4	124,2	131,8	140,1	140,1	140,1	799,20
Total revenue	214,8	231,8	238,8	247,1	247,1	247,1	1 426,27
Net result	**[75,30]**	**[35,53]**	**1,50**	**20,90**	**20,60**	**20,30**	**[47,53]**

(436) Secondly, the Commission observes that the *ex post* quantification of the compensation paid to Trenitalia was based on the costs effectively borne by Trenitalia and the amount of capital employed, and was capped at the amount of funds allocated in the State budget. Notably, as shown by Table 13, the total amount of aid paid to Trenitalia under the Third Contract did not exceed: (a) the total amount of compensation estimated in the Economic and Financial Plan and that eventually granted; (b) Trenitalia's overall net costs projected in the Economic and Financial Plan and those effectively borne.

([258]) Ancillary revenue is revenue derived from goods or services other than a company's core business operation (in this case freight transport services).

Table 13

Compensation under the Third Contract

(EUR mln)

	2009	2010	2011	2012	2013	2014	Total
Compensation estimated	92,4	107,0	107,0	107,0	107,0	107,0	**627,40**
Compensation granted	92,4	106,7	107,0	106,1	106,1	105,2	**623,50**
Compensation paid	92,4	106,6	102,5	106,0	103,6	101,0	**612,10**
Trenitalia's net costs projected	290,0	267,0	237,3	226,2	226,5	226,8	**1 473,80**
Trenitalia's net costs effectively borne	200,0	179,6	138,0	131,0	113,7	92,9	**855,20**

(437) Against this background, the Commission takes the view that the overall compensation received by Trenitalia under the Third Contract did not go beyond what necessary to cover the net cost of discharging the PSOs and therefore was proportionate. This implies that also the compensation paid until 3 December 2012 was proportionate.

(438) The conclusion about the proportionality of the overall compensation paid under the Third Contract to Trenitalia is without prejudice to the assessment of the other conditions that must be fulfilled under Article 93 TFEU for finding the compensations paid after 3 December 2012 compatible with the internal market.

8.4.3.2. Conclusion

(439) For the above reasons, the Commission concludes that all the obligations included in the Third Contract comply with Article 1(4) and 14 of Regulation (EEC) No 1191/69 as well as with the general principles of the Treaty. Therefore, the compensation paid to Trenitalia until 3 December 2012 under the Third Contract qualifies as compatible State aid.

8.4.3.3. Compatibility of the payments made after 3 December 2012 pursuant to Article 93 TFEU

8.4.3.3.1. Existence of a genuine SGEI

(440) For the purposes of assessing the existence of a genuine SGEI under Article 93 TFEU, it is necessary to check whether Italy made a manifest error in the definition of the SGEI covered by the Third Contract.

(441) This assessment is conducted in the light of the rulings of the General Court in *Andersen* ([259]) and *SNCM* ([260]), taking however into account the specificities of the sectorial legal framework. In this regard, the Commission notes that Member States' discretion with regard to the definition of the content and scope of SGEIs in rail freight transport is not limited by secondary legislation at Union level. Reference is made to Article 93 TFEU, which provides that aid measures shall be compatible if they 'represent reimbursement for the discharge of certain obligations inherent in the concept of a public service'.

([259]) Judgment of 18 January 2017, T-92/11 RENV, ECLI:EU:T:2017:14, paragraphs 69-70.
([260]) Judgment of 1 March 2017, T-454/13, ECLI:EU:T:2017:134, paragraphs 134-135.

(442) Against this background, the Commission will cumulatively assess:

(1) the transport needs at stake in view of the legitimate objective of public interest pursued by the Member State concerned (i.e., the existence of a real public service need);

(2) to what extent could market forces alone satisfy those needs (i.e., the existence of a market failure that makes the aid necessary to satisfy the public service need identified above);

(3) whether PSCs were the least distortive measures to remedy that shortage in view of the public objective pursued by the Member State concerned (i.e., the appropriateness of the aid).

8.4.3.3.1.1. Existence of a real public service need

(443) According to Italy, the Third Contract aimed at ensuring rail freight traffic in order to strengthen regional cohesion between Northern Italy and Southern Italy. Italy argued that maintaining a rail freight transport modal alternative in Southern Italy, at least of a minimal nature, was of fundamental importance for the final users and the whole community, also in order to avoid massive transfer of traffic to the road mode (recital (165)).

(444) The main objective pursued by Italy in the present case was territorial economic and social cohesion between Northern Italy and Southern Italy through the organisation of an interregional rail freight transport service. For that purpose, Italy identified the need to ensure a minimum network of rail freight transport services rather than individual connections, across the Southern Italy. This network was meant to allow the provision of rail freight transport services to/from Southern Italy. In addition, it was meant to serve an environmental and territorial policy objective, by favouring a safer and less polluting freight transport system.

(445) The Commission considers that the objectives of territorial economic and social cohesion and of environmental and territorial policy identified by Italy are legitimate and not affected by any manifest error because the organisation of interregional rail freight transport services can play a relevant role in strengthening regional cohesion while providing a sustainable alternative to road transport.

(446) In 2008, two years after Trenitalia's competitors had started to operate in Southern Italy, the volume of goods transiting between Northern and Southern Italy was relatively low compared to the traffic in Northern Italy ([261]). As indicated by Italy, that volume was considered insufficient by the administrations of the regions in Southern Italy (recital (229)), and was going to decrease even further considering Trenitalia's announced plan to cut its loss-making rail freight transport services in the absence of public compensation (recital (216)).

(447) Italy considered that, in the absence of proper support measures, the provision of rail freight transport services was likely to disappear in Southern Italy. This would have negatively affected the regional cohesion considering that the freight traffic imbalance between Northern Italy and Southern Italy existed also in road ([262]) and air ([263]) transport. Due to those circumstances, the Commission considers that, even in the absence of a public consultation, there are sufficient elements allowing it to conclude that public support for rail freight transport was needed. This view was also supported by the fact that intermodal terminals and platforms were mainly present in Northern Italy, with only scarce installations in Southern Italy.

([261]) In particular, Italy showed that, in 2008, rail freight traffic in the regions of Southern Italy counted only for 10 % of the total volume of goods transported in Italy, 60 % of the latter being concentrated in four regions of Northern Italy (Emilia Romagna, Lombardia, Piemonte and Veneto). As made clear by the FS Group in its observations (recital (214)), Trenitalia's competitors provided only a very marginal part of the already very limited rail freight transport services in Southern Italy.

([262]) In the absence of rail transport, road transport would not be able to cater for the freight transport needs of Southern Italy. In 2007 the volume of goods transported by road from Northern Italy to Southern Italy and vice-versa represented only less than 2,5 % of the total road freight traffic. In 2008, road freight transport accounted for 90 % of the total national freight traffic. See Report on the state of the transport infrastructure in Italy, UnionTrasporti, February 2011.

([263]) In the absence of rail transport, air transport would not be able to cater for the freight transport needs of Southern Italy. Air freight traffic was essentially concentrated in the regions of Northern Italy, with very low traffic operated from the airports located in Southern Italy. Goods transported from airports in Southern Italy represented only 3 % of the national air freight traffic in 2010.

(448) In addition, Italy considered that rail freight transport was likely to avoid a modal shift to road transport that could potentially increase accidents and congestion, in particular on the road network in Southern Italy. In this respect, the Commission takes note of the particular circumstances resulting notably from the insularity connection between Sicily and the mainland as well as the defaced state of parts of the road network in some regions of Southern Italy (for example in Calabria) as underlined by the PWC study (see recitals (235) to (237)). An increase of road freight traffic between Northern Italy and Southern Italy would have potentially led to an increase not only of pollution but also of road safety risks ([264]).

