Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

11 September 2012*

(State aid — Maritime cabotage sector — Service of general economic interest — Private investor in a market economy test — Social policy of the Member States — Restructuring aid — Effects of a judgment annulling a decision)

In Case T-565/08,

Corsica Ferries France SAS, established in Bastia (France), represented by S. Rodrigues and C. Bernard-Glanz, lawyers,

applicant,

v

European Commission, represented by C. Giolito and B. Stromsky, acting as Agents,

defendant,

supported by

French Republic, represented initially by G. de Bergues and A.-L. Vendrolini, and subsequently by G. de Bergues, N. Rouam and J. Rossi, acting as Agents,

and by

Société nationale maritime Corse-Méditerranée (SNCM) SA, represented by A. Winckler and F.-C. Laprévote, lawyers,

interveners,

ACTION for annulment of Commission Decision 2009/611/EC of 8 July 2008 concerning the measures C 58/02 (ex N 118/02) which France has implemented in favour of the Société nationale maritime Corse-Méditerranée (SNCM) (OJ 2009 L 225, p. 180),

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová, President, K. Jürimäe and M. van der Woude (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 December 2011,

* Language of the case: French.

gives the following

Judgment

Background to the dispute

Shipping companies at issue

1 The applicant, Corsica Ferries France SAS, is a shipping company operating regular services to Corsica from mainland France (Marseilles, Toulon and Nice) and Italy.

2 The Société nationale maritime Corse-Méditerranée (SNCM) is a shipping company operating regular services to Corsica from mainland France (Marseilles, Toulon and Nice) and to North Africa (Algeria and Tunisia) from France and services to Sardinia. One of the main subsidiaries of SNCM is the Compagnie méridionale de navigation ('CMN'), which is wholly owned by SNCM.

3 In 2002, SNCM was 20% held by the Société nationale des chemins de fer (French National Railways) and 80% held by the Compagnie générale maritime et financière ('CGMF'), which in turn were wholly owned by the French State. When it opened its capital in 2006, two purchasers, Butler Capital Partners ('BCP') and Veolia Transport ('VT'), assumed control of 38% and 28% of the capital, respectively, whilst CGMF maintained a presence with 25% and 9% of the capital was reserved for the employees. Since then, BCP has transferred its shares to VT.

Administrative procedure

4 By its Decision 2002/149/EC of 30 October 2001 on the State aid awarded by France to SNCM (OJ 2002 L 50, p. 66; 'the 2001 Decision'), the Commission of the European Communities found that aid of EUR 787 million granted to SNCM, during the period from 1991 to 2001, by way of public service compensation, was compatible with the common market under Article 86(2) EC. No action for annulment of that decision has been brought before the General Court.

5 By letter of 18 February 2002, the French Republic notified the Commission of a plan to grant aid for the restructuring of SNCM in an amount of EUR 76 million ('the 2002 Plan').

6 By its Decision 2004/166/EC of 9 July 2003 on aid which France intends to grant for the restructuring of SNCM (OJ 2004 L 61, p. 13; 'the 2003 Decision'), the Commission approved, with conditions attached, two tranches of restructuring aid paid to SNCM in a total amount of EUR 76 million, one of EUR 66 million, payable immediately, and the other of a maximum amount of EUR 10 million, depending on the net result from disposals relating to, in particular, SNCM's vessels.

7 The applicant brought an action for annulment of the 2003 Decision before the General Court on 13 October 2003 (Case T-349/03).

8 By its Decision 2005/36/EC of 8 September 2004 amending the 2003 Decision (OJ 2005 L 19, p. 70; 'the 2004 Decision'), the Commission amended one of the conditions imposed by Article 2 of the 2003 Decision. This concerned the condition relating to the maximum number of 11 ships of which SNCM was authorised to dispose. In the 2004 Decision, the Commission authorised the replacement of one of those ships, the *Aliso*, by another, the *Asco*.

9 By decision of 16 March 2005, the Commission approved the payment of a second tranche of aid for restructuring, in an amount of EUR 3 327 400, on the basis of the 2003 Decision ('the 2005 Decision').

10 By judgment of 15 June 2005 in Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197 ('the 2005 judgment'), the General Court annulled the 2003 Decision on the ground of an erroneous assessment of the minimal nature of the aid, due principally to calculation errors in the net proceeds from disposals, while rejecting all the other pleas in law alleging an insufficient statement of reasons and an infringement of Article 87(3)(c) EC and of the Community guidelines on State aid for restructuring and rescuing firms in difficulty (OJ 1999 C 288, p. 2; 'the Guidelines').

11 By letter dated 7 April 2006, the French authorities called on the Commission to find that, by reason of its nature as public service compensation, part of the restructuring aid agreed to under the 2002 Plan, in an amount of EUR 53.48 million, was not to be classified as a measure taken under a restructuring plan but as a measure not constituting aid in accordance with the judgment of the Court of Justice in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('*Altmark*') or as a measure independent of the 2002 Plan pursuant to Article 86(2) EC.

12 On 21 April 2006, the planned merger concerning the acquisition of joint control of SNCM by BCP and VT was notified to the Commission pursuant to Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1). The Commission authorised the merger on 29 May 2006 on the basis of Article 6(1)(b) of that regulation.

13 In June 2006, the French authorities provided the Commission with several items of information concerning the financial operations which had taken effect on the transfer of SNCM to the private sector.

14 On 13 September 2006, the Commission decided to initiate the procedure under Article 88(2) EC in regard to the new measures carried out in favour of SNCM while incorporating the 2002 Plan (OJ 2006 C 303, p. 53; 'the 2006 Decision').

15 By its Decision 2009/611/EC of 8 July 2008 concerning the measures C 58/02 (ex N 118/02) which France has implemented in favour of SNCM (OJ 2009 L 225 p. 180; the 'contested decision'), the Commission found that the measures of the 2002 Plan constituted unlawful State aid within the meaning of Article 88(3) EC but were compatible with the common market under Article 86(2) EC and Article 87(3)(c) EC and that the measures of the 2006 privatisation plan ('the 2006 Plan') did not constitute State aid within the meaning of Article 87(1) EC.

Measures at issue

16 The contested decision concerns the following measures:

— under the 2002 Plan: CGMF's capital contribution to SNCM in an amount of EUR 76 million, including EUR 53.48 million for public service obligations and the balance for restructuring aid;

— under the 2006 Plan:

  — the negative sale price of SNCM by CGMF for an amount of EUR 158 million;

  — the capital contribution from CGMF for an amount of EUR 8.75 million;

— the current account advance from CGMF for an amount of EUR 38.5 million for staff made redundant by SNCM in the event of a new social plan.

Contested decision

17 In the contested decision, in particular at recitals 37 to 54, the Commission found that the operation of passenger transport services to Corsica was a market characterised by the fact that it was seasonal and concentrated. The competitive structure of the market had changed significantly following the arrival of the applicant in 1996. Since 2000, SNCM and the applicant constituted a de facto duopoly holding over 90% of the market share. In 2007, the applicant clearly overtook SNCM and transported an additional million passengers, in a market increasing steadily by 4% per annum. SNCM, together with CMN, on the other hand, retained a near-monopoly in respect of freight transport.

18 The Commission found, at recitals 219 to 225 of the contested decision, that all the contributions received by SNCM through CGMF were financed via State resources, that they threatened to distort competition and that they had an effect on trade between Member States. Accordingly, it found that three of the four criteria of Article 87(1) EC had been fulfilled. It then examined, for each measure, the existence of a selective economic advantage and its possible compatibility with the common market.

19 As regards the EUR 76 million notified in 2002, the Commission took the view, at recital 236 of the contested decision, that EUR 53.48 million could be considered to be public service compensation. In accordance with paragraph 320 of the 2005 judgment, cited at paragraph 10 above, the Commission evaluated that contribution in the light of *Altmark*, cited at paragraph 11 above, and found, at recital 257 of the contested decision, that it indeed constituted State aid but was nevertheless compatible with the common market in accordance with Article 86(2) EC. The remaining EUR 22.52 million then had to be considered in terms of restructuring aid.

20 As regards the 2006 Plan, the Commission next applied, at recitals 267 to 352 of the contested decision, the market economy private investor test ('the private investor test') to the negative sale price of EUR 158 million. In order to do so, it evaluated whether a hypothetical private investor, in the place of and instead of CGMF, would have preferred to recapitalise CGMF for that amount or place the company in liquidation and bear the costs thereof. It was therefore necessary to assess a minimum cost of liquidation.

