JUDGMENT OF THE COURT (Second Chamber)

19 December 2019 (*)

(Reference for a preliminary ruling — State aid — Notion — Public railway undertaking in difficulties — Aid measures — Allocation of financial aid — Aim — Continued operation of the public railway undertaking — Allocation to and shareholding in the capital of that public undertaking — Transfer to the capital of another public undertaking — Private investor test — Prior notification obligation for new aid)

In Case C−385/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 5 April 2018, received at the Court on 11 June 2018, in the proceedings

Arriva Italia Srl,

Ferrotramviaria SpA,

Consorzio Trasporti Aziende Pugliesi (CO.TRA.P)

v

Ministero delle Infrastrutture e dei Trasporti,

joined parties:

Ferrovie dello Stato Italiane SpA,

Gestione Commissariale per le Ferrovie del Sud Est e Servizi Automobilistici Srl a socio unico,

Autorità Garante della Concorrenza e del Mercato,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, P.G. Xuereb (Rapporteur), C. Vajda and A. Kumin, Judges,

Advocate General: E. Tanchev,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 8 May 2019,

after considering the observations submitted on behalf of:

– Arriva Italia Srl, Ferrotramviaria SpA and Consorzio Trasporti Aziende Pugliesi (CO.TRA.P), by G.L. Zampa and T. Salonico, avvocati,

– Ferrovie dello Stato Italiane SpA, by A. Zoppini, G.M. Roberti, G. Bellitti and I. Perego, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Palmieri, avvocatessa dello Stato,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by D. Recchia and F. Tomat, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 July 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 107 and Article 108(3) TFEU.

2 The request has been made in proceedings between Arriva Italia Srl, Ferrotramviaria SpA and Consorzio Trasporti Aziende Pugliesi (CO.TRA.P) ('Arriva Italia and Others'), on the one hand, and the Ministero delle Infrastrutture e dei Trasporti (Ministry of Infrastructure and Transport, Italy), on the other, concerning the transfer, by the latter, of its 100% shareholding in the capital of Ferrovie del Sud Est e Servizi Automobilistici Srl a socio unico ('FSE') to Ferrovie dello Stato Italiane SpA ('FSI').

Legal context

European Union law

3 Paragraph 188 of Commission Notice on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1; '2016 Commission Notice') states:

'The fact that the authorities assign a public service to an in-house provider (even if they were free to entrust that service to third parties) does not as such exclude a possible distortion of competition. However, a possible distortion of competition is excluded if the following cumulative conditions are met:

(a) a service is subject to a legal monopoly (established in compliance with EU law) …

(b) the legal monopoly not only excludes competition on the market, but also for the market, in that it excludes any possible competition to become the exclusive provider of the service in question …

(c) the service is not in competition with other services; and

(d) if the service provider is active in another (geographical or product) market that is open to competition, cross-subsidisation has to be excluded. This requires that separate accounts are used, costs and revenues are allocated in an appropriate way and public funding provided for the service subject to the legal monopoly cannot benefit other activities.'

4 Paragraphs 211 and 212 of the 2016 Commission Notice are worded as follows:

'211. There are circumstances in which certain infrastructures do not face direct competition from other infrastructures of the same kind or other infrastructures of a different kind offering services with a significant degree of substitutability, or with such services directly … The

absence of direct competition between infrastructures is likely the case for comprehensive network infrastructures … that are natural monopolies, that is to say for which a replication would be uneconomical. Similarly, there may be sectors where private financing for the construction of infrastructures is insignificant … The Commission considers that an effect on trade between Member States or a distortion of competition is normally excluded as regards the construction of the infrastructure in cases where at the same time (i) an infrastructure typically faces no direct competition, (ii) private financing is insignificant in the sector and Member State concerned and (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large.

212. In order for the entire public funding of a given project to fall outside State aid rules, Member States have to ensure that the funding provided for the construction of the infrastructures in the situations mentioned in paragraph 211 cannot be used to cross-subsidise or indirectly subsidise other economic activities, including the operation of the infrastructure. …'

5 Paragraph 219 of the 2016 Commission Notice states:

'While the operation of railway infrastructure …. may constitute an economic activity, … the construction of railway infrastructure which is made available to potential users on equal and non-discriminatory terms — as opposed to the operation of the infrastructure — typically fulfils the conditions set out in paragraph 211 and its financing therefore typically does not affect trade between Member States or distort competition. …

(*) [Official footnote] This observation is without any prejudice to the question of whether any advantage granted to the infrastructure operator by the State amounts to State aid. For instance, if the operation of the infrastructure is subject to a legal monopoly and if competition for the market to operate the infrastructure is excluded, an advantage granted to the infrastructure operator by the State cannot distort competition and therefore does not constitute State aid. … As explained in paragraph 188, if the owner or operator is active in another liberalised market, it should, in order to prevent cross-subsidisation, maintain separate accounts, allocate costs and revenues in an appropriate way and ensure that any public funding does not benefit other activities.'