(449) The fact that the Third Contract focused on region/region connections and not on individual route/route connections does not make the scope of the SGEI inconsistent with the objective of regional cohesion. For the reasons explained below (recitals (450) to (452)), the Commission considers that the region/region connection approach was justified by the characteristics of rail freight transport and did not run counter the objective of regional cohesion.

(450) First, rail transport is organised on a network basis and it services several stations on the same route as well as several routes on the same region/region connection.

(451) Second, with particular regard to freight transport, final users are not only industrial operators but also freight transporters that operate point-to-point transport services according to customers' needs. Therefore, for the purposes of territorial cohesion, the Commission considers it appropriate to focus on the rail freight transport services provided at the level of the region/region connection rather than at a more granular level.

(452) Last, the Commission notes that the amount of 11,9 million train/km per year, which sets the perimeter of the contract, was meant to strike a balance between the transport need as identified in recitals from (443) to (445) and the Italian budgetary constraints. This amount concerned the entire territory of Italy (irrespective of the single routes to be serviced) in order to keep the system flexible enough to accommodate the highest possible amount of freight transport needs as well as to provide the largest possible service coverage. According to Italy, such flexibility was necessary as demand for rail freight transport differed not only from region to region but also on a yearly basis depending on industrial production.

(453) In view of the above circumstances, the Commission concludes that Italy defined without committing a manifest error the need for rail freight transport services on specific region/region connections for the sake of improving territorial cohesion.

8.4.3.3.1.2. Existence of a shortage of commercial offer of rail freight services on the market

(454) FerCargo claimed that its members could have ensured services comparable to those provided by Trenitalia in terms of continuity, regularity and frequency, capacity and rates (recital (206)). By contrast, Italy argued that, in the period 2008-2009, at the time of definition of the geographic scope and perimeter of the Third Contract, market forces alone would not have delivered a sufficient volume of rail freight transport services to/from the regions in Southern Italy.

(455) Table 14 details, on the basis of the data submitted by Italy ([265]), the offer (train/km) of Trenitalia's competitors on the region/region connections covered by the Third Contract in 2008 and 2009.

([264]) The road network in Southern Italy had an unbalanced density of highways, and some of these highways were under important modernization works at the time the Third Contract was entrusted (highway A3 between Salerno and Reggio Calabria). Some regions did not have any highways (Molise, Basilicata and a major part of Puglia), forcing freight services to be operated rather on national roads, thus increasing the risk of congestion and accidents (see Report on the state of the transport infrastructures in Italy, UnionTrasporti, February 2011).

([265]) Pages 44-58 of the PWC Study 3.

Table 14

	Connections		2008		2009	
	From	To	Competitors	Offer	Competitors	Offer
1.	**Abruzzo**	Abruzzo	*Linea, Rail One, Ferrovia Adriatico Sangritana*	3 800	*Ferrovia Adriatico Sangritana*	4 200
2.	**Calabria**	Calabria	*Rail Traction Company*	250	*Rail Traction Company*	300
3.	**Campania**	Campania	*NordCargo, Rail Traction Company*	900	*Rail Italia, Rail Traction Company*	6 300
4.	**Molise**	Molise	-	-	-	-
5.	**Apulia**	Apulia	*Linea, Rail One, Ferrovia Adriatico Sangritana*	1 000	*Ferrotramviaria, Ferrovia Adriatico Sangritana, GTS Rail, Linea, Nordcargo*	7 100
6.	**Sicily**	Sicily	-	-	-	-
7.	**Abruzzo**	Basilicata	-	-	-	-
	Basilicata	Abruzzo	-	-	-	-
8.	**Abruzzo**	Campania	-	-	-	-
	Campania	Abruzzo	-	-	-	-
9.	**Abruzzo**	Calabria	-	-	-	-
	Calabria	Abruzzo	-	-	-	-
10.	**Abruzzo**	Molise	*Ferrovia Adriatico Sangritana*	350	-	-
	Molise	Abruzzo	*Ferrovia Adriatico Sangritana*	350	-	-
11.	**Abruzzo**	Apulia	*Rail One, Ferrovia Adriatico Sangritana*	810	*Ferrotramviaria, Ferrovia Adriatico Sangritana, Nordcargo*	34 000
	Apulia	Abruzzo	*Rail One, Ferrovia Adriatico Sangritana,*	940	*Ferrotramviaria, Ferrovia Adriatico Sangritana, Nordcargo*	34 100
12.	**Abruzzo**	Sicily	-	-	-	-
	Sicily	Abruzzo	-	-	-	-
13.	**Basilicata**	Calabria	-	-	-	-
	Calabria	Basilicata	-	-	-	-

	Connections		2008		2009	
	From	To	Competitors	Offer	Competitors	Offer
14.	**Basilicata**	Campania	-	-	-	-
	Campania	Basilicata	-	-	-	-
15.	**Basilicata**	Apulia	-	-	Linea	1 000
	Apulia	Basilicata	-	-	Linea	2 300
16.	**Basilicata**	Sicily	-	-	-	-
	Sicily	Basilicata	-	-	-	-
17.	**Calabria**	Campania	*Rail Traction Company*	90 900	*Rail Italia, Rail Traction Company*	89 600
	Campania	Calabria	*Rail Traction Company*	91 600	*Rail Italia , Rail Traction Company*	89 500
18.	**Calabria**	Apulia	-	-	-	-
	Apulia	Calabria	-	-	-	-
19.	**Calabria**	Sicily	-	-	-	-
	Sicily	Calabria	-	-	-	-
20.	**Campania**	Molise	-	-	-	-
	Molise	Campania	-	-	-	-
21.	**Campania**	Apulia	-	-	-	-
	Apulia	Campania	-	-	-	-
22.	**Campania**	Sicily	-	-	-	-
	Sicily	Campania	-	-	-	-
23.	**Molise**	Calabria	-	-	-	-
	Calabria	Molise	-	-	-	-
24.	**Molise**	Apulia	*Rail One*	200	*Ferrotramviaria*	400
	Apulia	Molise	-	-	*Ferrotramviaria*	400
25.	**Molise**	Sicily	-	-	-	-
	Sicily	Molise	-	-	-	-
26.	**Apulia**	Sicily	-	-	-	-
	Sicily	Apulia	-	-	-	-

	Connections		2008		2009	
	From	To	Competitors	Offer	Competitors	Offer
27.	**Sicily**	North	-	-	-	-
	North	Sicily	-	-	-	-
28.	**Molise**	North	-	-	-	-
	North	Molise	*Rail One*	700	-	-
29.	**Apulia**	North	*Rail One, Linea*	49 000	*Linea, NordCargo*	90 700
	North	Apulia	*Rail One, Linea*	51 500	*Linea, NordCargo*	108 000
30.	**Campania**	North	*NordCargo, Rail Traction Company*	187 100	*Compagnia Ferroviaria Italiana, NordCargo, Rail Italia, Rail Traction Company*	193 500
	North	Campania	*NordCargo, Rail Traction Company*	175 600	*Compagnia Ferroviaria Italiana, NordCargo, Rail Italia, Rail Traction Company*	185 100
31.	**Calabria**	North.	-	-	-	-
	North	Calabria	-	-	-	-
32.	**Basilicata**	North	-	-	*Linea*	105 900
	North	Basilicata	-	-	*Linea*	92 000
33.	**Abruzzo**	North	*NordCargo, Linea, Rail One, Ferrovia Adriatico Sangritana,*	113 800	*Ferrovia Adriatico Sangritana, Nordcargo, Rail Traction Company*	179 800
	North	Abruzzo	*NordCargo, Rail One, Ferrovia Adriatico Sangritana,*	116 400	*Ferrovia Adriatico Sangritana, Nordcargo*	178 100

(456) The Commission notes that, in 2008-2009, market operators were not present on 19 of the 33 region/region connections (roundtrip) to be serviced by Trenitalia under the Third Contract. Namely, the 19 connections not serviced by competitors neither in 2008 nor in 2009 were: Molise/Molise, Sicily/Sicily, Abruzzo/Basilicata, Abruzzo/Campania, Abruzzo/Calabria, Abruzzo/Sicily, Basilicata/Calabria, Basilicata/Campania, Basilicata/Sicily, Calabria/Apulia, Calabria/Sicily, Campania/Molise, Campania/Apulia, Campania/Sicily, Molise/Calabria, Molise/Sicily, Apulia/Sicily, Sicily/Northern Italy, Calabria/Northern Italy.

