Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 20 July 2017 [1]

Case C-127/16 P

SNCF Mobilités, formerly Société nationale des chemins de fer français (SNCF)
v

European Commission

(Appeal — Aid implemented by the French Republic in favour of Sernam — Restructuring and recapitalisation aid, guarantees and write-off of Sernam's financial debts by SNCF — Sale of assets en bloc — Private investor test — Applicability — Compensatory measures)

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1 Original language: French.

1. By this appeal, SNCF Mobilités ('SNCF')[2] seeks to have set aside the judgment of the General Court of the European Union of 17 December 2015, *SNCF* v *Commission*[3] ('the judgment under appeal'), by which that court dismissed SNCF's application for annulment of Commission Decision 2012/398/EU of 9 March 2012 on State aid SA.12522 (C 37/08) — France — Enforcing the Sernam 2 Decision ('the Sernam 3 Decision').[4]

2 For further information on the appellant, see paragraph 1 of the judgment under appeal.

3 T-242/12, EU:T:2015:1003.

4 OJ 2012 L 195, p. 19.

I. Background to the dispute

2. By a decision adopted on 23 May 2001[5] ('the Sernam 1 Decision'), the European Commission approved, under certain conditions, restructuring aid in the total amount of EUR 503 million in favour of Sernam.[6]

3. By a second decision adopted in 2004[7] ('the Sernam 2 Decision'), the Commission found that some of the conditions imposed by the Sernam 1 Decision had not been complied with, which had resulted in misuse of the authorised aid.

4. In that context, first, the Commission declared that, subject to compliance with new conditions, the EUR 503 million in aid approved by the Sernam 1 Decision was compatible with the internal market, subject to the conditions laid down in Articles 3 and 4 of the Sernam 2 Decision. Secondly, it found that there was EUR 41 million additional aid that was incompatible with the internal market and therefore had to be recovered by the French authorities.

5. Using the possibility set out in Article 3(2) of the Sernam 2 Decision,[8] SNCF chose to sell Sernam's assets en bloc. According to the French authorities, Sernam's economic situation failed to elicit any proposals based on a positive valuation in the call for tenders conducted on SNCF's behalf by a third party. All the offers submitted under that procedure apparently concluded that the value was very negative and no firm offer was submitted. The decision was then taken to continue discussions solely with the consortium established by candidate 5, who was associated with Sernam's management team. On 15 June 2005, candidate 5 ultimately informed SNCF orally that it was not in a position to submit a takeover offer — not even a conditional one — before 30 June 2005.

6. On 30 June 2005, SNCF then took the decision to sell Sernam's assets en bloc to Sernam's management team. Following that transfer, Sernam was put into compulsory liquidation on 15 December 2005. The debt of EUR 41 million, corresponding to the State aid to be repaid under Article 1(2) of the Sernam 2 Decision, was entered in the liabilities of the liquidation account of Sernam. Of that amount, SNCF was actually able to recover EUR 2.75 million at the end of the winding-up proceedings.

7. Following complaints made by competitors on 24 June 2005, 10 April 2006 and 23 April 2007, which alleged that the Sernam 2 Decision had been either incorrectly or improperly applied, the Commission, by letter of 16 July 2008,[9] informed the French Republic of its decision to open the formal investigation procedure provided for in Article 88(2) EC, the outcome of which was the adoption of the Sernam 3 Decision dated 9 March 2012, sent to the French authorities on 26 March 2012.

8. In the Sernam 3 Decision, the Commission found that the disposal of Sernam's assets en bloc had not complied with the conditions set out in the Sernam 2 Decision and that the incompatible aid of EUR 41 million had not been recovered. It concluded that the State aid of EUR 503 million approved conditionally by the Sernam 2 Decision had been used improperly and that it was therefore

5 Decision No D/288742 concerning State aid NN 122/00 (ex NJ 140/00) — France — Aid for the restructuring of SCS SERNAM by the SNCF.

6 For further information on Sernam and its development, see paragraph 1 et seq., and paragraphs 20 and 21 of the judgment under appeal. Since Sernam used various names over the course of the administrative procedure (Sernam SCS, Sernam SA), for the sake of convenience I shall simply refer to 'Sernam' as a catch-all name in this Opinion.

7 Decision 2006/367/EC of 20 October 2004 on the State aid partly implemented by France for the Sernam company (OJ 2006 L 140, p. 1).