Italian law

6 Article 1(867) of Legge n. 208 — Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2016) (Law No 208, laying down measures for the drawing up of the annual and multiannual State budget (Stability Law for 2016)) of 28 December 2015 (Ordinary Supplement to GURI No 15 of 20 January 2016; 'Stability Law for 2016') provided for the receivership of FSE in view of the 'serious financial situation' of FSE. That receivership was to be implemented by decree of the Ministry of Infrastructure and Transport.

7 The second and fifth sentences of Article 1(867) of the Stability Law for 2016 called upon the Special Commissioner, entrusted with the receivership of FSE, respectively, to 'prepare a business plan for restructuring' focused on reducing the operating costs of FSE, and to submit proposals to the Minister for Infrastructure and Transport for the transfer or disposal of FSE according to criteria and procedures defined by a decree adopted by that Minister. Further, the sixth and last sentence of Article 1(867) of the Stability Law for 2016 provided that, pending the implementation of the aforementioned restructuring plan, 'for the purpose of ensuring the continued operation of [FSE]', an expenditure of EUR 70 million was to be authorised for 2016.

8 Pursuant to that provision of the Stability Law for 2016, the Minister for Infrastructure and Transport adopted Decree No 9 of 12 January 2016 ('Decree of 12 January 2016'), which provided for the receivership of FSE. According to Article 6 of that decree, the sum of EUR 70 million, allocated to FSE under Article 1(867) of the Stability Law for 2016, was intended to progressively

increase the capital of FSE and could be used by the Special Commissioner without authorisation by the public shareholder 'in order to ensure the continuity and regularity of the service managed by the company'.

9 By Decree No 264 of 4 August 2016 ('Decree of 4 August 2016'), and in the light of the fact that the negative net equity of FSE amounted to EUR 200 million, the Minister for Infrastructure and Transport decided to transfer the entire shareholding of that Ministry in the capital of that company to FSI.

10 In accordance with the Decree of 4 August 2016, the acquirer of FSE was selected on the basis of the criteria listed in Article 1(1) of that decree, namely (a) 'increased efficiency of public shareholdings in the context of a reorganisation within a single economic entity held by the same owner (State body)'; (b) 'the possession, by the acquirer, of industrial capacity and assets sufficient to ensure the continuity of employment and service and to provide a guarantee for creditors …' and (c) 'the restructuring of the company, account being taken of the negative net equity of [FSE]'.

11 Article 2(2) of the Decree of 4 August 2016 provided that the transfer was to be for no consideration, subject to the formal undertaking on the part of FSI to put an end, within the statutory time limits, to the asset imbalance of FSE. Article 2(3) of that decree provided that the transfer would not call into question the right of FSE to make use of the allocation of the sum of EUR 70 million referred to in Article 1(867) of the Stability Law for 2016 in order to attain the objectives provided for by that law. Further, it is apparent from Article 2(4) of that decree that the transfer could not be made until the Autorità Garante della Concorrenza e del Mercato (Competition and Market Authority, Italy; 'the AGCM') had decided not to initiate an examination of the merger between FSI and FSE or to authorise that merger.

12 Following the transfer of the shareholding in the capital of FSE to FSI, Article 47(7) of Decreto-legge n. 50 — Disposizioni urgenti in materia finanziaria, iniziative a favore degli enti territoriali, ulteriori interventi per le zone colpite da eventi sismici e misure per lo sviluppo (Decree-law No 50 — Urgent financial measures, initiatives to assist regional or local authorities, further action to support areas affected by seismic events, and development measures) of 24 April 2017 (Ordinary Supplement to GURI No 95 of 24 April 2017; 'Decree-law No 50/2017'), now, after amendment, Law No 96 of 21 June 2017 (Ordinary Supplement to GURI No 31 of 23 June 2017), replaced the sixth sentence in Article 1(867) of the Stability Law for 2016 with the following text:

'Without prejudice to the obligations laid down in this paragraph, the expenditure of EUR 70 million shall be authorised for 2016. The corresponding resources shall be transferred to the capital of [FSE], to be used, in accordance with [EU] rules in this matter and in relation to the plan for the restructuring of the company, only to cover the liabilities, where applicable pre-existing, and financial requirements of the infrastructure sector. The acts, measures and operations already implemented under [the Decree of 4 August 2016] shall be unaffected. …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 At the time when FSE was placed in receivership, it was tasked, by the Apulia Region (Italy), with the operation and maintenance of local railway infrastructure covering 474 km, local rail passenger transport services, and additional services and/or alternatives to road transport.

14 FSI, a company wholly owned by the Ministry of Economic Affairs and Finance, is the holding company of a group that operates in the sector of rail transport of goods and passengers, together with its subsidiary Trenitalia SpA, which is the main Italian railway undertaking and concession-holder for the operation of the national railway network of Rete Ferroviaria Italiana SpA, which is part of the same group.

15 On 24 October 2016, Arriva Italia and Others, which all operate in the sector of rail or road public transport, and which had previously informed the Special Commissioner of their interest in acquiring FSE, brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), seeking annulment of the Decree of 4 August 2016 providing for the transfer to FSI of the entire shareholding of the Ministry of Infrastructure and Transport in the capital of FSE.