(457) By contrast, the remaining 14 region/region connections (roundtrip) where Trenitalia's competitors were already established in the years 2008-2009 were: Abruzzo/Abruzzo; Calabria/Calabria; Campania/Campania; Apulia/Apulia; Abruzzo/Molise; Abruzzo/Apulia; Basilicata/Apulia; Calabria/Campania; Molise/Apulia; Molise/Northern Italy; Apulia/Northern Italy; Campania/Northern Italy; Basilicata/Northern Italy; and Abruzzo/Northern Italy.

The 19 region/region connections serviced only by Trenitalia in 2008 and 2009

(458) On the 19 region/region connections not serviced by competitors neither in 2008 nor in 2009 it was not reasonable to assume a swift entrance of competitors on the market.

(459) First, at that time, competitors did not hold the relevant safety certificates to operate on these 19 region/region connections – with the exception of the Basilicata/Calabria connection (for which GTS held a certificate as of 10 December 2009) ([266]) and the Campania/Apulia connection (for which Compagnia Ferroviaria Italiana held a certificate as of 29 December 2009) ([267]). The said certificates were however limited to certain types of freight ([268]). As the prior acquisition of such certificates was necessary to operate the connection ([269]), any railway undertaking willing to extend its activities on a 'new' connection had to submit a specific request to the competent national agency, bear the relative costs and wait for the release of the safety certificate, before being able to operate ([270]).

(460) Second, the mere possession of the relevant safety certificate did not guarantee the provision of the services on the connection as the holder of the certificate was free to decide what connections to serve and when. As the data provided in Table 14 show, the competitors operating on a region/region connection were not necessarily the same in 2008 and 2009, and some connections serviced by competitors in 2008 were not serviced in 2009 (notably, Abruzzo/Molise and Northern Italy/Molise). Furthermore, based on the information provided by the interested parties and by Italy, there is no evidence (such as declaration of interests, business plans or press releases) showing that, absent the Third Contract, Trenitalia's competitors would have launched new rail freight services (or expand existing ones) on the 19 region/region connections.

(461) Last, the Commission excludes that the competitors' ability to provide services on the said 19 region/region connections could have been affected by the Second Contract in place until the end of 2008. The Second Contract only provided for tariff obligations and obligations to operate regarding rail freight traffic from/to Sicily and Sardinia. First, the Commission observes that Italy considered that there was a need to conclude the Third Contract in view of the inappropriateness of the Second Contract to ensure a sufficient coverage of Southern Italy and connections with Northern Italy (see recitals (80)-(83)). Secondly, at the expiry of the Second Contract, Trenitalia's competitors were not present on the said connections, with the exception of the Campania/Apulia and Basilicata/Calabria connections. However, the Second Contract could not have affected commercial operations on those two connections, since they did not fall within the perimeter of the Second Contract. The only PSO imposed on Trenitalia on connections to/from Southern Italy was the tariff obligations on rail freight transport over distances exceeding 1 000 km. However, traffic on the Campania/Apulia connection and Apulia/Basilicata connection is well below that threshold.

(462) In light of the above, and given the specific circumstances and features of those 19 region/region connections, the Commission considers that, in the period 2008-2009, when the scope of the Third Contract was defined, the 19 region/region connections not serviced by competitors were affected by a market failure. Therefore, the Commission concludes that on these 19 region/region connections market forces alone were not able to satisfy the need for rail freight public services meeting the objective of public interest defined by Italy, and therefore the aid was necessary to meet that objective.

([266]) GTS Rail had applied for the safety certificate on 8 April 2008. Information available at www.ansf.gov.it (last accessed on 15.11.2023).

([267]) Compagnia Ferroviaria Italiana had applied for the safety certificate on 31 October 2008. Information available at www.ansf.gov.it (last accessed on 15.11.2023).

([268]) GTS Rail could not transport any dangerous goods on the Basilicata/Calabria connection. Compagnia Ferroviaria Italiana could not transport some dangerous goods (e.g. explosives and radioactive material) on the Campania/Apulia connection. Source: www.ansf.gov.it (last accessed on 15.11.2023).

([269]) See Article 10 of the 2003 Decree and Article 14(1) of Legislative Decree No 162/2007.

([270]) In order to obtain the safety certificate, the railway undertaking has to prove compliance with the specific requirements for safe movement on the national railway infrastructure resulting from safety rules, technical standards and national standards in force at the time of the issuing of the certificate. According to a study published by Confcommercio ('*Analisi e previsioni per il trasporto merci in Italia*', October 2017, page 27), the release of the certificate usually took from 6 months to 1 year.

(463) This conclusion is not altered by the progressive entry of competitors on these 19 region/region connections, because the assessment of the existence of a market failure has to be carried out at the time of entrustment of the services. In any event, the commercial activities on these connections proved to be extremely marginal during the whole duration of the Third Contract, as confirmed by the PWC study 3. As Italy explained, rail freight services on the 19 region/region connections had to cope with:

(a) objective shortcomings of the available rail infrastructure in the areas concerned, which required the use of specific rolling-stock;

(b) higher manoeuvring costs usually linked to conventional transport, due to the assembly/disassembly of wagons; and

(c) high demand volatility and the consequent impossibility to rely on constant flows of traffic and revenues ([271]).

(464) With specific regard to Sicily, it is also relevant to mention the additional infrastructure fees to be paid for ferry crossing and manoeuvring, and the characteristics of the rail network in Sicily that could sustain only a very old and specific type of freight locomotives.

The 14 region/region connections where Trenitalia's competitors were already established in 2008 and 2009

(465) As regards the remaining 14 region/region connections where Trenitalia's competitors were already established in the years 2008-2009 ([272]), Italy and the FS Group claimed that Trenitalia's competitors' offer was not adequate because too limited (in terms of routes serviced, direction, and type of service) and/or unstable (recitals (214) and (230)-(238)). Trenitalia's competitors were pursuing a cherry-picking strategy as their offer was concentrated on the most profitable routes and consisted mainly of combined transport services ([273]).

(466) The PWC study 3 shows that, on these connections, competitors' offer was insufficient to cover the entire demand for services on the region/region connection of the relevant year ([274]). Moreover, on some region/region connections, competitors provided rail freight transport services only in one direction ([275]) or at least only in one direction with regard to a specific type of transport ([276]), whereas Trenitalia had to provide services in both directions. Similarly, the offer of Trenitalia's competitors on the Campania/Northern Italy, Abruzzo/Northern Italy, Calabria/Campania and Basilicata/Northern Italy connections was higher than Trenitalia's offer only with regard to combined rail transport, whereas Trenitalia had to provide also conventional transport services. Last, competitors operated on some region/region connections only on some of the routes ([277]), whereas Trenitalia had to service all routes available on the relevant region/region connection.

(467) The Commission considers that those elements are however not sufficient to establish the existence of a market failure on the above said 14 region/region connections.