21 The Commission took the view, at recitals 267 to 280 of the contested decision, that the cost of liquidation had necessarily to include the cost of a social plan, namely the cost of additional redundancy payments in addition to statutory obligations and obligations under agreements, in order to comply with the practice of large groups of undertakings today and to not harm the brand image of the holding company to which it belongs and its ultimate shareholder. It therefore calculated, with the help of an independent expert, the cost of those additional redundancy payments by carrying out a comparison with social plans implemented recently in France by groups of undertakings such as Michelin and Yves Saint-Laurent.

22 At recital 350 of the contested decision, the Commission found that the negative sale price was the result of an open, transparent, unconditional and non-discriminatory selection procedure, and that, in that regard, it constituted a market price. Consequently, accepting the premiss of the cost of liquidation being limited to redundancy payments alone, it concluded, at recital 352 of that decision, that the cost of liquidation was higher than the negative sale price and that the capital contribution of EUR 158 million did not therefore constitute State aid within the meaning of Article 87(1) EC.

23 As regards the capital contribution of EUR 8.75 million from CGMF, the Commission took the view, at recitals 356 to 358 of the contested decision, that since the contribution of the private purchasers was significant and concurrent, it could be automatically excluded that this was in the nature of aid. Next, it stated that the fixed rate of profitability constituted an adequate return on the capital invested and that the existence of a clause to cancel the sale was not such as to call into question the equal treatment. It concluded, at recital 365 of that decision, that CGMF's capital contribution, in an amount of EUR 8.75 million, did not constitute aid within the meaning of Article 87(1) EC.

24 Next, the Commission observed, at recitals 372 to 378 of the contested decision, that the measures involving aid to individuals, up to EUR 38 million, deposited in an escrow account would be carried out should a new social plan be implemented by the purchasers and that the measures did not reflect the implementation of the staff reductions provided for under the 2002 Plan. According to the Commission, that aid could be paid only to individuals whose employment contract with SNCM had been terminated prematurely. Those measures did not therefore constitute charges arising out of the normal application of the social legislation applicable to cases where employment contracts have been terminated. The Commission concluded that that aid to individuals, approved of by the State in the exercise of its public authority and not by the State in its capacity as shareholder, therefore fell within the Member States' social policy and by the same token did not constitute aid within the meaning of Article 87(1) EC.

25 As regards the balance of EUR 22.52 million notified under restructuring aid, namely the balance of EUR 76 million notified under the 2002 Plan and of the EUR 53.48 million considered to be compatible with the common market pursuant to Article 86(2) EC (see paragraph 19 above), the Commission found, at recital 381 of the contested decision, that this constituted State aid within the meaning of Article 87(1) EC. Next, it assessed the compatibility of that measure with the Guidelines.

26 The Commission stated, at recitals 387 to 401 of the contested decision, that, in 2002, SNCM was indeed a firm in difficulty within the meaning of point 5(a) and of point 6 of the Guidelines and that the 2002 Plan was capable of helping the company restore its viability, in accordance with points 31 to 34 of the Guidelines.

27 In respect of the avoidance of undue distortions of competition (points 35 to 39 of the Guidelines), the Commission took the view, at recital 404 of the contested decision, that there was no excess capacity on services by sea to Corsica and that it was therefore not necessary to contribute to its improvement. It considered next, at recital 406 of the contested decision, that the restructuring plan significantly reduced the firm's presence on the market. The criteria relating to the prevention of undue distortions of competition was therefore also satisfied.

28 At recitals 410 to 419 of the contested decision, the Commission observed that the need for aid, calculated at the minimum under points 40 and 41 of the Guidelines, was limited to EUR 19.75 million on 9 July 2003, subject to the net proceeds of the disposals provided for by the 2003 Decision. To that end, the Commission began by calculating SNCM's cash-flow requirements for its restructuring plan. According to the Commission, the cost of the restructuring plan was determined at EUR 46 million. Next, it deducted all the disposals made between 18 February 2002 (date of notification of the 2002 Plan) and 9 July 2003 (date of adoption of the 2003 Decision), namely EUR 26.25 million, to arrive at an amount of EUR 19.75 million.

29 As regards the compensatory measures, the Commission found that almost all the conditions provided for under the 2003 Decision concerning the acquisitions, the use of the fleet, the disposal of assets, the prohibition on offering lower fares than those of each of its competitors ('the condition of price leadership') and the limitation on the number of round trips on routes departing from Corsica had been complied with. In so far as those conditions had been satisfied and the amount of the aid notified was substantially less than the amount approved in 2003, the Commission did not consider it appropriate to impose additional obligations. Accordingly, after having taken account of the amount of

the additional disposals provided for under the 2003 Decision, the Commission found, at recital 434 of the contested decision, that the final restructuring balance, established at EUR 15.81 million, was State aid compatible with the common market pursuant to Article 87(3)(c) EC.

30 The operative part of the contested decision reads as follows:

'*Article 1*

The compensation of EUR 53.48 million for public service obligations paid by the French State to SNCM for the period 1991-2001 constitutes unlawful State aid for the purpose of Article 88(3) of the EC Treaty but is compatible with the common market under Article 86(2) thereof.

The negative sale price of SNCM of EUR 158 million, the EUR 38.5 million in social measures aimed at employees and borne by CGMF, as well as the related and concurrent recapitalisation of SNCM by CGMF for the sum of EUR 8.75 million do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

The EUR 15.81 million in restructuring aid operated by France to benefit SNCM constitutes illegal aid within the meaning of Article 88(3) of the EC Treaty but is compatible with the common market under Article 86(2) thereof.

Article 2

This Decision is addressed to the French Republic.'

Procedure and forms of order sought

31 By application lodged at the Registry of the Court on 17 December 2008, the applicant brought the present action.

32 By order of 27 April 2009, the French Republic was granted leave to intervene.

33 By order of 1 July 2009, SNCM was granted leave to intervene.

34 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure.

35 In the context of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, the Court requested the parties to answer certain questions and to produce certain documents. The parties complied with those requests within the periods prescribed.

36 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

37 The Commission, the French Republic and SNCM contend that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

38 In support of the present action for annulment, the applicant raises, in essence, six pleas in law.

39 The first plea in law is an argument regarding an interpretation which is allegedly too broad of Article 287 EC, which results in an inadequate statement of reasons for the contested decision as well as in an infringement of the rights of the defence and of the right to an effective legal remedy.

40 The second, third, fourth, fifth and sixth pleas in law allege an infringement of Articles 87 EC and 88 EC and of the Guidelines. Those pleas in law concern, successively, the capital contribution of EUR 53.48 million as public service compensation, the disposal of SNCM at a negative price of EUR 158 million, the capital contribution from CGMF of EUR 8.75 million, the aid measures to individuals of EUR 38.5 million and the balance of EUR 22.52 million notified as restructuring aid.

The first plea in law, alleging an inadequate statement of reasons and an infringement of the rights of the defence and of the right to an effective legal remedy

41 By the present plea in law, the applicant claims that the contested decision, in essence, is vitiated by an inadequate statement of reasons, in so far as essential information had been redacted by the Commission, on the ground of confidentiality, in the version communicated to the applicant. In the alternative, it submits that it was not sufficiently consulted on the subject of the data which related to it.

42 In that regard, it must be borne in mind that, according to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct or individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question as to whether the statement of reasons for a measure meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited).

43 Similarly, it should be recalled that Article 287 EC obliges the members, officials and agents of the institutions of the Community not to disclose information which by its nature is covered by the obligation of professional secrecy. However, the obligation laid down in Article 287 EC to preserve professional secrecy cannot be invoked as justification for deficiencies in the statement of reasons. The obligation to respect professional secrecy cannot therefore be given so wide an interpretation that the obligation to provide a statement of reasons is deprived of its essential content, thus making it difficult for the Member States and the interested parties to prepare their defence (see, to that effect, Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 27). In particular, the requirement to provide reasons for a decision taken in regard to State aid cannot be determined solely on the basis of the interest which the Member State to which that decision is addressed may have in obtaining information. Where a Member State has obtained from the Commission what it was seeking, namely authorisation for its planned aid, its interest in having a reasoned decision addressed to it may be greatly reduced, in contrast to that of competitors of the beneficiary of the aid (see, to that effect, Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 92).