16 In support of that action, they argued in particular that the allocation of EUR 70 million and the transfer to FSI of the entire shareholding of the Ministry of Infrastructure and Transport in the capital of FSE (together, 'the measures in question') constitute State aid, and that, in failing to notify the Commission of such measures and in implementing them, the Italian State had acted in breach of Article 108(3) TFEU.

17 On 26 October 2016, the AGCM notified the Italian Government of the planned transfer to FSI of the 100% shareholding of the Ministry of Infrastructure and Transport in the capital of FSE and of the allocation of EUR 70 million ('notification of the AGCM'). The reason for that notification was that each of the measures in question was, according to the AGCM, capable of constituting State aid.

18 On 21 November 2016, the AGCM decided not to initiate an examination of the merger between FSI and FSE, given that, according to that authority, such a merger did not entail the creation or strengthening of a dominant position capable of eliminating or reducing in a substantial and lasting manner competition on the markets concerned.

19 By memorandum of 28 November 2016, the Minister for Infrastructure and Transport took note that the two conditions to which the transfer to FSI of the entire shareholding of that minister in the capital of FSE was subject were satisfied, namely, that the AGCM had decided to not initiate an examination of the merger between FSI and FSE and that FSI had undertaken to put an end, within the statutory time limits, to the asset imbalance of FSE. On the same day, the shareholding in the capital of FSE was transferred to FSI by a notarised instrument.

20 The ministerial memorandum of 28 November 2016 stated that the sum of EUR 70 million, allocated under Article 1(867) of the Stability Law for 2016, 'must be used — subject to an exclusive restriction on utilisation — to cover the financial requirements of [FSE]'s rail infrastructure, in accordance with EU legislation'.

21 In January 2017, FSE filed an application with the Tribunale di Bari (District Court, Bari, Italy), seeking leave to enter an arrangement with creditors.

22 By judgment of 31 May 2017, the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio) dismissed the action brought before it.

23 Arriva Italia and Others lodged an appeal against that judgment before the Consiglio di Stato (Council of State, Italy).

24 The Consiglio di Stato (Council of State) considers that, in order to deal with the dispute before it, an interpretation of the provisions of the FEU Treaty is necessary.

25 In the first place, the referring court expresses doubts as to whether the measures in question were financed through State resources and whether they confer an advantage on the beneficiary, as required by Article 107(1) TFEU. In particular, the transfer of the shareholding in the capital of FSE to FSI could be part of a context and fall within the objectives which allow the principle of neutrality of the European Union in relation to the system of property ownership for undertakings, enshrined in Article 345 TFEU, to be invoked.

26 In the second place, the referring court notes that the sum of EUR 70 million allocated to FSE, even though it was included in FSE's accounts, were not paid out of the budget of the Italian State. It is therefore doubtful that the funds in question can be regarded as having already been granted, and therefore subject to the notification obligation laid down in Article 108(3) TFEU.

27 In the third place, the referring court notes that the relevant economic sector in the present case is that of regional transport of passengers on the territory referred to in the service contract concluded between FSE and the Apulia Region. The referring court states that the AGCM established that the transfer of the shareholding in the capital of FSE to FSI did not constitute a merger having the effect of restricting competition on any of the markets of transport services at issue in the main proceedings.

28 Finally, the referring court raises the question whether, in the event that such State aid should nevertheless be established in the present case, the allocated sum of EUR 70 million must be withdrawn and the structure of the current ownership of FSE preserved, or whether, on the contrary, a competitive tender procedure should be organised for the acquisition of that company.

29 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the factual and legal circumstances set out above, does a measure involving the statutory allocation of EUR 70 million for the benefit of an operator in the rail transport sector, in accordance with the conditions laid down by [Article 1(867) of the Stability Law for 2016], as amended by Decree-Law [No 50/2017], and the subsequent transfer of that operator to another economic operator, without a competitive tender procedure and for no consideration, constitute State aid within the meaning of Article 107 [TFEU]?

(2) If so, is it necessary to establish whether the aid in question is, in any event, compatible with EU law, and what are the consequences of failure to give notification of the aid for the purposes of Article 107(3) TFEU?'

Consideration of the questions referred

The first question

30 By its first question, the referring court asks, in essence, whether Article 107 TFEU must be interpreted as meaning that, first, the allocation of a sum of money to a public railway undertaking which is in serious financial difficulties, and, secondly, the transfer of the entire shareholding of a Member State in the capital of that undertaking to another public undertaking, without a competitive tender procedure and for no consideration but in exchange for an obligation on the part of the latter to remedy the asset imbalance of the former, constitute State aid within the meaning of Article 107 TFEU.

31 According to settled case-law, classification of a measure as State aid within the meaning of Article 107(1) TFEU requires all the conditions mentioned in that provision to be fulfilled. Thus, first, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 38 and the case-law cited).

32 It must therefore be examined whether the conditions are fulfilled for the measures in question.

The allocation of the sum of EUR 70 million to FSE

33 As regards the allocation of the sum of EUR 70 million to FSE, it must be borne in mind, in respect of the first of the conditions referred to in paragraph 31 of the present judgment, that, in order for it to be possible to categorise advantages as 'aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State (judgment of 15 May 2019, *Achema and Others*, C−706/17, EU:C:2019:407, paragraph 47 and the case-law cited).