8 The wording of which is reproduced in point 22 of this Opinion.

9 For the opening decision, see OJ 2009 C 4, p. 5.

incompatible with the common market.[10] The Commission also found that the measures adopted by SNCF in order to effect that disposal, in particular the recapitalisation of EUR 57 million corresponding to the negative price of Sernam's assets en bloc and an alleged 'write-off of debts' of EUR 38.5 million, constituted new State aid which was incompatible with the internal market.[11]

9. Articles 1 and 2 of the Sernam 3 Decision read as follows:

'*Article 1*

1. The State aid of EUR 503 million, granted by France to Sernam SCS (which became Sernam SA) and approved by the Commission by [the Sernam 2] Decision[,] was used improperly. It is incompatible with the internal market. This aid also benefited Sernam Xpress, as well as Financière Sernam and its subsidiaries, Sernam Services and Aster.

2. The State aid of EUR 41 million, granted by France to Sernam SCS and declared incompatible by the Sernam 2 Decision, also benefited Sernam Xpress, as well as Financière Sernam and its subsidiaries, and notably Sernam Services and Aster.

3. The recapitalisation of EUR 57 million of Sernam SA by SNCF, the write-off of Sernam SA's debts to SNCF amounting to EUR 38.5 million and the guarantees granted by SNCF on the transfer of the business of Sernam SA to Financière Sernam, with the exception of the guarantee granted to the railwaymen, constitute State aid which is incompatible with the internal market.

Article 2

1. France shall recover the aid referred to in Article 1 from Financière Sernam and its subsidiaries, Sernam Services and Aster.

…'

10. On 4 April 2012, the Commission, further to a request made by the French Republic, concluded that there was no economic continuity between the Sernam group and the parties potentially taking over part of that group's assets — comprising companies in the Geodis groups, belonging to SNCF and BMV — and that, therefore, it was not necessary to extend the obligation to recover the aid declared to be unlawful and incompatible by the Sernam 3 Decision to Geodis and BMV.

11. On 13 April 2012 Financière Sernam and Sernam Services were liquidated, and on the same day Geodis lodged an offer and was designated as the party taking over the assets of the Sernam group.

II. Procedure before the General Court and the judgment under appeal

12. By application lodged at the Registry of the General Court on 4 June 2012, the appellant brought an action for the annulment of the Sernam 3 Decision.

13. The appellant put forward six pleas in law in support of its application. The first alleged infringement of its rights of defence. The second plea concerned infringement of the principle of the protection of legitimate expectations. The third plea alleged infringement of the duty to act within a reasonable time and of the principle of legal certainty. The fourth plea concerned errors of law and of fact committed by the Commission in its finding that the transfer en bloc of Sernam's assets had not

10 Sernam SCS (which became Sernam SA), Sernam Xpress and Financière Sernam, as well as Sernam Services and Aster, Financière Sernam's subsidiaries, were also designated as beneficiaries of the aid: see Article 1(1) of the Sernam 3 Decision.

11 See Article 1(3) of the Sernam 3 Decision. For a description of the transfer, see paragraph 22 of the judgment under appeal.

complied with the conditions laid down in Article 3(2) of the Sernam 2 Decision. The fifth plea alleged an error of law on the part of the Commission in its finding that the obligation to recover the EUR 41 million in State aid declared incompatible in the Sernam 2 Decision had been transferred to Financière Sernam and its subsidiaries. The sixth plea concerned an error of law on the part of the Commission in its finding that the measures provided for in the memorandum of understanding of 21 July 2005 concerning the transfer en bloc of Sernam's assets constituted new State aid in favour of Sernam Xpress-Financière Sernam.

14. Without ruling on the admissibility of the action in the judgment under appeal, and despite the fact that it upheld the second part of the fourth plea,[12] the General Court dismissed that action.

III. Procedure before the Court and forms of order sought

15. On 26 February 2016, the appellant lodged an appeal against the judgment under appeal. In the form of order sought by SNCF, that company claims that the Court should declare the appeal admissible and well founded, and therefore set aside the judgment under appeal and order the Commission to pay the costs. In its response, the Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs of the proceedings. The companies Mory SA and Mory Team, interveners in support of the Commission in the proceedings before the General Court, together argue also that the Court should dismiss the appeal and order the appellant to pay the costs.