44 Furthermore, it must be noted that, in accordance with settled case-law, a statement of claim must be sufficiently clear and precise to enable the European Union Courts to exercise their power of judicial review and the defendant to prepare its defence. In order to guarantee legal certainty and sound administration of justice, it is therefore necessary that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently, precisely and intelligibly in the application itself (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 31, and Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraph 208). It is also apparent from the combined provisions of Article 44(1) of the Rules of Procedure that the application initiating proceedings must indicate the subject-matter of the dispute and set out in summary, but clear and precise, form the pleas raised.

45 It is in the light of the foregoing considerations that the present plea must be examined.

46 In the first place, as regards the obligation to state reasons, it is firstly necessary to take account of the fact that the contested decision was adopted after the decisions taken between 2001 and 2005 and after the 2005 judgment, cited at paragraph 10 above. The contested decision was therefore adopted in a context which was well known to the applicant (see, to that effect, Case T-17/02 *Olsen* v *Commission* [2005] ECR II-2031, paragraph 97).

47 Secondly, in the light of the application, it is necessary to note that the applicant was in a position properly to defend itself. Likewise, the contested decision was sufficiently clear and precise to enable the European Union Court to exercise its power of judicial review.

48 Thirdly, it is necessary to note that, in the present case, the applicant does not state, in a sufficiently precise manner, which essential information from the contested decision had been redacted. The only specific information put forward by the applicant is presented allusively, without the applicant taking the trouble to show in what respect it was essential in the light of the obligation to state reasons.

49 Consequently, the complaint alleging infringement of the obligation to state reasons must be rejected as being unfounded.

50 In the second place, as regards the alleged infringement of the rights of the defence, the Commission was not obliged to consult the applicant on the subject of the data and assessments relating to the latter. Companies receiving aid or their competitors are considered to be 'interested parties' only during the administrative procedure. Accordingly, the case-law confers on the parties concerned essentially the role of information sources for the Commission in the administrative procedure instituted under Article 88(2) EC. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, interested parties have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (*British Airways and Others* v *Commission*, cited at paragraph 43 above, paragraphs 59 and 60, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 125).

51 In the present case, the applicant had the opportunity effectively to make known its views on the accuracy and relevance of the various points of fact and law relating to the operation at issue. The information available to the Court, regarding the applicant's participation in the administrative procedure, shows clearly that it had the opportunity to set out its opinion both on the 2002 Plan and on the 2006 Plan, as is apparent from recitals 24, 131 to 134 and 142 to 159 of the contested decision. The applicant therefore had the opportunity to participate fully in the procedure by providing the Commission, on several occasions, with its written observations.

52 Consequently, the complaint alleging infringement of the rights of the defence must be rejected as being unfounded.

53 In the third place, as regards the alleged infringement of the right to an effective legal remedy, it must be borne in mind, first, that the applicant's complaints concerning the infringements of the obligation to state reasons and the rights of the defence have been rejected as being unfounded (see paragraphs 49 and 52 above). Second, it is necessary to state that the applicant did not put forward any specific argument in support of its complaint. Consequently, the complaint alleging an infringement of its right to an effective legal remedy must also be rejected as being unfounded.

54 In the light of the foregoing, the first plea in law must be rejected as being unfounded.

The second plea in law, alleging, in essence, a manifest error of assessment by the Commission resulting from the approval of the capital contribution of EUR 53.48 million under Article 86(2) EC, read in conjunction with Article 87(1) EC

55 The applicant claims, in essence, that the Commission committed a manifest error of assessment in taking the view that SNCM was entitled to receive a capital contribution of EUR 53.48 million as public service compensation, in particular having regard to the fact that the territorial continuity could have been ensured by the interplay of market forces alone.

56 In that regard, it should be borne in mind that European Union law does not provide a precise definition of the concept of services of general economic interest ('SGEIs'), referred to in Article 86(2) EC. On the contrary, it follows from the Court's case-law that the Member States have a wide discretion in defining what they regard as SGEIs and that the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error. However, the Member State's power to take action under Article 86(2) EC, and, accordingly, its power to define SGEIs, is not unlimited and cannot be exercised arbitrarily for the sole purpose of removing a particular sector, such as maritime cabotage, from the application of the competition rules (*Olsen* v *Commission*, cited at paragraph 46 above, paragraph 216; Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraphs 165 to 169; and judgment of 6 October 2009 in Case T-8/06 *FAB* v *Commission*, not published in the ECR, paragraph 63).

57 More specifically, as regards the SGEI relating to maritime transport, Article 4(1) of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7; 'the Cabotage Regulation') provides expressly for the possibility of concluding public service contracts in order to ensure the adequacy of regular transport services to, from and between islands, provided that there is no discrimination. The Court of Justice found in Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 27, that the objective of territorial continuity is a legitimate public interest.

58 In the present case, it is apparent from the contested decision that, in order to comply with paragraph 320 of the 2005 judgment, cited at paragraph 10 above, the Commission examined, at recitals 226 to 244, the capital contribution of EUR 53.48 million in the light of *Altmark*, cited at paragraph 11 above. The Commission stated, at recital 244 of the contested decision, that that capital contribution gave SNCM a selective economic advantage and consequently constituted State aid within the meaning of Article 87(1) EC. Next, it took the view, at recital 257 of the contested decision, that that aid was compatible with the common market under Article 86(2) EC.

59 As regards the existence of an SGEI, the Commission limited itself to stating briefly, at recital 249 of the contested decision, the reasons for which it considered that the public service delegation ('PSD') agreements met a real need for public service. It must be noted that the PSD agreements, signed between the delegating public authorities and companies, are contracts specifying the public service obligations capable of making it possible to implement the principle of territorial continuity. SNCM had been chosen by the French State in 1976 to ensure the territorial continuity for a period of 25 years. In accordance with the new Community rules, and following a European call for tenders,

SNCM and CMN together obtained the PSD for the operation of services to Corsica for the periods from 2002 to 2006, and subsequently from 2007 to 2013. In the contested decision, the Commission pointed out that the principle of territorial continuity dealt with the disadvantages which insularity created, that that legitimate objective could not in the present case be achieved through the interplay of market forces alone and, finally, referred to its thorough analysis of the competitive situation expounded in the 2001 Decision.

60 In so far as it is apparent from recital 249 of the contested decision that the Commission limited itself to providing, in a summary fashion, reasons for the existence of an SGEI for the period from 1991 to 2001 and to refer to the 2001 Decision for further explanations, it is necessary to assess whether it was right to base itself in part on that earlier decision in order to justify the existence of an SGEI in the contested decision, or whether it was, on the contrary, required, as the applicant claims, to re-examine that decision in depth.

61 In that regard, it must be noted, in the first place, that point 7.2 of the 2001 Decision established in a convincing manner that there was a real need for a public service. The question whether the competition, in particular having regard to the applicant's entry into the market in 1996, was able to ensure that the objective of territorial continuity would be met is dealt with at recitals 72 and 74 of the 2001 Decision. The Commission considered, in particular, at recital 72 of the 2001 Decision, the line-by-line development between Corsica and France for the period from 1996 to 2001 as set out in the applicant's tender. The Commission next concluded, at recital 74 of that decision, that private operators were unable to ensure the territorial continuity outside of the PSD, both as concerns the qualitative and quantitative criteria provided for under the scheme set up by the agreement, itself described, as well as the legal framework, at recitals 18 to 30 of that decision and outlined briefly at recitals 73, 75 and 80 thereof. The 2001 Decision examined in detail the relationship between competition and the minimum public service until April 2001 (recital 72) and was not the subject of any action for annulment brought by the applicant.

62 In the second place, it must be noted that the genuine nature of the public service which is the subject of the PSD agreement was never disputed by the applicant or by any other interested parties during the various administrative and judicial proceedings before the European Union institutions which followed the 2001 Decision. In particular, the action for annulment of the 2003 Decision, brought by the applicant on 13 October 2003, sought to dispute the Commission's assessment of the compensation for the public service of part of the aid, and not the existence of the public service itself.

63 In the third and final place, during the administrative procedure which led to the adoption of the contested decision, the applicant also did not dispute the existence of a public service. It is apparent from recital 146 of the contested decision that the applicant claimed that none of the criteria set out in *Altmark*, cited at paragraph 11 above, was satisfied in the present case, with the exception of the first, namely in relation to the existence of an actual public service.