34 In the first place, as regards whether the measure is attributable to the State, it is sufficient to state that the allocation of that sum to FSE is made directly by the Stability Law for 2016.

35 In the second place, as regards the requirement that the advantage is granted directly or indirectly through State resources, it must be noted that the circumstance that, according to the referring court, the sum of EUR 70 million was not paid out of the budget of the Italian State and is therefore not an item of expenditure for the budget of that Member State does not mean in itself that such a sum cannot be classified as 'State resources', in particular where Article 1(867) of the Stability Law for 2016 created a potential burden on the budget of the Italian State.

36 In that regard, it is apparent from the case-law of the Court that, from the moment when the right to receive support, provided through State resources, is conferred on the beneficiary under the applicable national legislation, the aid must be considered to be granted, so that the actual transfer of the resources in question is not decisive (see, to that effect, judgment of 21 March 2013, *Magdeburger Mühlenwerke*, C−129/12, EU:C:2013:200, paragraph 40).

37 As regards in particular a beneficiary undertaking which is in financial difficulties, it is the decision of the public authorities to allocate State support to that company, rather than the actual payment of that support, that is capable of allowing the persons who manage such an undertaking to conclude that its operation is economically viable and thus to continue that operation, provided that that decision gives rise, for the beneficiary undertaking, to a right to receive that support, which is for the referring court to ascertain, where necessary.

38 In that regard, it must be stated that it follows from Article 1(867) of the Stability Law for 2016 that the allocation of the sum of EUR 70 million to FSE was authorised 'pending the implementation of the restructuring plan' to be drawn up by the Special Commissioner, who was responsible for putting FSE into receivership pursuant to that provision.

39 As is equally clear from Article 1(867) of the Stability Law for 2016, the Italian legislature had decided, in the light of the 'serious financial situation' of FSE at the time that law was adopted, to make that sum available to FSE in order to guarantee its continued operation, as is apparent from Article 6 of the Decree of 12 January 2016, which means that that availability was deemed to apply immediately. It was not dependent on the finalisation of a restructuring plan.

40 In that regard, it must be stated that the technical report annexed to the Stability Law for 2016 refers to significant negative effects for the continuity of the public transport services in the Apulia Region which, without special intervention on the part of the Italian State, would occur from December 2015. It should also be recalled that it is apparent from the order for reference that the sum at issue in the main proceedings was included in the accounts of FSE following the adoption of that 2016 law.

41 In those circumstances, it must be considered that the allocation of the sum of EUR 70 million to FSE, on the basis of Article 1(867) of the Stability Law for 2016, can constitute, even on the assumption that that sum was not paid out of the budget of the Italian State, an intervention through State resources within the meaning of the case-law cited in paragraph 31 of the present judgment, on the condition that that provision had already conferred on FSE a right to that allocation, which is for the referring court to ascertain.

42 As regards the second condition referred to in paragraph 31 of the present judgment, it must be recalled that it is apparent from the case-law of the Court that for the purpose of categorising a national measure as 'State aid', it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and to distort competition (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C−74/16, EU:C:2017:496, paragraph 78 and the case-law cited).

43 In that regard, it is not necessary that the beneficiary undertakings themselves be involved in trade between Member States. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced (see, to that effect, judgment of 8 May 2013, *Libert and Others*, C−197/11 and C−203/11, EU:C:2013:288, paragraph 78 and the case-law cited).

44 Further, it is apparent from the case-law that the condition that the aid must be capable of affecting trade between Member States does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned (judgment of 14 January 2015, *Eventech*, C−518/13, EU:C:2015:9, paragraph 69).

45 In the light of that case-law, it must be stated that one of the applicants in the main proceedings, namely Arriva Italia, is a subsidiary of the German group Deutsche Bahn AG and that, as noted by the Advocate General in point 48 of his Opinion, the allocation of the sum of EUR 70 million to FSE reduced the possibility for that company, or other undertakings established in Member States other than the Italian Republic, to operate the railway infrastructure entrusted to FSE or to provide passenger transport services on that infrastructure. In those circumstances, financial support which makes it possible to ensure the continuity of an undertaking such as FSE, which is in financial difficulties, is capable of affecting trade between Member States.

46 As regards the third condition referred to in paragraph 31 of the present judgment, it is not disputed that the allocation of the sum of EUR 70 million to FSE constituted an advantage conferred on that public undertaking. It is clear, however, from settled case-law that the conditions which a measure must meet in order to be treated as 'aid' for the purposes of Article 107 TFEU are not met if the recipient undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources. In the case of public undertakings, that assessment is made by applying, in principle, the private investor test (judgment of 5 June 2012, *Commission* v *EDF*, C−124/10 P, EU:C:2012:318, paragraph 78 and the case-law cited).

47 It is also apparent from the case-law that, in order to assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as similar as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder — to the exclusion of those linked to its situation as a public authority — are to be taken into account (judgment of 5 June 2012, *Commission* v *EDF*, C−124/10 P, EU:C:2012:318, paragraph 79 and the case-law cited).