([271]) Users' demand for rail freight transport services (calculated as the sum of Trenitalia's offer and the competitors' offer) was not homogeneous and these region/region connections registered for several years either no traffic or traffic below 1 000 train/km.

([272]) I.e., Abruzzo/Abruzzo; Calabria/Calabria; Campania/Campania; Apulia/Apulia; Abruzzo/Molise; Abruzzo/Apulia; Basilicata/Apulia; Calabria/Campania; Molise/Apulia; Molise/Northern Italy; Apulia/Northern Italy; Campania/Northern Italy; Basilicata/Northern Italy; and Abruzzo/Northern Italy.

([273]) With the exception of the offer provided from Abruzzo where competitors also offered a sensible amount of conventional transport services (servicing for the most the automotive industry).

([274]) This was valid also for those connections, like Campania/Northern Italy, Apulia/Northern Italy, Abruzzo/Apulia and Abruzzo/Northern Italy, where between 2008 and 2010 the share of Trenitalia's competitors was showing an increasing trend.

([275]) E.g. in 2008 Trenitalia's competitors provided services only from Molise to Apulia on the Molise/Apulia connection and only from Northern Italy to Molise on the Molise/Northern Italy connection.

([276]) This was the case of traffic from Abruzzo to Apulia on the Abruzzo/Apulia connection that consisted only of conventional transport, mainly automotive.

([277]) This was clearly the case in Campania/Northern Italy and Apulia/Northern Italy.

(468) In order to establish the existence of a market failure justifying the inclusion in the Third Contract of these 14 region/region connections, Italy should have demonstrated that the transport need was not capable of being satisfied by the operators already present on the market, in the absence of an obligation imposed by the public authorities to that end. As a matter of fact, at the time of entrustment of the Third Contract, Italy did not sufficiently take into account the existing market offer on these connections to establish a market failure.

(469) First, the data provided in the PWC study 3 show that, in 2009 and 2010, Trenitalia's competitors, together, were already servicing, on some of these connections, a number of train/km higher than those provided by Trenitalia and that the amount of services provided was rapidly increasing ([278]). The PWC study 3 reveals that the private operators almost doubled the number of train/km between 2007 and 2009 on most of the 14 region/region connections where they were present. The increase in the volume of train/km concerned also some of the North/South connections, thus contributing to the objective of regional cohesion of Italy ([279]). Italy did not analyse whether that existing market offer sufficiently contributed to the objective of territorial economic and social cohesion between Northern Italy and Southern Italy, as identified in recital (444). In addition, the growing number of rail freight services provided by commercial operators between 2007 and 2009 might have been a sign of their willingness to expand further their commercial activities on the 14 region/region connections. Moreover, where competitors' traffic registered in 2009 proved sufficient to satisfy the total demand for rail freight transport services registered in 2010 ([280]), Italy should have further verified whether Trenitalia's services were really necessary to meet the transport needs on those connections ([281]).

(470) The argument according to which private operators did not have the necessary means to cover the entire perimeter of the Third Contract (11,9 million train/km) is irrelevant as the capacity of the private operators should have been assessed on each of the 14 region/region connections where they were present either in 2008 or in 2009. Indeed, the perimeter of the Third Contract should have been defined *after* having taken into account the capacity of the market offer to meet the transport needs.

(471) Second, the fact that competitors were servicing only some routes within a given region/region connection does not necessarily mean that the entire region/region connection suffered from a market failure. As mentioned in recital (451)), final users of rail freight transport are not only industrial operators but also freight transporters that operate point-to-point transport services according to customers' needs. Italy did not explain why, from the standpoint of those transporters, one or more routes within the same region/region connection were not substitutable. The Commission considers that such justification would have been a necessary element since Italy itself decided to define the public transport need at the level of the region/region connection, rather than at the level of individual connections.

([278]) Notably, on the Campania/Northern Italy connection, in 2009 Trenitalia's competitors provided 374 300 train/km of combined rail freight transport against 281 500 train/km provided by Trenitalia and, in 2010, 621 200 train/km of combined rail freight transport against 253 100 train/km provided by Trenitalia. On the Abruzzo/Northern Italy connection, in 2009 Trenitalia's competitors provided 57 300 train/km of combined rail freight transport, whereas Trenitalia did not provide any service and, in 2010, 93 400 train/km of combined rail freight transport against 50 900 train/km provided by Trenitalia. On the Calabria/Campania connection, in 2009 Trenitalia's competitors provided 179 100 train/km of combined rail freight transport against 46 900 train/km provided by Trenitalia. The competitors' offer fell to 7 200 train/km in 2010 against 20 100 train/km provided by Trenitalia. On the Basilicata/Northern Italy connection, Trenitalia's competitors provided 10 000 train/km of combined rail freight transport in 2009 and 1 000 train/km of combined rail freight transport in 2010, whereas Trenitalia provided no services at all. On the Abruzzo/Apulia connection, in 2009 Trenitalia's competitors provided 30 500 train/km of conventional rail freight transport against 6 800 train/km provided by Trenitalia and 37 600 train/km of combined rail freight transport against 1 200 train/km provided by Trenitalia. In 2010, Trenitalia's competitors provided 58 600 train/km of conventional rail freight transport against 1 100 train/km provided by Trenitalia and 59 800 train/km of combined rail freight transport, whereas Trenitalia did not provide any combined rail freight transport service.

([279]) In particular on the routes Campania/Northern Italy, Apulia/Northern Italy and Abruzzo/Northern Italy.

([280]) As it happened, for instance, on the Calabria/Campania connection.

([281]) The data provided by Italy do not allow to draw the conclusion that Trenitalia's services were really necessary to meet the transport needs on those connections because they do not give a comprehensive view on the development of rail freight traffic registered on these connections. In particular, Italy did not provide Trenitalia's traffic in 2007 and 2008 on those connections but only competitors' total traffic (without distinguishing between conventional and combined), see the PWC Study 3. Those data would have allowed to verify the trend of competitor's traffic against Trenitalia's traffic in the period 2007 - 2009 and understand whether that trend justified PSOs on those connections in 2010.

(472) Third, the Commission cannot accept Italy's argument that in some region/region connections the competitors' offer was not stable enough to guarantee a constant provision of a minimum amount of services ([282]). To start with, the purpose of the market consultation would have precisely been to establish whether operators that were already providing commercial services on given routes or networks envisaged increasing, maintaining or reducing those services, but Italy excluded the need for a market consultation (see recital (166)). Besides the Third Contract itself did not identify any specific route for Trenitalia to operate, but, more generally, imposed on Trenitalia the obligation to operate interregional connections (regardless of the routes operated within those regions) '*on demand*' expressed by any final user. Thus, the argument that competitors were able to operate only certain routes should be disregarded, as Trenitalia itself had no obligation to operate under the Third Contract all the routes within a given region. In any event, the Commission notes that the alleged instability of the competitors' offer is also linked to the intrinsic characteristics of demand on these region/region connections, which made it very difficult to identify a stable minimum amount of services to be provided on each region/region connection ([283]). Lastly, as highlighted in Table 15, a similar traffic trend characterised both Trenitalia's and its competitors' offer between 2009 and 2010 in the three region/region connections referred to by Italy.

Table 15

Rail freight traffic in 2009

(train/km)

region/region Connection	Competitors		Trenitalia	
	Conventional	Combined	Conventional	Combined
Apulia/Northern Italy	119 200	79 500	1 864 100	1 767 900
Calabria/Campania	-	179 100	264 800	46 900
Basilicata/Northern Italy	187 900	10 000	380 500	-

Rail freight traffic in 2010

(train/km)

region/region Connection	Competitors		Trenitalia	
	Conventional	Combined	Conventional	Combined
Apulia/Northern Italy	80 900	497 400	1 439 700	1 279 700
Calabria/Campania	-	7 200	80 200	20 100
Basilicata/Northern Italy	25 600	1 000	340 400	-

(473) As the data in Table 15 show, where competitors' traffic decreased, the same downwards trend was registered also by Trenitalia. Therefore, the evolution of Trenitalia's competitors' offer was rather imputable to a decrease in user demand rather than an alleged instability of the competitors' offer. In any event, Trenitalia's offer also decreased similarly, thus not guaranteeing a stable offer.