64 It follows from all the foregoing considerations that, in the absence of any new factor being brought to its attention by the interested parties, in particular during the administrative procedure which led to the adoption of the contested decision, and in the light of the evidence which it had before it, the Commission was entitled to provide merely a summary statement of reasons and to refer to the 2001 Decision in order to consider the existence of an actual public service as established for the period from 1991 to 2001, a period, furthermore, well before the contested decision.

65 It must therefore be stated that, in the context of its limited review of the definition of SGEIs by the Member States (*BUPA and Others* v *Commission*, cited at paragraph 56 above, paragraph 166), the Commission did not commit a manifest error of assessment in finding that the PSD agreement addressed a real need for public service for the period from 1991 to 2001.

66 For the sake of completeness, it must be noted that the arguments put forward by the applicant concerning, principally, its presence on the market at that time, are not such as to call that assessment into question.

67 In the first place, the fact that the applicant was already present on the market at the time of the renewal of the PSD contract in 2001, although that fact is established, is not such as to affect the Commission's conclusion. It is apparent from the documents before the Court that the applicant was totally absent from the market prior to 1996 and did not open a line between Toulon and Corsica until 2000. It held only 12% market share in terms of places offered during the summer period between Corsica and France in 2000. Its market share, however, was rapidly growing, amounting, in particular, to 30% in 2001. Even though the applicant's presence on the market therefore started to make itself felt more strongly during the last two years of the period under consideration, in particular in 2001, that could not in itself prove that market forces were capable of enabling a given operator to meet the obligations of the PSD contract as defined by the framework agreement, both in qualitative and in quantitative terms. The applicant does not adduce any specific evidence concerning, for example, its capacity to meet the frequency objectives in low season and in the peak period on all routes, the times of departure and arrival or the type of vessel, at the level of the transportation of passengers as well as at that of goods, and also in respect of its capacity to serve the numerous Corsican ports.

68 In the second place, it must be stated, as the applicant points out, that the PSD was abandoned on routes departing from Nice and Toulon in favour of a system of social aid services for certain categories of passengers, including Corsican residents, and frequency of service obligations for all operators. Those systems of social aid were considered to be compatible with the common market by the Commission under Article 86(2) EC. However, contrary to what the applicant claims, although it is unquestionable that its progressive arrival on the market points to an intensification of competition, an objective, moreover, highlighted by the European Union since the implementation of the Cabotage Regulation, that cannot call into question the public service nature of the PSD during the period under consideration, all the more so as it is evident from recital 36 of the contested decision that the social aid system was established only in 2002, namely after that period.

69 Rather than indicating unjustified aid intended to 'save' SNCM, as the applicant claims, the move to social aid indicates sound management by the awarding authority. By progressively limiting the compensation paid to SNCM, the Office des transports de la Corse (the Corsican Transport Office; 'the OTC') limited the cost to the consumer and adapted the compensation, as required by Article 86(2) EC. The OTC therefore responded to the requirement to take into account the development of market forces and acted diligently by launching an assessment on the change of system after the year 2000. Finally, it should be pointed out that the existence of social aid in itself tends to demonstrate the existence of a real need for public service. The fact that the scope of that public service was limited by the OTC cannot call this fact into question.

70 In the third and last place, as regards the applicant's argument that the decision of the tribunal administratif de Bastia (Administrative Court of Bastia) (France) of 5 July 2001 annulling the peak services during the summer period has the effect of showing that there was no real public service, it suffices to state that that decision was annulled by the French Conseil d'État (Council of State) on 24 October 2001, as SNCM points out. Finally, as regards the judgment of the cour administrative d'appel de Marseille (Administrative Court of Appeal, Marseilles) (France) of 7 November 2011, cited by the applicant during the hearing, it must be noted that that judgment concerns the most recent PSD period, running from 2007 to 2013. Consequently, the analyses of the existence of a real need for public service during that period are unable to adduce any conclusive evidence capable of calling into question the Commission's assessment for the period from 1996 to 2001, in particular in the light of the particularly rapid development of competition on the market at issue.

71 In the light of the foregoing, the second plea in law must be rejected as being unfounded.

The third plea in law, alleging a manifest error of assessment by the Commission concerning the approval of the disposal of SNCM at a negative price of EUR 158 million as a measure not constituting aid within the meaning of Article 87(1) EC

72 In support of its third plea in law, the applicant puts forward six complaints seeking to challenge the Commission's application of the private investor test to the negative sale price of EUR 158 million. Firstly, it submits that the Commission made an improper link between the social problems of 2005 and the high probability of a liquidation of SNCM. Secondly, it submits that the test of comparability with the recent social plans was not sufficiently justified. Thirdly, it submits that the additional redundancy payments cannot be included in the minimum cost of liquidation. Fourthly, it submits that the economic impact of the right to sell should have been analysed. Fifthly, it submits that the Commission's failure to take account of the French State's liability in the current situation of SNCM is not in line with its decision-making practice. Sixthly, it submits that equal treatment between CGMF and the purchasers has not been ensured.

73 The Court considers that it is appropriate to start the examination of the third plea in law with the third complaint.

74 In the context of this third complaint, the applicant claims that, in the light of the case-law, the Commission could not include, in the calculation of the hypothetical cost of liquidation of SNCM, additional redundancy payments going beyond the strict statutory obligations and obligations under agreements, in so far as such an approach cannot be a characteristic of the conduct of a private investor guided by prospects of profitability in the long term. In answer to a written question from the Court, the applicant specified the scope of its complaint by claiming, first, that, contrary to what the Commission maintains at recital 270 of the contested decision, the protection of the brand image of CGMF, the sole shareholder of which was SNCM, could not constitute a sufficient reason to justify making additional redundancy payments. Second, it claimed that the payment of additional redundancy payments was intended, in actual fact, to limit the occurrence of social problems in the event of SNCM's liquidation, something which follows from the objectives of the State in the exercise of its public authority, not from the conduct of a private investor.

75 It is apparent from the contested decision that, with a view to assessing whether SNCM had benefited from a selective economic advantage for the purposes of Article 87(1) EC, the Commission compared, at recitals 259 to 352, the negative sale price of EUR 158 million with a hypothetical cost of liquidation of the company. According to the Commission, the cost of liquidation, calculated at the minimum, is limited in the present case to the cost of the additional redundancy payments (recital 306 of the contested decision). In the Commission's view, those have become a de facto obligation for large groups nowadays in the event of winding up a subsidiary or closing a site. In the present case, the provision of additional redundancy payments is particularly necessary, given the recurrent social problems within SNCM, in order to protect the brand image of CGMF and the French State (recitals 270 and 271 of the contested decision). The Commission then concluded that, as the amount of the additional redundancy payments was higher than the cost of recapitalisation, the negative sale price of EUR 158 million did not include elements of State aid within the meaning of Article 87(1) EC.

76 In that regard, it is necessary to note that, according to case-law, investment by public authorities in the capital of undertakings, in whatever form, may constitute State aid (see Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 125 and the case-law cited).

77 However, it must also be borne in mind that, according to its Article 295, the EC Treaty does not influence the rules in Member States governing the system of property ownership. Accordingly, the Member States are free to undertake, directly or indirectly, economic activities in the same way as private companies. That principle of equal treatment between the public and private sectors implies that the Member States may invest in economic activities and that the capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal

market conditions cannot be regarded as State aid (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 29; Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 20; and Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 70).

78 In order to determine whether the privatisation of SNCM for a negative sale price of EUR 158 million involved elements of State aid, it is therefore necessary to assess whether, in similar circumstances, a private investor could have been prompted to make a capital contribution of such an amount in the context of the sale of that company, or whether he would have opted to liquidate it (see, to that effect, Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 70, and Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 133).

79 With a view to applying the private investor test, a distinction has to be drawn between the obligations which the State must assume in its capacity as a company exercising an economic activity and its obligations as a public authority (see, to that effect, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 22, and *Germany* v *Commission*, cited at paragraph 78 above, paragraph 134). When an investment by a State occurs in the course of the exercise by the State of its public authority, the conduct of the State can never be compared to that of an operator or private investor in a market economy (Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, paragraph 85).