48 Further, where there is doubt, that test does not apply unless the Member State is capable of showing, unequivocally and on the basis of objective and verifiable evidence established before or at the same time as the decision to confer the economic advantage, that the measure implemented falls to be ascribed to the State acting as shareholder. In that regard, it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability (see, to that effect, judgment of 5 June 2012, *Commission* v *EDF*, C−124/10 P,

EU:C:2012:318, paragraphs 82 and 84).

49 In that regard, it must be recalled that it follows from Article 1(867) of the Stability Law for 2016 that the sum of EUR 70 million was allocated to FSE in the light of its 'serious financial situation', 'for the purpose of ensuring the continued operation of [FSE]' pending the implementation of the restructuring plan. A private investor in a situation that is as close as possible as that of the State would not, in a situation such as that at issue in that case, have allocated an amount of EUR 70 million to an undertaking in serious financial difficulties without first assessing the profitability of such an investment.

50 However, it is not apparent from the information in the file that the Italian State carried out such an assessment before adopting the Stability Law for 2016. It is true that the technical report accompanying that law refers to an 'economic and financial analysis' in that regard. However, as noted by the Advocate General in point 54 of his Opinion, there is no indication that that analysis sought to determine the profitability of the allocation of EUR 70 million for the Italian State.

51 In those circumstances, in the absence of information capable of establishing that the decision to allocate the sum in question to FSE was taken by the State in its capacity as shareholder of FSE, a matter which will nevertheless be for the referring court to determine, it does not appear possible to apply the private investor test in order to reach a conclusion that that allocation does not constitute a selective advantage.

52 As regards the last condition referred to in paragraph 31 of the present judgment, it must be recalled that, according to the case-law cited in paragraph 42 of the present judgment, it is not necessary to establish that competition is actually being distorted, but only to examine whether that aid is liable to distort competition. It must also be recalled that it follows from that same case-law that, in principle, aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C−74/16, EU:C:2017:496, paragraph 80 and the case-law cited).

53 An allocation of funds such as that at issue in the main proceedings, allowing an undertaking in serious financial difficulties to continue to be present on the market, is therefore, in principle, capable of distorting the conditions of competition.

54 It is true that FSI and the Italian Government submit, first, that that is not the case in the main proceedings, referring to the fact that the sum of EUR 70 million could be used only to finance the railway infrastructure operated by FSE, secondly, that that operation was subject to a legal monopoly under Italian law, and thirdly, that the fact that FSE keeps separate accounts for, on the one hand, the operation of that infrastructure and, on the other hand, the provision of transport services, avoids any risk of cross-subsidisation. Those arguments cannot, however, invalidate the finding made in the preceding paragraph of the present judgment regarding the effects on the conditions of competition which are liable to result in keeping an undertaking such as FSE, which is in serious financial difficulties, on the market.

55 First, it must be stated that neither the original version of Article 1(867) of the Stability Law for 2016 nor the Decree of 12 January or the Decree of 4 August 2016 provided that the sum of EUR 70 million allocated to FSE could be used only to finance railway infrastructure used by FSE. It was only in the version amended by Decree-law No 50/2017, adopted on 24 April 2017, that that provision of the Stability Law for 2016 referred to such an appropriation of that sum.

56 Since it follows from the case-law cited in paragraph 36 of the present judgment that the decisive moment for assessing whether a measure is compliant with EU rules on State aid is when the right to receive the aid in question is conferred on the beneficiary under the applicable national legislation, the change to the appropriation of the sum at issue in the main proceedings by Decree-law

No 50/2017 cannot affect the conclusion according to which the allocation of that sum is capable of distorting competition, on the condition that Article 1(867) of the Stability Law for 2016, in its initial version, had already conferred on FSE the unconditional right to that allocation, which is a matter for the referring court to determine, as is apparent from paragraph 41 of the present judgment.

57 Secondly, it is true, as stated by the Commission, in essence, in paragraphs 188 and 219 of the 2016 Commission Notice, that the fact that a Member State assigns a public service subject to a legal monopoly to a public undertaking does not entail, in certain circumstances, a distortion of competition, and an advantage granted to the operator of an infrastructure subject to a legal monopoly cannot, in such circumstances, distort competition. However, as the Commission also states, in paragraph 188(b) of that notice, it is necessary, for such a distortion to be able to be excluded in such circumstances, that the legal monopoly not only excludes competition on the market, but also for the market, in that it excludes any possible competition to become the exclusive provider of the service in question.

58 It is apparent from the file submitted to the Court that, for the duration of its contract with the Apulia Region, FSE has the exclusive right to operate the railway infrastructure covered by that contract in order to provide public railway transport services for passengers. However, in order to establish that this was a market for which competition was excluded, it would be necessary to show that the Apulia Region was required, by legislative or regulatory measures, to award the operation of that infrastructure and those services exclusively to that undertaking (see, by analogy, judgment of 29 July 2019, *Azienda Napoletana Mobilità*, C−659/17, EU:C:2019:633, paragraph 38). No information in the file submitted to the Court establishes the existence of such an obligation, with the result that it appears that that region would have been equally free to award that operation and those services to another provider.