([282]) Notably the connections Apulia/Northern Italy, Calabria/Campania and Basilicata/Northern Italy, see recital (235).

([283]) That difficulty was acknowledged by Italy itself when it decided to impose the obligation to provide services 'on demand' rather than the obligation to provide a fixed amount of services.

(474) Lastly, the Commission observes that Italy did not show that the services provided by Trenitalia had special characteristics (compared to those offered by the commercial operators) justifying a market failure. The Third Contract had a very large perimeter, which was only limited to the maximum number of train/km for which Trenitalia was entitled to compensation. For example, the Third Contract did not limit the PSOs to the transport of certain goods on the 14 region/region connections that the commercial operators could not transport. On the contrary, under the Third Contract, Trenitalia could potentially transport any type of goods required by the clients. According to the PWC study 3, the freight transport services provided by Trenitalia concerned mainly goods transported by containers, which is a type of service that also commercial operators could have provided. The Third Contract did not require that the goods had to be transported according to certain standards that commercial operators could not meet or in specific trains that those operators did not possess. The Third Contract did not limit the perimeter of the PSOs to specific freight services and Italy did not demonstrate that on the 14 region/region connections the Third Contract entrusted Trenitalia with specific freight services compared to those of commercial operators.

(475) The fact that Trenitalia was subject to an obligation of punctuality ([284]) and to ensure a sufficient level of safety does not change the above conclusion. Indeed, punctuality and safety are standards of quality expected from any freight operator and nothing in the file suggests that the commercial operators were not able to meet such standards. In the same vein, the fact that Trenitalia had to ensure non-discriminatory prices is irrelevant in this case, as this aspect does not confer *per se* a special characteristic to the services offered by Trenitalia under the Third Contract.

(476) It follows from the elements in recitals from (469) to (475) that Italy has not proven that Trenitalia was compensated only for the services provided to remedy a shortage of market offer. Given the large perimeter of the Third Contract and the increasing presence of commercial operators on the 14 regions/region connections, Italy had to carry out further market research, public consultations or any other appropriate studies to analyse the existing and projected market offer. Therefore, with regard to the 14 region/region connections, the Commission concludes that, where competitors were already present at the time of entrustment of the Third Contract, the Third Contract did not cover only the region/region connections characterised by a market failure.

(477) As regards the Northern Italy/Northern Italy connections covered by the Third Contract, the Commission takes note of the clarification provided by Italy that these connections were a mere continuation of the North/South connections in order to gather and optimise traffic flows (recital (237)). As Italy explained, those ancillary connections served two purposes:

— They allowed Trenitalia to reallocate the trains and wagons, or any other necessary assets, from Northern Italy (where it concentrated its commercial rail freight activities) to the regions/regions connections covered by the Third Contract. As the Third Contract did not provide for regular scheduled routes to be operated by Trenitalia, but for *ad hoc* routes to be operated on demand on the regions/regions connections, Trenitalia did not allocate on a permanent basis assets on those regions/regions connections, but repositioned assets on those connections depending on user's demand. This repositioning took place on the Northern Italy/Northern Italy connections, since the required assets were principally located in Northern Italy.

— In addition, Trenitalia used the Northern Italy/Northern Italy connections to optimise the traffic of goods to be transported on the other regions/regions connections. Thanks to these connections, Trenitalia could transport all the goods collected on the Northern Italy/Northern Italy connections to the same final destination in Southern Italy (and vice-versa). In other words, the Northern Italy/Northern Italy connections were also used as ancillary routes to the 33 region/region connections in order to gather the volume of goods on those latter connections and, thus, optimise the loading factor as much as possible.

([284]) See Annex 3 of the Third Contract.

(478) Therefore, the absence or existence of a market failure on these Northern Italy/Northern Italy connections ultimately depended on the absence or existence of a market failure on the specific North/South connection linked to the Northern Italy/Northern Italy connection.

(479) In conclusion, the Commission acknowledges the existence of a market failure on the 19 region/region connections (and their associated Northern Italy/Northern Italy connections) where there was a clear shortage of commercial offer of rail freight services on the market, because no competitors were present. By contrast, on the remaining 14 region/region connections (and the linked Northern Italy/Northern Italy connections), which were already serviced by competitors at the time of entrustment of the Third Contract, Italy did not carry out a complete analysis of the actual and potential market offer and therefore did not establish *ex ante* the existence of a market failure. As Italy did not carry out that assessment in the current case, there is no evidence that the aid was necessary to satisfy a public service need. It follows that the compensation paid for services provided on these 14 region/region connections (and the linked Northern Italy/Northern Italy connections) is not compatible with the internal market under Article 93 TFEU.

8.4.3.3.1.3. A PSC was the least distortive measure to remedy the market failure

(480) Finally, the Commission will verify whether the Third Contract was the least distortive measure to remedy the market failure identified by Italy with regard to the pursued objective of territorial economic and social cohesion.

(481) Italy argued that in the period 2008-2010 the liberalisation of the market was not mature enough to guarantee a sufficient level of rail freight transport services to/from Southern Italy even in the presence of a generalised system of subsidies.

(482) The Commission considers that, in the period 2008-2010, given the limited competition available on the market, an aid scheme ([285]) would not have been sufficient to ensure rail freight transport coverage of all regions in Southern Italy. Such a scheme, open to all railway undertakings meeting specific eligibility and substantive conditions, might have reduced the costs borne by Trenitalia's competitors for the provision of the services but would not have guaranteed the provision of minimum services on all region/region connections, and therefore would not have satisfied the objective of territorial cohesion pursued by Italy. The competitors' traffic was inexistent on the 19 region/region connections characterised by a market failure and, in any event, competitors would have remained free to decide whether to expand on region/region connections not previously serviced ([286]).

(483) Furthermore, as regards the possibility to entrust the services to different operators and thus avoid a bundle of services under a single PSC, the Commission observes that the Third Contract was dealing with 33 region/region connections (roundtrip) each covering several routes. The Commission further observes that, concluding different PSCs (and the related administrative costs) could have been excessively burdensome. Moreover, Italy did not have the obligation to tender the PSCs for rail freight transport services but it could directly award a PSC to one single operator. For those reasons, the conclusion of separate PSCs would not have had less distortive effects on the market.

(484) For the above reasons, the Commission concludes that the entrustment to Trenitalia of a PSC, for the provision of rail freight transport services on the 19 region/region connections affected by a market failure (and the linked Northern Italy/Northern Italy connections), was appropriate to ensure the objective of territorial cohesion between Northern and Southern Italy pursued by Italy.

([285]) Such as a scheme is open to all railway undertakings meeting the eligibility and substantive conditions set out therein. See for instance, the measure assessed by the Commission in case SA.45482 – Rail freight transport support scheme.

([286]) This is not contradicted by the fact that in 2015 Italy abandoned the PSC and introduced a scheme for the compensation of infrastructure access tariffs and external costs related to the provision of rail freight transport services (case SA.45482 – Rail freight transport support scheme, and case SA.48759 – Prolongation of rail freight transport scheme). That scheme was based on a different policy objective, that is to support intermodal freight transport services across the entire national territory, rather than to guarantee the provision of a minimum amount of rail freight transport services in Southern Italy.