16. The appellant, the Commission and both Mory SA and Mory Team presented oral argument and answered the questions put by the Court at the hearing held on 9 March 2017.

IV. Legal analysis

17. In support of its appeal, the appellant raises six grounds of appeal: the first alleges an error of law, an inadequate statement of reasons and a distortion of Article 3(2) of the Sernam 2 Decision. The second alleges that the General Court erred in law in holding that the principles of openness and transparency laid down in Article 3(2) of the Sernam 2 Decision required that the selected candidate must have participated in the tender procedure as a candidate and in an autonomous capacity from the outset. The third alleges that, in holding that the tender submitted by the Sernam management team was much more unfavourable to the vendor than the non-binding tenders of the other candidates, the General Court distorted the facts and erred in law. The fourth alleges that, in holding that the Commission had not confused the subject matter and the price of the sale of Sernam's assets, the General Court erred in law and provided an inadequate and contradictory statement of reasons. The fifth ground alleges that, in holding that the entry in the liabilities of the liquidation account of Sernam S.A. of the amount corresponding to the recovery of the EUR 41 million of aid was incompatible with Article 4 of the Sernam 2 Decision, the General Court erred in law and distorted the operative part of the Sernam 2 Decision. The sixth ground alleges that, in holding that the private investor principle was not applicable to the disposal en bloc of Sernam's assets, the General Court erred in law, provided an inadequate statement of reasons and distorted the facts.

A. Introductory reminder: from the Sernam 1 Decision to the Sernam 3 Decision

18. In order to better understand the scope of this appeal, the background to this dispute must be considered in a little greater detail.

12 The General Court found that the Commission's reasoning that, since the Sernam transfer price was negative, there had been no sale and the conclusion reached by the Commission that Article 3(2) of the Sernam 2 Decision had not been observed (see paragraph 94 et seq. of the judgment under appeal) were incorrect.

19. By its Sernam 1 Decision, the Commission gave a decision on the restructuring plan for the undertaking Sernam submitted to the Commission for examination by the French Republic. At the end of its analysis, the Commission concluded that that plan involved State aid compatible with the EC Treaty (more specifically, the measures in that plan which related to commercial assistance for, and the recovery of, Sernam).

20. Whilst the restructuring plan could not be properly implemented in the circumstances described by the French Republic in the Sernam 1 Decision, which, in addition, culminated in SNCF's payment to Sernam of the sum of EUR 41 million because of the delay in linkage connected with the cancellation of the memorandum of understanding between the designated purchaser and SNCF,[13] the Commission examined the conditions for implementation of the aid in favour of Sernam following the Sernam 1 Decision.

21. Having found that the French Republic had paid the amount of EUR 503 million under conditions different from those approved in the Sernam 1 Decision,[14] the Commission nevertheless concluded, in the light of all the facts and subject to conditions, that that amount was compatible with the Treaty, whereas the EUR 41 million in aid paid unlawfully to Sernam was, for its part, incompatible and had to be recovered.[15] The State aid of EUR 503 million in favour of Sernam could be regarded as compatible with the Treaty, provided that (1) Sernam develops only its activities to carry mail by railway and SNCF guarantees that it will offer to any operator who so requests the same conditions as those granted to Sernam to develop freight transport by rail (Article 3(1)(a) of the Sernam 2 Decision), and (2) Sernam fully replaces its own road transport resources and services with road transport resources and services of one or more companies that are legally and economically independent of SNCF and are chosen in accordance with an open, transparent and non-discriminatory procedure (Article 3(1)(b) of the Sernam 2 Decision). It is clear from the grounds of the Sernam 2 Decision that, taking account of the misuse and the extension of the period of the restructuring plan as compared with what was provided for in the Sernam 1 Decision, the Commission expected Sernam to take a specific compensatory measure by permanently withdrawing from market segments with overcapacity so as to warrant approval of part of the aid.[16] The aim was also to prevent the undertaking, which would have had to give up its business on account of its stated difficulties, from continuing artificially to occupy market shares for which there is a very strong demand, to the detriment of financially sound competing companies.[17] The Commission therefore took the view that 'Sernam [had to] permanently withdraw from market segments with overcapacity, in this case the market segment of groupage/traditional mail carried by road'.[18] However, in the event of a sale en bloc of Sernam's assets, at market price, through a transparent and open procedure, to a company which has no legal link with SNCF, the conditions relating to Sernam's withdrawal from segments with overcapacity would no longer be applicable,[19] since in such circumstances the Commission took the view that Sernam would no longer operate in its legal form and would have ceded its market shares.[20]

13 See recitals 70 and 179 of the Sernam 2 Decision.

14 See recital 225 of the Sernam 2 Decision. With regard to the development of the situation between the Sernam 1 Decision and the Sernam 2 Decision, see the table reproduced in recital 223 of the Sernam 2 Decision.