59 Consequently, the allocation of the sum of EUR 70 million to FSE, allowing that company to remain on the market, was capable of preventing other undertakings, such as Arriva Italia and Others, from being assigned the operation of the railway infrastructure operated by FSE and the provision of transport services on that infrastructure.

60 Thirdly, as regards the arguments relating to the keeping of separate accounts by FSE for, on the one hand, the operation of the railway infrastructure in question, and, on the other hand, the provision of transport services, it must be stated that, even on the assumption that the sum of EUR 70 million was allocated to and used by FSE exclusively to finance that railway infrastructure, as the case may be from the entry into force of Decree-law No 50/2017, it must be stated that that circumstance would not preclude the effects on the conditions of competition referred to in paragraph 53 of the present judgment. As the Commission stated, in paragraph 219 of the 2016 Commission Notice, it is the construction of railway infrastructure which is made available to potential users on equal and non-discriminatory terms that typically fulfils the conditions set out in paragraph 211 of that notice, so that the financing of such construction does not typically distort competition.

61 Even assuming that the allocation of that sum to FSE could be understood as having been made for the sole purpose of construction of railway infrastructure, and not for any other purposes, it nevertheless concerns railway infrastructure which is not made available to potential users on equal and non-discriminatory terms, given that FSE has an exclusive right to that use for the duration of its contract concluded with the Apulia Region. Therefore, the fact that FSE is required to keep separate accounts does not affect the conclusion according to which the allocation of the sum of EUR 70 million to that undertaking was capable of distorting competition.

62 It follows from all of the foregoing considerations that, subject to the verifications to be carried out by the referring court, a measure consisting in the allocation of a sum of money to a public railway

undertaking in serious financial difficulties, can be classified as 'State aid' within the meaning of Article 107 TFEU.

The transfer of the shareholding in the capital of FSE to FSI

63 As regards the second of the two measures in question, it must be stated from the outset that it consists of two elements, namely, first, the transfer of the entire shareholding of the Ministry of Infrastructure and Transport in the capital of FSE to FSI, without a competitive tender procedure and for no consideration, and, secondly, the obligation assumed by FSI to remedy the asset imbalance of FSE.

64 Even though the fact that the shareholding in the capital of FSE was transferred to FSI for no consideration suggests, at first sight, that that latter undertaking could be regarded as being the beneficiary of potential State aid, it must be recalled that the procedure at issue in the main proceedings sought to restore the profitability of FSE. It is therefore not inconceivable that FSE could be regarded as being the beneficiary of potential State aid. It is therefore for the referring court to ascertain which of those two undertakings could be considered, as the case may be, as being a beneficiary of potential State aid, or whether both FSE and FSI can, together, be regarded as having benefited from such aid on the basis of the criteria established in paragraph 31 of the present judgment.

65 As regards the question whether the second of the two measures in question constitutes State aid within the meaning of Article 107 TFEU, it must be noted, in the first place, in respect of the first of the conditions referred to in paragraph 31 of the present judgment, that the transfer of the entire shareholding of the Ministry of Infrastructure and Transport in the capital of FSE to FSI must be considered to be a transfer of State resources attributable to the State. Further, the obligation assumed by FSI to remedy the asset imbalance of FSE also constitutes a transfer of State resources in favour of FSE, on condition that FSE has acquired a right to that support, which is a matter, as required, for the referring court to ascertain. Since the commitment to remedy the asset imbalance of FSE was made by a public undertaking wholly owned by the Ministry of Economic Affairs and Finance, it is, in any event, attributable to the Italian State.

66 Contrary to the claims of the Italian State and FSI, the fact that, according to Article 345 TFEU, that treaty is in no way to prejudice the rules in Member States governing the system of property ownership, cannot be relied on to support the claim that the transfer of the shareholding in the capital of FSE to FSI cannot be regarded as constituting State aid.

67 As the Advocate General recalled in point 87 of his Opinion, Article 345 TFEU does not exempt public ownership systems from State aid rules, given that it follows from Article 106(1) TFEU that the competition rules contained in the TFEU, including those on State aid, apply, in principle, also to public undertakings. Further, and as the Commission maintains, to accept the view that State aid rules do not apply on account of the fact that the beneficiary is a public undertaking and that the advantage conferred remains in the economic sphere of the State in the broad sense, would undermine the effectiveness of those rules and introduce unjustified discrimination between public beneficiaries and private beneficiaries, contrary to the principle of neutrality laid down in Article 345 TFEU.

68 In any event, it must be recalled that the main proceedings are concerned not only with the transfer of the capital of a public undertaking in financial difficulties to another public undertaking, but also with the obligation accepted by the transferee public undertaking to remedy the asset imbalance of the public undertaking in difficulty.

69 In the second place, as regards the condition regarding the effect on trade between Member States, it must be stated that the transfer at issue in the main proceedings, together with the allocation of the sum of EUR 70 million to FSE, reduces the possibility for Arriva Italia, and for other undertakings

established in Member States other than the Italian Republic, to operate on the markets assigned to FSE. In those circumstances, the transfer of the shareholding in the capital of FSE to FSI, for no consideration but in exchange for an obligation on the part of FSI to remedy the asset imbalance of FSE, must be understood as a measure capable of having an effect on trade between Member States.