80 However, in making that distinction between economic activities, on the one hand, and public authority intervention, on the other hand, it is necessary to take account of the fact that the conduct of a private investor, with which the intervention of a public investor must be compared, need not necessarily be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term. That conduct must, at least, be the conduct of a private holding company or a private group of undertakings pursuing a structural policy – whether general or sectoral – and guided by prospects of profitability in the longer term (Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 20).

81 Moreover, both the content of national social legislation and the practice of social relations within large groups of undertakings develop over time and differ within the European Union. Therefore, it is necessary that the monitoring of State aid should reflect the development of such use, as regards both the investments made by private companies and those made by the State, in accordance with the principle of equal treatment and without altering its effectiveness.

82 It should also be noted that, in a social market economy, a reasonable private investor would not disregard, first, its responsibility towards all the stakeholders in the company and, second, the development of the social, economic and environmental context in which it continues to develop. The challenges relating to social responsibility and the entrepreneurial context are, in actual fact, capable of having a major impact on the specific decisions and strategic planning of a reasonable private investor. The long-term economic rationale of a reasonable private entrepreneur's conduct cannot therefore be assessed without taking account of such concerns.

83 For that purpose, the payment by a private investor of additional redundancy payments is, in principle, capable of constituting a legitimate and appropriate practice, depending on the circumstances of the case, with a view to fostering a calm social dialogue and maintaining the brand image of a company or group of companies. The cost of additional redundancy payments is to be distinguished from the cost of social protection, which is necessarily a matter for the State in the event that a company goes into liquidation. Under the principle of equal treatment (see paragraph 75 above), the option of making additional redundancy payments is also open to the Member States in the event that a public company goes into liquidation, even though their obligations cannot in principle exceed the strict minimum under statutory obligations and obligations under agreements.

84 None the less, the assumption of the burden of those additional costs, because of legitimate concerns, cannot follow an exclusively social, even political, objective, as it would otherwise go beyond the framework of the private investor test as defined at paragraphs 76 to 82 above. In the absence of any economic rationale, even in the long term, the assumption of the burden of costs which exceeds the strict statutory obligations and obligations under agreements must therefore be considered to be State aid within the meaning of Article 87(1) EC.

85 In that regard, it should be specified that the protection of the brand image of a Member State as a global investor in the market economy cannot constitute, other than under specific circumstances and without a particularly cogent reason, sufficient justification to demonstrate the long-term economic rationale of the assumption of additional costs such as additional redundancy payments. To enable the Commission to refer summarily to the brand image of a Member State, as a global player, in order to support the finding that there is no aid within the meaning of Article 87(1) EC is such, first, as to distort the conditions of competition on the common market in favour of undertakings operating in Member States in which the public economic sector is relatively more developed, or in which social dialogue has been adversely affected to a particular degree, and, second, as to reduce improperly the effectiveness of the Community rules on State aid.

86 It should also be borne in mind that, in the context of the private investor test, it is for the Commission, in its broad discretion, to define the economic activities of the State, in particular at the geographic and sectoral level, in relation to which the long-term economic rationale of that Member State's conduct has to be assessed.

87 Without a sufficiently precise definition of the economic activities concerned, the Commission cannot be in a position, first, to define reference private investors and, therefore, to determine, on the basis of objective and verifiable factors, whether there is a sufficiently well-established practice amongst those investors. Second, in the absence of such a comparator, the definition of the economic activities concerned is also necessary in order to make it possible to establish the existence of a reasonable and sufficiently substantiated probability that the Member State will obtain an indirect material benefit, even in the long term, from the conduct at issue.

88 As regards, finally, the scope and nature of the judicial review, firstly, it is important to note that State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the European Union Courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25, and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 111). The European Union Courts must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 65 and the case-law cited).

89 It is in the light of those principles that the third complaint of the third plea in law must be examined.

90 In that regard, it must be stated at the outset that the Commission has not defined, in an unambiguous manner, the French State's economic activities for which a need to protect the brand image might potentially exist.

91 It is apparent from recitals 270 and 271 of the contested decision that the brand image to be protected is that of the 'holding company to which it belongs and its ultimate shareholder', namely that of CGMF and the French State. On that point, it must be noted, as the applicant has correctly pointed out, that CGMF has no other asset in the maritime transport sector. The argument relating to protection of the brand image could not therefore, in any event, concern CGMF.

92 Next, in answer to a written question from the Court, the Commission maintained that the brand image worthy of protection was, in actual fact, that of the French State as a global investor in the market economy. Finally, at the hearing, the Commission changed its position again, stating, several times, that the argument relating to protection of the brand image applied in fact to the French State as an investor in the transport sector. The French Republic, by contrast, referred to the French State as a global investor in the market economy.

93 It must therefore be held that the Commission has failed to define, to the requisite legal standard, the French State's economic activities in relation to which it was necessary to assess the economic rationale of the measures at issue in the present case (see paragraphs 86 and 87 above).

94 In the absence of such a definition, it is, as a matter of principle, impossible for the Court to monitor the long-term economic rationale of the negative sale price of SNCM which the French State granted in order to avoid making additional redundancy payments in the event of liquidation (see paragraphs 86 and 87 above). In that respect alone, it must be held that the Commission erred in law.

95 Furthermore, irrespective of the definition of the economic activities concerned, it must be stated, in the first place, that the Commission has not adduced sufficient objective and verifiable data capable of showing that the making of additional redundancy payments, in similar circumstances, is an established practice among private entrepreneurs.

96 It is necessary to note, firstly, that the Commission did not deal with that question in the contested decision, other than at footnote 135. At recitals 267 and 268 of the contested decision, the Commission limited itself to noting that the payment of additional redundancy payments, in the same way as other measures such as support for seeking employment, had become an established practice among large groups of undertakings, but without producing any evidence whatsoever to that effect. Although it is established, as the Commission maintained at recital 267 of the contested decision, that large groups of undertakings cannot disregard the social consequences of closing a production site, that cannot, on the other hand, mean, without any other evidence, that the payment of additional redundancy payments is an established practice among large groups of undertakings in the event of the liquidation of a subsidiary.

97 At recital 272 of and footnote 135 to the contested decision, the Commission again confirmed that the fact that the additional redundancy payments were not included in the hypothetical cost of liquidation would amount to overlooking the social reality which large groups of undertakings face, and it limited itself to referring, as proof of that assertion, to its Decision 92/266/EEC of 27 November 1991 on the conversion activities of French public industrial groups outside the steel and coal industries and excluding the Compagnie générale maritime, pursuant to Articles 92 to 94 of the EEC Treaty (OJ 1992 L 138, p. 24) and to the social plans cited subsequently. In that regard, suffice it to note, first, that a decision dating from 1991 is not such as to prove the existence of a social practice sufficiently established at the time of the privatisation in 2006 and, second, that the mere reference to a limited number of social plans is also not capable of demonstrating the existence of a sufficiently established practice in cases comparable to the present. This applies a fortiori as those social plans concern restructuring operations, and not liquidation operations, as the Commission acknowledged during the hearing, in sectors which, in principle, have nothing in common with transport infrastructure, such as cosmetics (Yves Saint-Laurent Haute Couture) or agri-food (Danone).

98 Secondly, it should be pointed out that the only factual elements put forward by the Commission, at recitals 274 to 277 of the contested decision, were put forward, essentially, in order to produce an estimate of the cost of those payments per employee, and not in order to substantiate the existence of a sufficiently established practice, as the Commission confirmed at paragraph 41 of the rejoinder. In that regard, it may, moreover, be noted that the estimates put forward vary significantly depending on the undertakings and sectors concerned.

99 Thirdly, neither the Commission nor the interveners have adduced evidence establishing a practice of additional redundancy payments being made, either in their written answers to the Court's questions or during the hearing. The Commission did not in fact deal with that question at all, while the French Republic mentioned only one single private company, in the iron- and steel-making sector, which appears to contemplate the making of such additional redundancy payments.

100 In the light of paragraphs 96 to 99 above, it must be held that the Commission has been unable to demonstrate that the payment of additional redundancy payments was a sufficiently established practice among private entrepreneurs.

101 In the second place, it must be noted that the Commission has also failed to adduce sufficient objective and verifiable evidence capable of demonstrating that, in the absence of an established practice on the part of private investors, the French State's conduct was motivated, in the present case, by a reasonable probability of obtaining an indirect material profit, even in the long term (see paragraphs 86 and 87 above).