15 In view of the fact that it was a direct consequence of the misuse of the initial aid: see recital 179 of the Sernam 2 Decision. With regard to the obligation to recover the EUR 41 million in aid, see also the second sentence of Article 4 of the Sernam 2 Decision.

16 See recital 208 of the Sernam 2 Decision.

17 See recital 209 of the Sernam 2 Decision.

18 Recital 210 of the Sernam 2 Decision.

19 See Article 3(2) of the Sernam 2 Decision.

20 See recital 217 of the Sernam 2 Decision.

22. For the purposes of the following analysis, it is important to bear in mind the wording of Articles 3 and 4 of the Sernam 2 Decision:

'*Article 3*

1. Subject to paragraph 2, the following conditions shall be complied with:

(a) Sernam may develop only its activities to carry mail by railway in accordance with the Train Bloc Express (TBE) concept. In this regard, SNCF guarantees that it will offer to any other operator who so requests the same conditions as those granted to Sernam to develop TBE freight transport by rail.

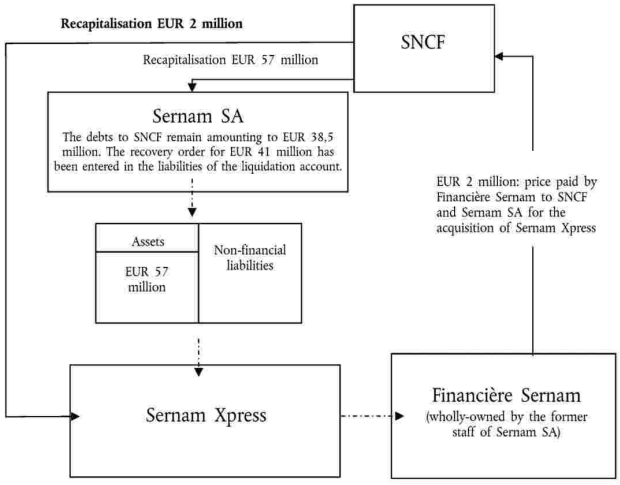
(b) In return, Sernam shall, in the next two years as from the day on which this Decision is notified, fully replace its own road transport resources and services by road transport resources and services of one or more companies that are legally and economically independent of SNCF and are chosen in accordance with an open, transparent and non-discriminatory procedure. …

2. In the event that Sernam sells its assets en bloc by [30 June 2005] at market price through a transparent and open procedure to a company that has no legal link with SNCF, the conditions of paragraph 1 shall not be applicable.

Article 4

Any partial or full sale of Sernam shall be effected at market price and through a transparent procedure that is open to all its competitors. Under these conditions, the Sernam company shall, if it continues to exist, be responsible for paying back the aid of [EUR] 41 million.'

23. With a view to implementing the Sernam 2 Decision, the French Republic opted for the scenario provided for in Article 3(2) of that decision. To that end, SNCF first invited any interested party to express its interest in taking over all Sernam's assets. All the offers received were negative and no firm offer was obtained. The Sernam management team made a takeover offer through a company still to be set up, which would become Financière Sernam.[21] The transfer of Sernam's activities to Financière Sernam took place in four stages, as shown in the diagram below[22]:



21 See recital 31 of the Sernam 3 Decision.

22 In accordance with recital 35 of the Sernam 3 Decision.

24. First, SNCF recapitalised its wholly-owned subsidiary Sernam SA to the amount of EUR 57 million. Secondly, Sernam SA made a contribution to its wholly-owned subsidiary Sernam Xpress of all the assets, including the EUR 57 million from the recapitalisation described in the previous sentence, and the liabilities of Sernam (with the sole exception of the 'financial' liabilities) amounting to EUR 38.5 million. In return, Sernam SA received a share in Sernam Xpress with a nominal value of EUR 100. Thirdly, Sernam Xpress undertook a capital increase of EUR 2 million, underwritten in full by SNCF, thus allowing SNCF to be the majority shareholder in Sernam Xpress. Fourthly, Sernam SA and SNCF assigned to Financière Sernam for EUR 2 million all their shares in Sernam Xpress, which represented the latter's entire capital. Furthermore, Sernam SA was put into compulsory liquidation on 15 December 2005 and the amount of EUR 41 million repayable to SNCF under the Sernam 2 Decision was entered in the liabilities of the liquidation account.