70 In the third place, as regards the question whether the transfer of the shareholding of the Ministry of Infrastructure and Transport in the capital of FSE to FSI is capable of constituting a selective advantage for FSI, it must be stated that such a transfer of capital, for no financial consideration, gives rise, in principle, to a selective advantage for the entity to which the capital is transferred if, at the time of that transfer, the value of that capital exceeds the cost of the potential obligations assumed by that entity within the context of that transfer operation. Thus, in the present case, the transfer in question is capable of constituting a selective advantage for FSI, since the value of FSE at the time of that transfer, as increased, as the case may be, by the allocation of the sum of EUR 70 million in its favour by the Italian State, exceeds the amount of the investment which FSI must make in order to meet its obligation to remedy the asset imbalance of FSE, which is a matter for the referring court to verify.

71 Such a transfer is equally capable of constituting a selective advantage for the entity whose capital is transferred, where that transfer ensures its continued operation. In the main proceedings, the existence of such an advantage, conferred on FSE, therefore depends on whether the obligation assumed by FSI to remedy the asset imbalance of FSE allows FSE to continue to operate the railway infrastructure assigned to it by the Apulia Region and to provide transport services on that infrastructure, which is a matter for the referring court to determine.

72 Contrary to the claims of the Italian Government and FSI at the hearing, it is not apparent from the file submitted to the Court that, under the private investor test, the public undertaking that is the beneficiary of that advantage, whether FSI or FSE, could have obtained the same advantage as that made available through State resources in circumstances which correspond to normal market conditions, given that, as stated in the notification of the AGCM, the Italian State did not carry out an assessment of the profitability of the transfer of the shareholding in the capital of FSE, for no consideration, to FSI, in exchange for an obligation on the part of FSI to remedy the asset imbalance of FSE, before proceeding with the transfer, which is, however, a matter for the referring court to determine, taking into account in particular the audit report, to which the Italian Government made reference in its observations, and the evaluations from the months of March and May 2016, to which FSI made reference at the hearing before the Court.

73 In that regard, it must be recalled, first, that, in order to apply the private investor test, where there is doubt, it must be possible to establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented by the Member State in question falls to be ascribed to that State acting as shareholder (judgment of 5 June 2012, *Commission* v *EDF*, C−124/10 P, EU:C:2012:318, paragraph 82). It is apparent from the Decree of 4 August 2016 that the transfer of the shareholding in the capital of FSE to FSI sought, in particular, to ensure the continuity of employment and transport services provided by FSE. Moreover, that transfer also pursued the objective of maintaining public sector shareholding in the capital of FSE. However, such considerations are not taken into account by a private investor.

74 Further, it must be stated that, for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred or on a retrospective finding that the investment made by the Member State concerned was actually profitable (judgment of 5 June 2012, *Commission* v *EDF*, C−124/10 P, EU:C:2012:318, paragraph 85). The positive outcome, according to FSI, of the procedure for an arrangement with creditors initiated by FSE therefore cannot be taken into consideration in order to determine whether the transfer of the shareholding in the capital of FSE to FSI satisfied the private investor test.

75 In the light of the foregoing, it does not appear possible, subject to the verification referred to in paragraph 72 of the present judgment, to apply the private investor test in order to reach the conclusion that the transfer of the shareholding of the Ministry of Infrastructure and Transport in the capital of FSE to FSI did not constitute, in the present case, a selective advantage.

76 In the fourth place, as regards the question whether such a transfer is capable of distorting competition, it must be stated, as noted by the Advocate General in point 118 of his Opinion, that that transfer, combined with the obligation assumed by FSI to remedy the asset imbalance of FSE, prevented potential competitors of FSE, such as Arriva Italia and Others, from being assigned the operation of the railway infrastructure operated by FSE and the provision of passenger transport services on that infrastructure.

77 That conclusion is not called into question by the fact that the AGCM did not initiate an examination of the merger between FSI and FSE in the light of the Italian merger rules, given that an assessment of the effects of a merger on competition in the light of those rules is not identical to an assessment as to whether there is potential State aid. It is apparent from the decision of the AGCM that the assessment carried out by the AGCM sought to determine whether the merger in question created or reinforced a dominant position capable of eliminating or reducing in a substantial and lasting manner competition on the markets concerned, and not whether it was capable of distorting competition within the meaning of Article 107(1) TFEU. Further, it is apparent from the notification of the AGCM that the AGCM considered that the transfer at issue in the main proceedings was capable of distorting competition.

78 It follows that, subject to the verifications to be carried out by the referring court, a transfer of a shareholding in the capital of a public undertaking in serious financial difficulties to another public undertaking, for no consideration but in exchange for an obligation on the part of the latter to remedy the asset imbalance of the public undertaking in difficulties, can be classified as 'State aid'.