8.4.3.3.2. Entrustment of the public transport service

(485) The Commission notes that, as already mentioned in recital (405), all substantial elements of the Third Contract had been agreed upon by Trenitalia and the MIT already on 29 October 2010 and the contract was signed on 3 December 2012. Therefore, the Commission considers that Italy entrusted Trenitalia with the operation of PSOs for the period covered by the Third Contract.

8.4.3.3.3. Absence of overcompensation

(486) The considerations already developed in recitals (432) to (437), with regard to the proportionality of the compensation paid under the Third Contract until 3 December 2012, apply to the compensation paid under the Third Contract in the period from 4 December 2012 to 31 December 2014 because the same methodology to calculate the aid was applied.

(487) In particular, the Commission notes that the compensation paid under the Third Contract was calculated *ex ante* on the basis of the costs connected to the provision of the services, as provided in Trenitalia's Economic and Financial Plan annexed to the Third Contract (recital (99)). The total compensation provided in the contract was limited to the actual financial burden borne by the operator in relation to the whole duration of the contract. Furthermore, from an *ex post* perspective, the compensation paid in the period from 3 December 2012 to 31 December 2014 is below the amount of total costs registered by the company for the provision of services in the same period (see recital (436)). Moreover, it was even lower than the amount foreseen in Trenitalia's Economic and Financial Plan.

(488) Against this background, the Commission takes the view that the overall compensation received by Trenitalia under the Third Contract did not go beyond what necessary to cover the net cost of discharging the PSOs and therefore it was proportionate. This implies that also the compensation paid after 3 December 2012 was proportionate. The conclusion about the proportionality of the overall compensation paid under the Third Contract to Trenitalia is without prejudice to the assessment of the other conditions that must be fulfilled for finding the compensations paid after 3 December 2012 compatible with the internal market.

8.4.3.3.4. Avoidance of undue negative effects on competition

(489) The Commission considers that the Third Contract was not liable to distort competition on the 19 region/region connections affected by a market failure. First, on the majority of these connections, Trenitalia's competitors did not have the necessary authorisation to operate (see recital (459)). Second, even assuming that they had or could acquire in a relative short period the relevant authorisation, the Commission notes that the Third Contract did not prevent them from entering the market, but merely ensured a constant provision of services on routes that were proven to be of little interest for market operators (see recitals (460)-(461)). Last, the '*on demand*' approach followed by Italy ensured that Trenitalia's offer did not exceed users' demand.

(490) By contrast, as regards the 14 region/region connections on which the Commission found that there was no market failure (see recital (479)), the compensation paid was liable to distort competition, especially considering that on these routes competitors were already present at the time Trenitalia and the MIT had agreed on all substantial elements of the Third Contract and that, absent the Third Contract, competitors could have increased their services on the region/region connections already serviced.

(491) As regards the Northern Italy/Northern Italy connections covered by the Third Contract, the Commission notes that they were meant to gather and optimise the traffic flows on the North/South connections, and as such, were ancillary to the regions/regions connections (recital (237)). The Commission considers that the Third Contract distorted competition only on the Northern Italy/Northern Italy connections ancillary to the 14 region/region connections for which Italy did not establish *ex ante* the existence of a market failure.

9. **CONCLUSIONS**

(492) The compensation paid under the First Contract is not State aid, with the exception of: (a) the compensation granted for national rail freight transport services carried out as of 22 October 2003, which constituted existing aid; and (b) the compensation granted for international rail freight transport services between the Italian port of Trieste and Hungary and through the port of Trieste Marittima, carried out as of 15 March 2003, which constitutes new aid. This new aid, assessed under Regulation (EEC) No 1191/69 and the general principles of the Treaty, qualifies as compatible State aid with regard to the amounts paid in relation to international rail freight transport between the Italian port of Trieste and Hungary; it qualifies as unlawful and incompatible aid with regard to the amounts paid in relation to international rail freight transport through the port of Trieste Marittima.

(493) The compensation paid under the Second Contract, assessed under Regulation (EEC) No 1191/69 and the general principles of the Treaty, qualifies as compatible State aid, with the exception of the aid paid in relation to the tariff obligation concerning rail freight transport through the port of Trieste Marittima, which qualifies as unlawful incompatible State aid.

(494) Concerning the Third Contract, the compensation paid until 3 December 2012, assessed under Regulation (EEC) No 1191/69 and the general principles of the Treaty, qualifies as compatible State aid. The compensation paid after 3 December 2012 under the Third Contract, for which the compatibility is assessed directly under Article 93 TFEU, constitutes unlawful aid and it qualifies partially as compatible aid and partially as incompatible aid. The amount paid by Italy to Trenitalia with regard to rail freight transport services provided in the following 19 region/region connections constitutes unlawful compatible aid: Molise/Molise, Sicily/Sicily, Abruzzo/Basilicata, Abruzzo/Campania, Abruzzo/Calabria, Abruzzo/Sicily, Basilicata/Calabria, Basilicata/Campania, Basilicata/Sicily, Calabria/Apulia, Calabria/Sicily, Campania/Molise, Campania/Apulia, Campania/Sicily, Molise/Calabria, Molise/Sicily, Apulia/Sicily, Sicily/Northern Italy, Calabria/Northern Italy (and the linked Northern Italy/Northern Italy connections). The amount paid by Italy to Trenitalia with regard to rail freight transport services provided in the following 14 region/region connections constitutes unlawful incompatible aid: Abruzzo/Abruzzo; Calabria/Calabria; Campania/Campania; Apulia/Apulia; Abruzzo/Molise; Abruzzo/Apulia; Basilicata/Apulia; Calabria/Campania; Molise/Apulia; Molise/Northern Italy; Apulia/Northern Italy; Campania/Northern Italy; Basilicata/Northern Italy; Abruzzo/Northern Italy (and the linked Northern Italy/Northern Italy connections). For those 14 region/region connections, which were serviced also by Trenitalia's competitors, Italy committed a manifest error of assessment by considering that, in the absence of the Third Contract, the market could not have provided all or part of the services provided by Trenitalia under the Third Contract.

Table 16

Conclusion on the three PSCs

State aid measures	State aid assessment
First Contract	**No aid**: compensation for (a) international rail freight transport services before 15.3.2003; (b) national rail freight transport services before 22.10.2003. **Existing aid**: compensation for national rail freight transport services between 22.10.2003 and 31.12.2003. **New aid**: compensation for international rail freight transport services on the TERFN between 15.3.2003 and 31.12.2003, of which: — ***compatible aid***: compensation for the provision of international rail freight transport services between the Italian port of Trieste and Hungary; — ***unlawful incompatible aid***: compensation for the provision of international rail freight transport services through the port of Trieste Marittima.

State aid measures	State aid assessment
Second Contract	**New aid:** compensation for the provision of rail freight transport services, of which: — ***compatible aid***: compensation for the provision of international rail freight transport services between the Italian port of Trieste and Hungary and for the provision of national rail freight transport services (tariff obligations and obligations to operate); — ***unlawful incompatible aid***: compensation for the provision of international rail freight transport services through the port of Trieste Marittima.
Third Contract	**New aid:** compensation for the provision of rail freight transport services, of which: — ***compatible aid***: aid paid until 3.12.2012 for the provision of rail freight transport services; — ***unlawful compatible aid***: aid paid after 3.12.2012 for the provision of rail freight transport services on the 19 region/region connections mentioned in recital (456) and the linked Northern Italy/Northern Italy connections; — ***unlawful incompatible aid***: aid paid after 3.12.2012 for the provision of rail freight transport services on the 14 region/region connections mentioned in recital (457) and the linked Northern Italy/Northern Italy connections.

10. **RECOVERY**

(495) According to the TFEU and the established case law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when the Commission has found that the aid is incompatible with the internal market ([287]). The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([288]).