25. Financière Sernam's offer was forwarded on 30 June 2005 to SNCF, which accepted it in principle on the same day. The memorandum of understanding was signed on 21 July 2005, Financière Sernam was registered in the trade register on 14 October 2005 and the operations described above were carried out on 17 October 2005.[23]

26. In the Sernam 3 Decision, the Commission concludes, first, that the aid authorised by the Sernam 2 Decision was misused in that the French authorities did not comply with the conditions imposed by Article 3(2) of that decision. The Commission took the view inter alia that the transfer of the activities had not been completed by 30 June 2005; that the transfer of those activities did not constitute a sale on account of its negative price; that the transfer of the activities was not a sale of assets but a transfer of Sernam in its entirety (assets and liabilities); that the transfer had not been limited to the assets held by Sernam at the time of the Sernam 2 Decision but was increased by EUR 59 million; that the transfer had not taken place through a transparent and open procedure; and that the ultimate purpose of a sale of assets had not been observed.[24] The misuse of the EUR 503 million in aid means that it is not compatible with the internal market and it must be recovered.

27. With regard to the aid of EUR 41 million which was to be recovered by France from its recipient following the Sernam 2 Decision,[25] the Commission argues that it was entered in the liabilities of Sernam's liquidation account. Having stated that the Sernam 2 Decision provided that it was not necessary to recover that aid, in the event of a disappearance of Sernam's economic activity, from the parties who acquired the assets at market price through a transparent and open procedure, the Commission analysed the situation in particular in the light of the judgments of 29 April 2004, *Germany* v *Commission*,[26] and of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission*.[27] The Commission thus took the view that, following the merger between Sernam Xpress and Financière Sernam, the obligation regarding recovery was transferred to the latter, inter alia on account of the fact that it continues to benefit from the aid of EUR 41 million initially granted to Sernam. Furthermore, it did not apply the private investor test.

28. Finally, the Commission examined the new aid granted to Sernam Xpress following the memorandum of understanding of 21 July 2005.[28] Since that new aid was granted in a recovery context, the Commission took the view that it was not appropriate to apply the private investor principle because the State acted, in that context, under the obligations incumbent upon it under EU law.[29] The aid examined consisted in the EUR 57 million capital injection by SNCF in Sernam, the EUR 2 million capital injection by SNCF in Sernam Xpress, the write-off of Sernam's debts to SNCF,

23 With regard to all these points, see recital 32 of the Sernam 3 Decision.

24 See recitals 88 to 131 of the Sernam 3 Decision.

25 See recitals 132 to 151 of the Sernam 3 Decision.

26 C-277/00, 'the *SMI* judgment', EU:C:2004:238.

27 C-328/99 and C-399/00, 'the *Seleco* judgment', EU:C:2003:252.

28 See recitals 152 to 175 of the Sernam 3 Decision.

29 See recital 154 of the Sernam 3 Decision.

the guarantees granted by SNCF on the transfer of Sernam's activities to Financière Sernam [30] and the selling price paid by Financière Sernam. The Commission found that there was new aid for Sernam Xpress-Financière Sernam that is incompatible with the internal market and that had to be recovered from Financière Sernam and its subsidiaries, which were continuing the economic activity which received the aid (previously carried out by Sernam Xpress, merged with Financière Sernam).

B. The appeal

1. The first ground of appeal, alleging errors of law, an inadequate statement of reasons and a distortion of Article 3(2) of the Sernam 2 Decision

29. This first ground consists of three parts: the first concerns the purpose of the sale of assets en bloc; the second concerns a distortion by the General Court of the wording of Article 3(2) of the Sernam 2 Decision in relation to the concept of 'sale'; and the third concerns errors of law, a distortion of Article 3(2) of the Sernam 2 Decision and an infringement of the obligation to state reasons in relation to the assessment that the transfer of assets en bloc must be understood as concerning only assets, to the exclusion of liabilities. Since the first and third parts are connected, I propose to examine them together.