102 It must be stated, once again, that that question is, essentially, not addressed at all in the contested decision. The Commission limited itself, at recitals 270 and 271, to confirming that the social tensions within the undertaking, which were, according to it, demonstrated by the social conflict which took place during 2004, would lead, in the event of the liquidation of SNCM, to social problems liable to alter the brand image of its parent company and its ultimate shareholder. For that reason, the Commission did not put forward any factor, in the contested decision, capable of explaining the specific nature of the damage suffered and, in particular, of specifying the stakeholders (users, clients, suppliers or staff) in relation to whom the brand image of CGMF and the French State would be affected. Moreover, the contested decision contains no factor which has the effect of demonstrating that the Commission attempted to quantify the damage suffered, damage which must, however, necessarily be compared with the estimated cost of the additional redundancy payments for which it constitutes the justification.

103 In its written answer to the Court's questions, the Commission submitted that social problems would probably arise in companies controlled by the State and operating close to SNCM, such as the port of Marseilles, and could also take place in all public companies, irrespective of the sector, in particular in transport. Accordingly, it is the brand image of the State as an employer which would suffer. Consequently, a liquidation of SNCM, without the making of redundancy payments, would, according to the Commission, probably give rise to solidarity strikes throughout the public service, such as those which had taken place in certain private companies. The French Republic specified, during the hearing, that the deterioration of the brand image, in its view, had to be understood as a deterioration of the brand image in the view of all its commercial partners and their non-professional clients. Furthermore, the Commission outlined specific risks of violence and damage to property.

104 Apart from the late nature of the reasoning submitted, the Court finds, in any event, that the information presented in the written answers and during the hearing is not capable of constituting sufficiently convincing reasoning to justify inclusion of the additional redundancy payments in the hypothetical cost of liquidating SNCM.

105 It is necessary to state, firstly, that the Commission has not put forward any information capable of establishing the existence, in the present case, of a reasonable probability that the social costs justifying payment of the additional redundancy payments would arise. That risk has not been studied by the Commission at all, as the latter acknowledged at the hearing. In essence, the Commission limited itself to confirming that there was a risk of solidarity strikes, without providing any indication whatsoever as to their size, other than stating that they might affect all public companies, in particular those in the transport sector. By way of specific example, the Commission limited itself to mentioning the potential consequences for the State's commercial activities which would follow from a blockade of the port of Marseilles, as occurred during the social problems of March 2011. It also gave three examples of blockades of production sites which occurred in France and in Belgium during the last 15 years. Consequently, although it may be considered to be sufficiently established that high social tensions existed within SNCM, as is apparent, for example, from recital 271 of the contested decision, the information provided cannot establish, in the present case, that there was, on the date of adoption of that decision, a genuine risk of solidarity strikes in other companies controlled, directly or indirectly, by the French State.

106 Secondly, it must be noted that the Commission's failure to attempt to quantify the indirect social costs is particularly damaging because those costs must be considerable in order to justify its reasoning. The cost of the additional redundancy payments amounts, by definition, to more than EUR 158 million, which is the negative sale price of SNCM. In order for the additional redundancy payments to be justified, their cost must be lower than the indirect social costs, such as those of solidarity strikes. It follows that the amount of the indirect social costs, in the event that they do in actual fact arise, must be particularly high in order to justify the Commission's reasoning.

107 Thirdly, in the light of the information provided by the Commission, it is necessary to point out that there is nothing in the case-file to justify the conclusion that granting to SNCM employees additional redundancy payments could have prevented social problems from arising in the event of the liquidation of the company, a fact acknowledged by the Commission during the hearing. The Commission not only omitted to analyse the probability of the abovementioned indirect social costs arising, but also failed to analyse the risk that they might occur even if the additional redundancy payments were paid. In the latter case, the indirect social costs put forward, which constituted the justification for those payments, would therefore have had to be borne by the French State despite the award of additional payments.

108 The Commission has therefore not adduced any evidence making it possible to show, to the requisite legal standard, how the inclusion of the considerable cost of the additional redundancy payments, which, moreover, may reach up to 10 times the amount of the statutory obligations and obligations under agreements alone, as is apparent from recital 277 of the contested decision, might have been motivated, in the present case, by a reasonable probability that the French State would obtain a material indirect benefit, even in the long term. Although it is impossible to exclude the risk of certain social consequences in other public companies in the event of a liquidation of SNCM without additional redundancy payments being made, the scale of the indirect social costs concerned, and the probability of their being incurred, was not analysed by the Commission at all, even in its written answers to the Court. Consequently, it is necessary to take the view that the long-term economic rationale of the French State's conduct has not been demonstrated to the requisite legal standard.

109 In the light of paragraphs 72 to 108 above, the applicant's third complaint must be upheld. It is for that reason necessary to uphold the third plea in law, without it being necessary to analyse the first, second, fourth, fifth and sixth complaints. The consequences for the lawfulness of the contested decision will be examined at paragraph 155 et seq. below.

The fourth plea in law, alleging a manifest error of assessment by the Commission resulting from the approval of CGMF's capital contribution of EUR 8.75 million as a measure not constituting aid within the meaning of Article 87(1) EC

110 The applicant puts forward two complaints in support of the present plea in law, alleging, on the one hand, a misapplication of the criterion that the capital contributions of the private purchasers and those of CGMF must be made at the same time and, on the other hand, the failure to comply with the principle of equal treatment.

111 It is apparent from recital 72 of the contested decision that the joint and concurrent subscription by the purchasers and CGMF of new shares for EUR 35 million, 25% of which were taken by CGMF, was provided for by Section III of the memorandum of understanding. That subscription had to take place after the recapitalisation of an amount of EUR 142.5 million and the disposal of 75% of the shares to private purchasers for a symbolic amount.

112 At recital 354 of the contested decision, the Commission first of all expressed the view that a public capital contribution did not constitute aid if large-scale private investments were made at the same time. It then went on to take the view that it was able to limit itself to analysing the simultaneous occurrence of the capital contributions, in so far as those contributions were significant, without carrying out an analysis of the yields, in order to be able to conclude that there was no State aid within the meaning of Article 87(1) EC. In so far as the criterion of simultaneity had been observed, it found, at recital 360 of the contested decision, that CGMF's capital contribution of EUR 8.75 million did not confer any economic advantage on SNCM and was therefore not aid.

113 Next, it was only after having established that there was no State aid within the meaning of Article 87(1) EC that the Commission addressed, at recitals 361 to 363 of the contested decision, the question whether the fixed yield of CGMF's holding would have been acceptable for a hypothetical private investor. It then expressed the view that, in so far as the fixed yield exempted CGMF from risk at the level of performance of the business plan, it constituted adequate long-term profitability for capital invested. Moreover, the Commission's expert concluded that, in terms of risk profile, that capital contribution was close to a French private sector bond.

114 Finally, it is apparent from recital 364 of the contested decision that the sale cancellation clause (see paragraph 23 above) was not dealt with in relation to the question of yields, the Commission limiting itself to confirming that it was not such as to call into question the equal treatment between CGMF and the private purchasers.

115 In that regard, it has already been observed, at paragraphs 76 and 77 above, that, in order to determine whether a contribution of public origin includes elements of State aid within the meaning of Article 87(1) EC, it is necessary to consider whether a private investor, in comparable circumstances, would have made such a contribution. Where the capital placed directly or indirectly at the disposal of an undertaking by the State was so made available in circumstances which correspond to normal market conditions, it cannot be regarded as State aid, by virtue of the principle of equal treatment between the public and private sectors. A capital contribution from public funds must therefore be regarded as satisfying the private investor criterion, and not involving the grant of State aid, if, inter alia, that contribution was made at the same time as a significant capital contribution on the part of a private investor effected in comparable circumstances (see Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 81 and the case-law cited).

Simultaneity

116 As regards the simultaneity of the contributions from private and public investors, the applicant claims that, since not all the EUR 35 million was released at the same time, the criterion that all the contributions must be made simultaneously was not respected, although the Commission considered it sufficient that the conditions were similar.