79 In the light of all of the preceding considerations, the answer to the first question is that Article 107 TFEU must be interpreted as meaning that, subject to the verifications to be carried out by the referring court, both the allocation of a sum of money to a public undertaking in serious financial difficulties and the transfer of the entire shareholding of a Member State in the capital of that undertaking to another public undertaking, for no consideration but in exchange for an obligation on the part of the latter to remedy the asset imbalance of the former undertaking, can be classified as 'State aid' within the meaning of Article 107 TFEU.

The second question

80 As a preliminary point, it must be stated that, even though, in its second question, the referring court made reference to Article 107(3) TFEU, it is apparent from its order that that question in reality seeks guidance on Article 108(3) TFEU, according to which the Member States are under an obligation to inform the Commission in sufficient time of their plans to grant or alter aid.

81 By its second question, the referring court asks, in essence, in the event that EU law must be interpreted as meaning that, where measures such as the allocation of a sum of money to a public undertaking in serious financial difficulties or the transfer of the entire shareholding of a Member State in the capital of that undertaking to another public undertaking, for no consideration but in exchange for an obligation on the part of the latter to remedy the asset imbalance of the former, must be classified as 'State aid' within the meaning of Article 107 TFEU, what inferences must be drawn from the fact that the Commission was not notified of that aid, contrary to the provisions of Article 108(3) TFEU.

82 It is true that, by its second question, the referring court also asks the Court whether, should the existence of such State aid be established, such aid would be consistent with EU law. However, it follows from its order that, by that question, the referring court in reality seeks to ascertain whether,

where the measures in question can be regarded as conferring an advantage on their addressees, the other conditions necessary to classify a measure as 'State aid' are also satisfied, and that, to that extent, the second question therefore overlaps with the first question.

83 In any event, it must be stated that it follows from settled case-law which is, moreover, cited in the order for reference, that the assessment of the compatibility of the aid with the internal market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union (judgments of 11 July 1996, *SFEI and Others*, C−39/94, EU:C:1996:285, paragraph 42, and of 29 July 2019, *Bayerische Motoren Werke* v *Commission*, C−654/17 P, EU:C:2019:634, paragraph 79 and the case-law cited).

84 As regards the answer to be given to the second question, it is apparent from settled case-law that it is for the national courts hearing a dispute on the alleged infringement of the obligation to notify the Commission of State aid in accordance with Article 108(3) TFEU, to draw all the necessary inferences from such an infringement, in accordance with domestic law, with regard both to the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision (see, to that effect, judgment of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados*, C−590/14 P, EU:C:2016:797, paragraph 100 and the case-law cited).

85 In that regard, it must be noted that restoring the situation prior to the payment of aid which was unlawful or incompatible with the internal market is a necessary requirement for preserving the effectiveness of the provisions of the Treaties concerning State aid (judgment of 7 March 2018, *SNCF Mobilités* v *Commission*, C−127/16 P, EU:C:2018:165, paragraph 104 and the case-law cited).

86 In the main proceedings and to the extent that the measures in question must be regarded as constituting State aid, it is therefore for the referring court to draw all the necessary inferences from the fact that the Commission was not notified of that aid, contrary to Article 108(3) TFEU, and that aid must therefore be considered as being unlawful.

87 As regards the allocation of the sum of EUR 70 million, it is in particular for the referring court to determine the advantage, including the interest accrued on that sum, that FSE had as a result of that sum being made available to it, and to order FSE to give back that advantage.

88 As regards the transfer of the shareholding in the capital of FSE to FSI, restoring the previous situation will entail, as the case may be, the reversal of that transfer by reassigning the shareholding in FSE to the Ministry of Infrastructure and Transport, and the neutralisation of the effects of that transfer.

89 In the light of all of the above considerations, the answer to the second question is that EU law must be interpreted as meaning that, where measures such as the allocation of a sum of money to a public undertaking in serious financial difficulties or the transfer of the entire shareholding of a Member State in the capital of that undertaking to another public undertaking, for no consideration but in exchange for an obligation on the part of the latter to remedy the asset imbalance of the former, are classified as 'State aid' within the meaning of Article 107 TFEU, it is for the referring court to draw all the necessary inferences from the fact that the Commission was not notified of that aid, contrary to Article 108(3) TFEU, and that aid must therefore be regarded as being unlawful.

Costs

90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 107 TFEU must be interpreted as meaning that, subject to the verifications to be carried out by the referring court, both the allocation of a sum of money to a public undertaking in serious financial difficulties and the transfer of the entire shareholding of a Member State in the capital of that undertaking to another public undertaking, for no consideration but in exchange for an obligation on the part of the latter to remedy the asset imbalance of the former undertaking, can be classified as 'State aid' within the meaning of Article 107 TFEU.**

2. **EU law must be interpreted as meaning that, where measures such as the allocation of a sum of money to a public undertaking in serious financial difficulties or the transfer of the entire shareholding of a Member State in the capital of that undertaking to another public undertaking, for no consideration but in exchange for an obligation on the part of the latter to remedy the asset imbalance of the former, are classified as 'State aid' within the meaning of Article 107 TFEU, it is for the referring court to draw all the necessary inferences from the fact that the Commission was not notified of that aid, contrary to Article 108(3) TFEU, and that aid must therefore be regarded as being unlawful.**

[Signatures]

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* Language of the case: Italian.