(a) The first and third parts of the first ground of appeal

(1) The judgment under appeal

30. It is apparent from the judgment under appeal that the General Court, having recalled the case-law that the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption, [31] inferred from the wording of Article 3(2) of the Sernam 2 Decision, read in the light of recital 217 of that decision, that that decision 'establish[ed] a clear contrast between a "sale of Sernam in its entirety (assets and liabilities)" and a "sale of the assets en bloc" of Sernam'. [32] It therefore held that the Commission was fully entitled to find that the sale of assets en bloc, as referred to in Article 3(2) of the Sernam 2 Decision, was to involve only the assets, to the exclusion of the liabilities, [33] since a contrary interpretation would have failed to take account of the difference between the alternative conditions set out in Article 3(1) of the Sernam 2 Decision, on the one hand, and in Article 3(2) of that same decision, on the other hand. [34] According to the General Court, if the sale of assets en bloc were to be interpreted as encompassing the liabilities, the use of those alternative conditions would be rendered 'illogical and inconsistent'. [35] The General Court went on to point out that the two paragraphs of Article 3 of the Sernam Decision are alternatives and held that they both pursued 'the same objective of preventing distortions of competition brought about by [the EUR 503 million of restructuring aid]'. [36] It confirmed the Commission's view that the purpose of the sale en bloc of the assets 'was to interrupt Sernam's economic activity'. [37] It thus held that the transfer of Sernam in its entirety, the purpose of which was to keep it operational and restore its viability, ran counter to the objective of 'interrupting its economic activity and ceding its market shares to the purchaser of its assets'. [38]

30 Details of those guarantees are provided in recital 163 of the Sernam 3 Decision.

31 See paragraph 87 of the judgment under appeal and the case-law cited. See also paragraph 114 of that judgment.

32 Paragraph 117 of the judgment under appeal.

33 See paragraphs 118 and 124 of the judgment under appeal.

34 See paragraph 119 of the judgment under appeal.

35 See paragraph 119 of the judgment under appeal.

36 Paragraph 194 of the judgment under appeal.

37 Paragraph 195 of the judgment under appeal.

38 Paragraph 204 of the judgment under appeal.

31. Furthermore, the General Court held that the Commission had correctly assessed, in recitals 109 and 110 of the Sernam 3 Decision, the operation referred to as a 'partial contribution of assets', finding that that operation could not be termed a 'sale of assets to a third party' because that sale related not only to the assets but also to the entire liabilities [39] and it had been made for the benefit of a wholly-owned subsidiary. [40]

(2) Summary of the arguments of the parties

(i) First part of the first ground of appeal

32. SNCF submits, in essence, that the transfer of the assets en bloc decided upon in June 2005 fully complied with the purpose of Article 3(2) of the Sernam 2 Decision, read in the light of recital 217 of that decision. The General Court's reasoning is incorrect for two main reasons. The first relates to the fact that, generally speaking, the inevitable consequence of the transfer of assets is the continuation of the activity, because the additional assumption of liabilities (that is to say debts) has no effect in that regard since its sole impact is on the valuation of the undertaking transferred. The General Court failed to explain how the transfer of all Sernam's assets en bloc to a sole purchaser who was to take over the market share ceded by Sernam could entail an interruption in Sernam's economic activity. The appellant claims that the statement of reasons in the judgment under appeal is inadequate in that regard. The second reason concerns the fact that the grounds on which the General Court bases its finding that the purpose of the transfer en bloc is Sernam's economic disappearance cannot justify such an interpretation. Recital 217 of the Sernam 2 Decision simply required that Sernam no longer operate in its earlier legal form and allowed an acquiring party independent of SNCF to operate Sernam's market share. By stating in paragraphs 194 and 195 of the judgment under appeal that the purpose pursued was the interruption of Sernam's economic activity, the General Court upheld a purpose which by no means follows from either the operative part or the grounds of the Sernam 2 Decision, which it therefore distorted. The General Court's statement of reasons also appears contradictory in view of the fact that the General Court itself acknowledged, in paragraph 218 of the judgment under appeal, that recital 217 of the Sernam 2 Decision gave 'the appearance of continuance of the economic activity' of Sernam. In the same vein, SNCF argues that recital 217 of that decision does not indicate that the continuance of the activity was to be understood as the activity pursued by the purchaser incorporating Sernam's assets into its own commercial strategy, and that this was an essential condition for being able to regard the beneficiary company's market shares as having been ceded. On the contrary, recital 217 of the Sernam 2 Decision simply referred to the ceding of Sernam's market shares to the independent acquiring party, that is to say having no connection to SNCF.