117 In that regard, it must be pointed out that the simultaneity of the contributions from private and public investors is, at most, an indication which suggests that there is no aid for the purposes of Article 87(1) EC. It is apparent from paragraph 81 of the judgment in *Alitalia* v *Commission*, cited at paragraph 115 above, quoted by the Commission at footnote 168 to the contested decision, that those contributions must have been made in comparable circumstances. As the objective of the private investor test is to compare the conduct of the State with that of a hypothetical private investor, it cannot be denied that the existence of investors prepared to invest significantly and concurrently is liable to facilitate the validation of such a test. However, all the relevant facts and points of law must be taken into account in order to evaluate the lawfulness of the contributions concerned in the light of the Community rules on State aid. Therefore, the temporal aspect is naturally important, but simultaneity cannot be regarded, as a matter of principle, as being sufficient in itself.

118 Consequently, in so far as simultaneity must be considered only as an indicator suggesting that there is no aid within the meaning of Article 87(1) EC, it cannot reasonably be determined in a strict manner. In the present case, by reason of the fact that the first quarter of each holding was invested strictly at the same time and because the same provisions of national law applied to the remaining three quarters, the Commission was entitled in law to take the view that that criterion of simultaneity had been satisfied, or at least that the analysis of the temporal aspect tended to prove that comparable conditions of private and public investments existed.

119 Consequently, the first complaint of the fourth plea in law must be rejected as being unfounded.

Equal treatment

120 According to the applicant, the inequality of yields between CGMF and the private purchasers, attributable, in particular, to the existence of the sale cancellation clause, calls into question the comparable nature of the investment conditions of the private purchasers and CGMF, a fact which vitiates the Commission's finding as to equal treatment.

121 In accordance with the principles set out at paragraph 115 above, it is necessary to determine whether the potential differences between the yields of the respective capital contributions from private purchasers and from CGMF are such as to call into question the soundness of the Commission's analysis concluding that there had been compliance with the principle of equal treatment.

122 In that regard, it must be borne in mind, as set out at paragraphs 117 and 118 above, that the simultaneity, in the present case, of the public and private investments could constitute, at best, only one relevant factor in determining whether a contribution from public capital was in the nature of State aid. Consequently, the Commission's statement at recital 354 of the contested decision, according to which the Community Courts had validated its analysis, is incorrect. Moreover, point 3.2.iii of the Communication on the application of Articles [87 EC] and [88 EC] to the acquisition of holdings by public authorities (Bulletin EC 9/1984), to which the Commission refers at footnote 167, establishes only a presumption that aid is not present in the event of concurrent and significant private investment. Consequently, as the Commission recognised in its written answers to the Court's questions, simultaneity cannot in itself, even where significant private investments have been made, suffice for a finding that there has been no aid within the meaning of Article 87(1) EC without taking into consideration the other relevant facts and points of law.

123 In the present case, it must be concluded that the question of fixed yield and that relating to the effect of the sale cancellation clause form part of all the relevant factors which ought to have been analysed by the Commission for the purpose of concluding that the investment conditions of the private purchasers and of CGMF were comparable, and thus that there had been compliance with the principle of equal treatment.

124 In the first place, it must be stated, on the one hand, that the yield of the capital contribution of the private purchasers is not fixed by the memorandum of understanding. On the other hand, the capital contribution of CGMF is deemed to function, according to the contested decision, in the manner of a bond by having a fixed rate of return. That fixed rate of return is not, however, guaranteed, in so far as, if (i) the sale cancellation clause is exercised following non-renewal of the PSD contract or (ii) a Commission or Community Court decision substantially affecting the value of the company is taken, then the fixed yield would cease to be paid. In the light of those factors, the Commission could not dispense with a thorough analysis of the effect of differences of yield of CGMF's and the private purchasers' shareholdings in the context of the examination of equal treatment.

125 In the second place, it is important to note that the investment of EUR 8.75 million in SNCM's capital cannot be considered to be a classic portfolio investment without disregarding the context of the company's privatisation. That capital contribution takes place in the context of a global sale agreement, resulting from a single set of negotiations, in which the purchasers' capital constitutes the counterpart to significant commitments, in various forms, made by the French State.

126 In the third place, as regards the sale cancellation clause, the Commission takes the view that this cannot call into question the equal treatment of the private and public investors in so far as the value placed on the clause had already been taken into account in the context of the sale of the company at a negative sale price.

127 Without it being necessary to deal with the question whether the value placed on the sale cancellation clause was correctly taken into account by the Commission, suffice it to state that its economic impact, and therefore its effect on the equal treatment of concurrent investors, was not assessed at all in the contested decision. Recital 364 of that decision merely states that it could not call into question the equal treatment of concurrent investors, but it does not contain any economic analysis. However, it is apparent from the case-file before the Court that the sale cancellation clause probably has a substantial economic value, which the applicant and the company STIM d'Orbigny, interested third parties which submitted their observations during the formal investigation procedure, had pointed out clearly during the administrative procedure, as is apparent from recitals 155, 158 and 163 of the contested decision.

128 It must be noted, firstly, that the sale cancellation clause may be exercised if the PSD contract is not renewed or if a Commission or Community Court decision affecting the value of the company is taken. Those two events are already, by themselves, such as to jeopardise the recapitalised SNCM in so far as it would lose, in one case, a significant portion of its turnover and could, in the other case, be the subject of a procedure aimed at the recovery of unlawful aid, for all or part of the contributions from CGMF. Against that difficult background for the company, the implementation of the sale cancellation clause would give rise, on the one hand, to an obligation to repay all the contributions from the purchasers, while, on the other hand, CGMF would again find itself holding 100% of SNCM's capital and therefore burdened with 100% liability for the costs of any potential future liquidation, while the risk of liquidation would have increased substantially.

129 Secondly, the Commission and the French Republic did not call into question, during the written procedure or in the course of the hearing, the fact that the sale cancellation clause had an actual economic value, since they claimed that its value was included, by implication, in the transaction. Moreover, the French Republic pointed out, in its statement in intervention, that one of the concurrent

offers, which did not include a sale cancellation clause, required a much larger recapitalisation from the French State in return. The Commission and the French Republic therefore did not dispute the fact that the sale cancellation clause had an actual financial value.

130 In the light of paragraphs 126 to 129 above, it must be found that the sale cancellation clause is, at the least, capable of removing any uncertainty for the private purchasers in the event of the occurrence of one of the triggering factors and that that clause, consequently, has an actual financial value. That clause is therefore liable to alter the risk profiles of the capital contributions of the private purchasers and of CGMF and therefore to call into question the comparable nature of the investment conditions. In any event, in the contested decision, the Commission could not therefore refrain from conducting a thorough analysis of the economic impact of the sale cancellation clause.

131 It is apparent from the foregoing considerations that the Commission omitted to take account of all the relevant factors, in particular the yields, in its assessment of the comparable nature of the investment conditions of the capital contributions made simultaneously. On that basis, the Commission committed a manifest error of assessment. The second complaint must therefore be considered to be well founded. Consequently, the fourth plea in law must be upheld in part. The consequences of that error on the lawfulness of the contested decision will be examined at paragraph 155 et seq. below.

The fifth plea in law, alleging a manifest error of assessment by the Commission resulting from the approval of the aid measures to individuals for an amount of EUR 38.5 million as being measures not constituting aid within the meaning of Article 87(1) EC

132 In support of this fifth plea in law, the applicant puts forward, in essence, three complaints. Firstly, it submits that the Commission's analysis does not comply with point 3.2.7 of the Guidelines, on 'aid to cover the social costs of restructuring' in so far as the purpose of that aid was not clearly defined. Secondly, it submits that, in so far as SNCM decides alone, under a joint venture agreement, on the amount granted to employees, that aid to individuals must be considered to be aid within the meaning of point 59 of the Guidelines. That measure, the applicant submits, therefore places SNCM in an advantageous situation as compared with its competitors, which constitutes a selective economic advantage, and therefore aid within the meaning of Article 87(1) EC. Thirdly, the applicant submits that the escrow account in which the funds for aid to individuals are placed is not remunerated. Therefore, in the applicant's view, it does not comply with the Guidelines in that the need for aid is not limited to the minimum.

133 The Commission takes the view, in essence, that those complaints are ineffective in so far as the applicant is criticising the compatibility of the aid with the common market under the Guidelines and not its nature as aid for the purposes of Article 87(1) EC. On the substance, it finds that those aid measures to individuals come within the scope of the social policy of the Member States.