(496) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage, which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored ([289]).

(497) In line with the case law, Article 16(1) of Council Regulation (EU) 2015/1589 ([290]) states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'

(498) Thus, given that some of the compensations paid to Trenitalia mentioned in recitals (492) to (494) were implemented in breach of Article 108(3) TFEU, and were found unlawful and incompatible aid, they shall be recovered in order to re-establish the situation that existed on the internal market prior to their granting. The amount to be recovered shall bear interest from the date at which they were put at the disposal of Trenitalia until effective recovery.

([287]) Judgment of 12 July 1973, *Commission v Germany*, C-70/72, ECLI:EU:C:1973:87, paragraph 13.
([288]) Judgment of 21 March 1990, *Belgium v Commission*, C-142/87, ECLI:EU:C:1990:125, paragraph 66.
([289]) Judgment of 17 June 1999, *Belgium v Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.
([290]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

(499) No provision of Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered. Rather, it is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty ([291]).

(500) The amount of illegal and incompatible aid granted to Trenitalia shall be calculated as follows.

(501) As regards the illegal and incompatible aid granted to Trenitalia under the First Contract and the Second Contract in the form of compensations for the provision of rail freight transport services through the port of Trieste Marittima carried out between 15 March 2003 and 31 December 2008, its amount shall be calculated as the difference between the actual revenue derived from the application of the tariff obligation and the revenue that Trenitalia would have had from the application of the standard rate, multiplied by the total number of wagons handled at the port of Trieste Marittima.

(502) As regards the illegal and incompatible aid granted to Trenitalia under the Third Contract after 3 December 2012 for the provision of rail freight transport services provided in the 14 region/region connections mentioned in recital (494) and the linked Northern Italy/Northern Italy connections, its amount shall be calculated taking into account the percentage of train/km serviced by Trenitalia on the said 14 region/region connections (and the linked Northern Italy/Northern Italy connections) compared to the total train/km compensated under the Third Contract after 3 December 2012.

(503) The Commission notes that, after the opening decision, Trenitalia's cargo division underwent a substantial restructuring process (see recitals (46) to (47)). In 2017, the FS Group, exclusive owner of Trenitalia, transferred all its freight activities to a new entity called 'Mercitalia Group', under the exclusive control of the FS Group. Such restructuring process included the spin-off of Trenitalia's cargo division in favour of Mercitalia Rail.

(504) Where the beneficiary of unlawful and incompatible State aid has transferred all or part of its activities to another undertaking, the obligation to repay an unlawful and incompatible State aid can be extended to the undertaking that effectively enjoys the advantage following the transfer of activities (successor undertaking) ([292]). Moreover, in case of merger or other forms of business reorganisation, the obligation to repay the aid may be passed on to the surviving entity ([293]).

(505) The Commission notes that the transfer of Trenitalia's cargo division to Mercitalia Logistics was essentially a business reorganisation taking the form of an intra-group transfer within the FS Group of the rail freight business from Trenitalia to Mercitalia Rail, where no price was paid. The FS Group itself presented the transfer as a reorganisation of its freight business (see recital (46)). As acknowledged by the Italian authorities, as of 1 January 2017, Mercitalia Rail, in its quality of new owner of the Trenitalia's cargo division, became under Italian law the legal successor to Trenitalia in the rail freight transport market.

(506) Pursuant to point 95 of the Recovery Notice, in case of a merger or another form of business organisation, the undertaking required to repay any incompatible and unlawful aid is the initial beneficiary or, if the aid cannot be recovered from the latter, its legal successor.

([291]) Judgment of 18 October 2007, *Commission v France*, C-441/06, ECLI:EU:C:2007:616, paragraph 29 and the case-law cited.

([292]) Judgment of 21 March 1991, *Italy v Commission*, C-303/88, ECLI:EU:C:1991:136, paragraph 57 and Communication from the Commission — Commission Notice on the recovery of unlawful and incompatible State aid, OJ C 247, 23.7.2019, p. 1 ('Recovery Notice'), point 89. By repaying the aid, the recipient must forfeit the advantage it previously enjoyed on the market, and the pre-aid situation is restored.

([293]) Recovery Notice, point 95.

(507) Therefore, the Commission concludes that any aid declared unlawful and incompatible under this Decision shall be recovered by Italy from Trenitalia, as direct beneficiary of that aid, or, should Italy be unable to recover the unlawful and incompatible aid from Trenitalia, from Trenitalia's legal successor, Mercitalia Rail.

(508) The above conclusion would not change even assuming, as argued by the Italian authorities, that the legal succession did not entail the transfer to Mercitalia Rail of the liabilities linked to the unlawful and incompatible aid granted to Trenitalia before the spin-off (see recital (198)). In fact, as it will be explained in recitals (511) to (517), Mercitalia Rail also qualifies in any event as economic successor of Trenitalia on the rail freight transport market.

(509) Pursuant to point 89 of the Recovery Notice, if, at the implementation stage of a recovery decision, the aid cannot be recovered from the original beneficiary and it was transferred to another undertaking, the Member State should extend recovery to the undertaking that effectively enjoys the advantage following the transfer of activities and ensure that the recovery obligation is not circumvented. Such transfer may take the form of the sale by the beneficiary of all or part of its assets, following which the activity is no longer carried out by the same legal entity.

(510) According to the Court judgment of 8 May 2003 *Italy and SIM 2 v. Commission* ([294]),the assessment of economic continuity between the aid beneficiary and the undertaking to which its assets were transferred is established through a set of indicators. The following factors may be taken into consideration, but do not need to be cumulatively met in order to establish economic continuity between two companies: ([295]) (a) whether the sale price corresponds to a market price or not; (b) the scope of the transfer (assets and liabilities, workforce, the existence of functional bundles of assets); (c) the identity of the buyer(s); (d) the moment of the transfer (after the initiation of preliminary assessment, the formal investigation procedure or the final decision); (e) the economic logic of the operation.

(511) In this case, the Commission considers that there are several factors that, taken together, allow to conclude that there is economic continuity between Trenitalia and Mercitalia Rail.

(512) First, as regards the identity of the buyer, the transferred activities ultimately remained under the same owner (Ferrovie dello Stato S.p.A.). It is undisputed that both, Trenitalia and Mercitalia Rail (the latter indirectly via Mercitalia Logistics), are under the control of Ferrovie dello Stato S.p.A., the holding company of the FS Group.

(513) Second, as regards the economic logic and purpose of the transaction, it is also clear that the entire transaction was conceived as a mere business reorganisation within the FS Group (recital (48)). That reorganisation was meant to continue operating Trenitalia' cargo division and the other rail freight activities of the FS Group in a more efficient way, by attributing them to a single entity (the Mercitalia Group).

(514) Third, it is undisputed (see recital (47)) that Mercitalia Rail did not pay any price to Trenitalia for the transfer of Trenitalia's cargo division and that the transfer took place by means of the reduction of Trenitalia's share capital and a proportional increase of the value of Mercitalia Rail's capital, for an amount equivalent to the book value of Trenitalia's transferred cargo division. Therefore, the transaction was not structured in a way that would have prevented the transfer of the incompatible aid from Trenitalia to Mercitalia Rail.

([294]) Judgment of the Court of 8 May 2003, *Italian Republic and SIM 2 Multimedia SpA v Commission*, C-328/99 and C-399/00, ECLI:EU:C:2003:252.

([295]) This set of indicators was confirmed by the Court in its judgment of 29 April 2021, Fortischem a.s, C-890/19P, ECLI:EU:C:2021:345, paragraph 59.