33. In its reply, SNCF adds, in essence, that the Commission failed to show how the transfer of all the assets of an undertaking in a single bloc for the benefit of one and the same purchaser could not entail, economically and legally, the transfer of the economic activity. The Commission itself explained to the General Court and to the Court of Justice that this was precisely the effect of such a transfer in the *SMI* and *CDA* cases. [41] In its response, the Commission also distorted the wording of recital 217 of the Sernam 2 Decision which, according to the appellant, makes no reference whatsoever to Sernam's competitors. Under the Sernam 2 Decision, the sole objective pursued by the Commission is the severance of any future capital link between SNCF and its subsidiary Sernam in order to prevent SNCF from granting further aid to Sernam, and the sole requirement was that the party acquiring Sernam have no link with SNCF. The purpose of a sale of assets en bloc is therefore not to interrupt Sernam's economic activity. The appellant adds that, contrary to the Commission's claim, there is no

39 With the exception of certain debts: see paragraph 144 of the judgment under appeal.

40 See paragraph 144 of the judgment under appeal.

41 Respectively, the *SMI* judgment (paragraphs 68 to 70) and the judgment of 19 October 2005, *CDA Datenträger Albrechts* v *Commission* (T-324/00, 'the *CDA* judgment', EU:T:2005:364, paragraph 73).

contradiction between the transfer of Sernam's assets en bloc, which necessarily involves the continuance of Sernam's activity, and the argument that the General Court erred in law in its examination of the various criteria for economic continuity developed in the case-law of the Court of Justice.

34. Finally, with regard to the price, the Commission required a market price that could be negative. If the assets are sold en bloc, entailing the transfer of a necessarily loss-making activity as well as contracts of employment, it is inevitable that its value is negative; to take the view that the price could have been positive is an unsupported conjecture and a distortion of the facts, since all the offers were broadly negative. Furthermore, SNCF submits that it is not appropriate to apply the principles established in case-law regarding interpretation where the provision in question is wholly unambiguous. It is impossible to transfer all the assets of an undertaking without transferring the economic activity to the purchaser, and it is impossible to transfer an undertaking's market share to the purchaser without transferring the activity. The interpretation put forward by the Commission and confirmed by the General Court thus results in an impossible situation.

35. For its part, the Commission takes the view that this first part of the first ground of appeal should be rejected.

(ii) Third part of the first ground of appeal

36. SNCF submits that, by simply reproducing the provisions of Article 3(2) of the Sernam 2 Decision and of recital 217 of that decision to support its interpretation that the Sernam 2 Decision established a clear contrast between the sale of Sernam in its entirety and the sale of only its assets, the General Court made peremptory assertions, distorted Article 3(2) of the Sernam 2 Decision and vitiated its reasoning by failing to provide an adequate statement of reasons. Recital 217 does not contain any information on the basis of which it may be concluded that the transfer of assets en bloc was to be understood as relating only to the assets. The General Court could not infer from the alternative scenario envisaged in recital 217 that Article 3(2) excluded liabilities, in particular because, in the light of the objective pursued, namely the interruption of Sernam's economic activity, the addition to the transfer of all or part of the liabilities has no impact. Neither the Commission nor the General Court explained how a transfer of all the assets in a single bloc to a sole purchaser meant to take over Sernam's market share could lead to the interruption of Sernam's economic activity.[42]

37. The line of reasoning put forward by the General Court in paragraphs 118 and 119 of the judgment under appeal is incorrect since different conditions were actually attached by the Sernam 2 Decision to each of the two scenarios. If the purpose pursued by Article 3(2) of the Sernam 2 Decision was to interrupt Sernam's activity, then only reference to a means of transfer allowing that objective to be achieved (such as the transfer of assets separately or by lots, as the Commission had already envisaged in other cases)[43] was necessary. The General Court thus made several errors of law, distorted the provisions of Article 3(2) of the Sernam 2 Decision and infringed the obligation to state reasons.