134 As a preliminary point, it must be stated that the applicant is confusing the existence of aid within the meaning of Article 87(1) EC with its compatibility with the common market under Article 87(3)(c) EC and the Guidelines. In so far as it is not for the Court to rule on the compatibility of aid which was not established by the Commission in the contested decision, the first and third complaints of the fifth plea in law must be rejected as being ineffective.

135 However, it is necessary to interpret the second complaint as directly challenging the Commission's finding that there was no aid within the meaning of Article 87(1) EC. It is therefore appropriate to examine whether that aid to individuals is in the nature of an economic advantage.

136 In that regard, it is established case-law that the mere fact that a measure has a social purpose is not sufficient to prevent it from the outset from being categorised as aid within the meaning of Article 87 EC. Paragraph 1 of that article does not distinguish between the causes or the objectives of State measures, but defines them in relation to their effect. The concept of aid includes public aid, which, in various forms, mitigates the burdens normally included in the budget of an undertaking (see, to that effect, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 21; Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 51; and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 46).

137 It follows that the concept of aid does not necessarily mean that a legal obligation is borne, but rather that costs which are normally included in the budget of an undertaking are mitigated (see, to that effect, Opinion of Advocate General Jacobs in *France* v *Commission*, cited at paragraph 136 above, [1994] ECR I-4553, point 42). The definition of what constitutes a cost coming within the day-to-day management of the undertaking cannot, therefore, by definition, be limited to statutory obligations and obligations under agreements. Similarly, the fact that the direct beneficiaries of the aid to individuals are employees is not sufficient to demonstrate that no aid had been provided to their employer (see, to that effect, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1).

138 In order to examine whether that aid to individuals constitutes aid within the meaning of Article 87(1) EC, it is therefore necessary to determine whether SNCM obtains an indirect economic advantage which enables it to avoid having to bear costs which would normally have had to be met out of its own financial resources and therefore prevents market forces from having their normal effect.

139 It is apparent from recital 70 of the contested decision that the current account advance agreed to by CGMF, for an amount of EUR 38.5 million, in favour of staff made redundant by SNCM is intended to finance the cost of future additional payments of a potential plan to reduce staff implemented by the purchasers. That current account advance is intended in actual fact to finance 'the proportion of the cost of possible voluntary departures or breach of employment contracts … which is in addition to sums of all kinds which must be paid by the employer under statutory provisions and provisions under agreements' (Article II.2 of the sale agreement of 16 May 2006, cited at footnote 66 to the contested decision).

140 The Commission pointed out, at recitals 366 to 370 of the contested decision, that a selective economic advantage existed when a public capital contribution relieved the undertaking of a burden coming under its day-to-day management. It took the view that, in the present case, the burdens coming under its day-to-day management were all the burdens following from the application of the social legislation and collective agreements applicable to the sector. In so far as that aid to individuals was not designed to finance the statutory obligations and obligations under agreements, it was not therefore intended to finance the burdens coming under the day-to-day management of the undertaking.

141 According to recital 372 of the contested decision, aid to individuals cannot have the intention or the effect of enabling employees to leave, in so far as the escrow account can be used solely for employees who had already left the undertaking at the time of the new social plan. That aid to individuals was therefore a measure under social policy, the French State thus acting as a public authority and not as a State shareholder. The Commission specified, at recital 375 of the contested decision, that that measure was not intended to finance the departures originally provided for under the 2002 Plan.

142 That argument cannot be accepted.

143 In the first place, it follows from the case-law cited at paragraphs 136 and 137 above that, contrary to what the Commission states at recital 371 of the contested decision, the fact that the measure at issue does not result from the strict statutory obligations and obligations under agreements is not, in principle, liable to have the result that the aid is not in the nature of State aid within the meaning of Article 87(1) EC.

144 In the second place, it must be stated that the existence of the escrow account is such as to create an inducement for SNCM employees to leave the company or, at least, to leave it without negotiating their departure, particularly in view of the possible grant of additional redundancy payments within the meaning of recital 268 of the contested decision, all of which created an indirect economic advantage for SNCM.

145 The fact that that escrow account was negotiated with the company's unions prior to privatisation, during the social conflict of 2005, as emerges from the Commission's written answers, is not, in itself, such as to call into question the nature of the measures concerned as being State aid. Irrespective of whether the advantage was agreed to before or after privatisation, it continues to benefit SNCM. Moreover, the fact that that aid to individuals forms part of the sale agreement itself tends to show that it creates an advantage. It is for that reason necessary to accept that the parties had recourse to it because they were able to obtain some benefit from it.

146 It follows that the Commission's explanations, in particular those at recital 372 of the contested decision, are therefore neither convincing nor even comprehensible.

147 In the light of paragraphs 142 to 146 above, it is necessary to hold that the Commission committed a manifest error of assessment in categorising that aid to individuals, in an amount of EUR 38.5 million, as being measures not constituting aid within the meaning of Article 87(1) EC. Therefore, the fifth plea in law must be upheld. The consequences of that error on the lawfulness of the contested decision will be examined at paragraph 155 et seq. below.

The sixth plea in law, alleging a manifest error of assessment by the Commission resulting from the approval of the balance for restructuring under Article 87(3)(c) EC and the Guidelines

148 In the first place, it must be noted that this sixth plea in law concerns the balance for restructuring, in a final amount of EUR 15.81 million, declared compatible with the common market under Article 87(3)(c) EC and the Guidelines.

149 In the second place, it is important to point out that the Commission's analysis of that balance for restructuring, set out at recitals 366 to 434 of the contested decision, was based on the premiss that the 2006 Plan was free of State aid elements.

150 In that regard, it must be noted that the 2006 Decision is explicit on the fact that, as there are elements of aid for restructuring in the 2006 Plan, those elements ought to be analysed in conjunction with the aid for restructuring in the 2002 Plan, as is apparent from recitals 6, 7, 25 and 129 of the 2006 Decision. Moreover, the Commission noted, at recital 161 of the 2006 Decision, that it could not exclude the possibility that all or part of the new capital contribution of EUR 158 million might have to be regarded as constituting State aid. It thus correctly noted that, if that measure constituted aid, it ought then to be assessed 'together with the global restructuring aid which should then be assessed for compliance'.

151 However, it is apparent from the contested decision that the 2006 Plan did not include, according to the Commission, new elements of aid, because it took the view that the negative sale price of EUR 158 million, the capital contribution in conjunction and simultaneous with CGMF for an amount of EUR 8.75 million and the aid to individuals for an amount of EUR 38.5 million did not constitute aid within the meaning of Article 87(1) EC.

152 However, it is apparent from an examination of the third, fourth and fifth pleas in law that the Commission erred in law and committed manifest errors of assessment such as to call into question the premiss that the 2006 Plan was free of elements of aid.

153 In those circumstances, the Court finds that the Commission's analysis relating to the balance for restructuring is not properly supported. The sixth plea in law must therefore be upheld, without it being necessary to examine the arguments put forward by the applicant.

154 It is now appropriate to consider the consequences of the Commission's errors of assessment on the lawfulness of the contested decision.

The consequences of the Commission's manifest errors of assessment on the lawfulness of the contested decision

155 It is apparent from paragraphs 94, 109, 131 and 147 above that the Commission erred in law and committed manifest errors of assessment in its analyses of the negative sale price of EUR 158 million, of the capital contribution in conjunction and simultaneous with CGMF for an amount of EUR 8.75 million, and of the aid to individuals for an amount of EUR 38.5 million. Consequently, the second paragraph of Article 1 of the contested decision must be annulled.

156 It follows from paragraphs 148 to 152 above that the Commission's analysis of the balance for restructuring, in a final amount of EUR 15.81 million, was based on an incorrect premiss. The third paragraph of Article 1 of the contested decision must therefore be annulled.

Costs

157 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

158 The French Republic and SNCM are to bear their own respective costs, in accordance with the first and third subparagraphs of Article 87(4) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls the second and third paragraphs of Article 1 of Commission Decision 2009/611/EC of 8 July 2008 concerning the measures C 58/02 (ex N 118/02) which France has implemented in favour of the Société nationale maritime Corse-Méditerranée (SNCM);**

2. **Orders the European Commission to bear its own costs and to pay the costs of Corsica Ferries France SAS;**

3. Orders the French Republic and SNCM to bear their own respective costs.

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 11 September 2012.

[Signatures]

Table of contents