(515) Fourth, as regards the scope of the transfer, as indicated by the Italian authorities and by the FS Group itself in its 2017 financial report (see recitals (46) to (47)), Mercitalia Rail took over all assets ([296]) and ongoing contracts of Trenitalia's cargo division. In particular, Mercitalia Rail took over: (a) all commercial contracts concluded by Trenitalia in relation to the freight transport activity as well as access to all of Trenitalia's freight customers' information and details; (b) the entire workforce and management of the Trenitalia's cargo division (i.e. 3 117 employees and 15 directors), who kept the same contractual conditions in place before the spin-off; (c) all commercial and intellectual property licenses relating to the freight transport activities owned by Trenitalia; (d) all lease agreements relating to freight transport activities (rolling stock, infrastructure, etc.), as well as ownership rights on assets previously owned by Trenitalia; and (e) the capacity and access rights to railway infrastructure and/or service facilities that Trenitalia enjoyed in Italy and any other Member State. The transfer included also a relevant part of Trenitalia's liabilities ([297]).

(516) Finally, as regards the moment of the transfer, the business reorganisation took place after the opening of the formal investigation procedure, i.e. when Trenitalia was already aware of the risk of recovery.

(517) All the elements mentioned in recitals from (512) to (516) indicate the existence of economic continuity between Trenitalia and Mercitalia Rail with regard to their freight business activity. The Italian authorities did not provide any element able to contradict that conclusion. The argument that Trenitalia had no intention to transfer to Mercitalia Rail the potential liabilities arising from any unlawful and incompatible State aid and that the Third Contract had already expired does not rule out that Mercitalia Rail enjoys the advantage from the unlawful and incompatible aid received by Trenitalia's cargo division. The fact that Trenitalia's safety certificate was not part of the transfer does not exclude by itself that Mercialia Rail operated in economic continuity with Trenitalia, and in any event is due to the fact that the newly created Mercitalia Rail had under the applicable legislation ([298]) to acquire its own certificate to be able to operate as railway undertaking on the rail freight market.

(518) Given the existence of economic continuity between Trenitalia and Mercitalia Rail with regard to their freight business activity, the latter should be considered the economic successor of Trenitalia.

(519) In conclusion, if the unlawful and incompatible aid cannot be recovered by Trenitalia, recovery should be extended to Mercitalia Rail in its quality of legal successor, or in any event in its quality of economic successor, of Trenitalia.

HAS ADOPTED THIS DECISION:

Article 1

The compensation granted to Trenitalia under the First Contract for the discharge of public service obligations concerning the provision of rail freight transport services does not constitute State aid as far as it concerned: (a) international rail freight transport services on the Trans-European Rail Freight Network carried out before 15 March 2003; and (b) national rail freight transport services carried out before 22 October 2003.

([296]) As explained by the Italian authorities in their replies of 11 April 2023, the assets included tangible assets (buildings, plants, equipment, rolling stock), intangible assets (mainly software related to the management systems of the division), participations held in subsidiaries, associates and other undertakings, inventory (notably spare parts for rolling stock maintenance); current trade receivables.

([297]) As explained by the Italian authorities in their submission of 11 April 2023, the liabilities transferred included the financial debt of the business branch (essentially consisting of short-term financing by the parent company Ferrovie dello Stato S.p.A.), provisions for severance pay and other personnel benefits, provision for risk and charges, other current liabilities and current trade payables. By contrast, as mentioned in recital (198), the transfer did not include liabilities that could stem from any finding of unlawful and incompatible aid granted to Trenitalia for the provision of rail freight transport services before the spin-off.

([298]) See footnote [44].

The compensation granted to Trenitalia under the First Contract for the discharge of public service obligations concerning the provision of rail freight transport services until 31 December 2003 constitutes State aid within the meaning of Article 107(1) TFEU as far as it concerned: (a) international rail freight transport services on the Trans-European Rail Freight Network carried out as of 15 March 2003; and (b) national rail freight transport services carried out as of 22 October 2003.

The compensation granted to Trenitalia under the Second Contract for the discharge of public service obligations concerning the provision of rail freight transport services constitutes State aid within the meaning of Article 107(1) TFEU.

The compensation granted to Trenitalia under the Third Contract for the discharge of public service obligations concerning the provision of rail freight transport services constitutes State aid within the meaning of Article 107(1) TFEU.

Article 2

The State aid granted to Trenitalia under the First Contract for the discharge of public service obligations concerning the provision of rail freight transport services qualifies as existing aid as far as it concerned national rail freight transport services carried out between 22 October 2003 and 31 December 2003. The State aid granted to Trenitalia under the First Contract for the discharge of public service obligations concerning the provision of rail freight transport services qualifies as new aid as far as it concerned international rail freight transport services on the Trans-European Rail Freight Network carried out between 15 March 2003 and 31 December 2003.

The State aid granted to Trenitalia under the Second Contract for the discharge of public service obligations concerning the provision of rail freight transport services qualifies as new aid.

The State aid granted to Trenitalia under the Third Contract for the discharge of public service obligations concerning the provision of rail freight transport services qualifies as new aid.

Article 3

The State aid paid to Trenitalia under the First Contract for the discharge of public service obligations concerning the provision of international rail freight transport services between the Italian port of Trieste and Hungary is compatible with the internal market. The State aid paid to Trenitalia under the First Contract for the discharge of public service obligations concerning the provision of international rail freight transport services through the port of Trieste Marittima was unlawfully put into effect in breach of Article 108(3) TFEU and is incompatible with the internal market.

The State aid paid to Trenitalia under the Second Contract for the discharge of public service obligations concerning the provision of rail freight transport services is compatible with the internal market, with the exception of the State aid paid to Trenitalia for the discharge of public service obligations concerning the provision of international rail freight transport services through the port of Trieste Marittima, which was unlawfully put into effect in breach of Article 108(3) TFEU and is incompatible with the internal market.

The State aid paid to Trenitalia under Third Contract for the discharge of public service obligations concerning the provision of rail freight transport services is lawful as regards the aid paid until 3 December 2012, whereas it was unlawfully put into effect in breach of Article 108(3) TFEU as regards the aid paid after 3 December 2012. The State aid paid to Trenitalia under Third Contract is compatible with the internal market, with the exception of the State aid paid after 3 December 2012 with regard to services on the following 14 region/region connections (including all linked Northern Italy/Northern Italy connections): Abruzzo/Abruzzo; Calabria/Calabria; Campania/Campania; Apulia/Apulia; Abruzzo/Molise; Abruzzo/Apulia; Basilicata/Apulia; Calabria/Campania; Molise/Apulia; Molise/Northern Italy; Apulia/Northern Italy; Campania/Northern Italy; Basilicata/Northern Italy; Abruzzo/Northern Italy, which is incompatible with the internal market.

Article 4

Italy shall recover the incompatible aid referred to in Article 3 from Trenitalia or, in the impossibility to recover such aid from Trenitalia, from Trenitalia's successor, Mercitalia Rail.

The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([299]) and to Commission Regulation (EC) No 271/2008 ([300]) amending Regulation (EC) No 794/2004.

Article 5

Recovery of the incompatible aid referred to in Article 3 shall be immediate and effective.

Italy shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 6

Within two months following notification of this Decision, Italy shall submit the following information:

— the total amount of aid received by the beneficiary;

— the total amount (principal and recovery interests) to be recovered from the beneficiary;

— a detailed description of the measures already taken and planned to comply with this Decision;

— documents demonstrating that the beneficiary has been ordered to repay the aid.

Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 3 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 7

This Decision is addressed to the Italian Republic.

([299]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

([300]) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

The Commission may publish the amounts of aid and recovery interest recovered in application of this Decision, without prejudice to Article 30 of Council Regulation (EU) 2015/1589 ([301]).

Done at Brussels, 24 November 2023

For the Commission
Didier REYNDERS
Member of the Commission

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