38. For its part, the Commission argues that this third part of the first ground of appeal must be rejected.

42 That complaint is made in the appellant's reply.

43 SNCF refers, in that regard, to the example of the Polish shipyards.

(3) Analysis

39. In the context of the first and third parts of this first ground of appeal, SNCF disputes the General Court's interpretation, first, of the purpose of the sale of assets en bloc required by Article 3(2) of the Sernam 2 Decision and, secondly, of the very concept of 'sale of assets en bloc'.

40. From the outset, the complaint alleging that the General Court should not rely on the traditional case-law concerning the methods of interpretation available to the European Union judicature must be rejected, since the General Court merely recalled and then applied settled case-law which enshrines well-established principles [44] defining the role of the judicature where it is required to interpret a provision of EU law. I would add that, given the differences in the interpretation by SNCF and the Commission of Article 3(2) of the Sernam 2 Decision, the European Union judicature did not go beyond its powers in seeking for the elements needed to shed light on the exact meaning and scope of that decision outside its operative part, and the General Court was therefore also fully entitled to refer not only to the wording of that article but also to the context in which it occurs and the objectives pursued by the rules of which it is part. [45]

41. Next, I would point out that Article 3 of the Sernam 2 Decision envisages two scenarios. Under Article 3(1) of that decision, Sernam's restructuring aid may continue to be regarded as compatible with the internal market provided that Sernam develops 'only its activities to carry mail by railway' and that SNCF guarantees, at the same time, that it 'will offer to any other operator who so requests the same conditions as those granted to Sernam to develop … freight transport by rail'. Moreover, in the two years following notification of the Sernam 2 Decision, Sernam was to 'fully replace its own road transport resources and services by road transport resources and services of one or more companies that are legally and economically independent of SNCF and are chosen in accordance with an open, transparent and non-discriminatory procedure'. In the event that the second scenario was chosen — that provided for in Article 3(2) of the Sernam 2 Decision — those conditions would no longer apply. By contrast, in that scenario, Sernam was required to '[sell] its assets en bloc by [30 June 2005] at market price through a transparent and open procedure to a company that has no legal link with SNCF'.

42. Identifying the reasons why the Commission envisaged those two scenarios and, ultimately, the purpose of the sale of the assets en bloc naturally required a comprehensive reading of that decision, that is to say including its grounds. It is clear from those grounds that the conditions laid down in Article 3(1) of the Sernam 2 Decision are conceived as 'compensatory measures' required of Sernam because it benefited from the misuse of aid. [46] It is therefore required 'permanently [to withdraw] from the market segments with overcapacity' to prevent an undertaking 'that would have had to give up its business on account of the stated difficulties [from] artificially [occupying] market shares for which there is a very strong demand, to the detriment of financially sound competing companies'. [47]

43. The Commission also took account of the French authorities' intention to sell off 'Sernam in its entirety (*including assets and liabilities*)', [48] and took care to draw an explicit contrast between that scenario and that of a sale of Sernam's assets en bloc. Thus, recital 217 of the Sernam 2 Decision states that, 'if Sernam is sold in its *entirety* (*assets and liabilities*) as intended by the French authorities, the conditions of the decision (takeover of Sernam's road activities by other companies and diversification of its activities towards rail freight) should *in any case* apply. *On the other hand*, should Sernam sell its

44 See paragraphs 87 and 114 of the judgment under appeal.

45 See paragraphs 86 and 101 of the judgment under appeal.

46 See recital 208 of the Sernam 2 Decision.

47 See recitals 208 and 209 of the Sernam 2 Decision.

48 Recital 216 of the Sernam 2 Decision. Emphasis added.

assets en bloc, the Commission recalls that the above two conditions concerning the company's restructuring will not apply as Sernam *will no longer operate* in its current legal form and *will cede its market shares* to the independent acquiring party (which will de facto continue its activities with Sernam's assets)'.[49]

44. I acknowledge that, read in isolation, Article 3(2) of the Sernam 2 Decision could have given the impression that the sale of the assets en bloc was not necessarily exclusive of a sale of the liabilities. However, once it has been accepted, without any real difficulty, that the General Court could refer to the recitals of the Sernam 2 Decision to clarify the meaning of its operative part, a reading of recital 217 is sufficient to confirm the conclusion reached by the General Court that the sale of the assets en bloc necessarily excluded the liabilities, since the Commission clearly contrasted the sale of Sernam in its entirety (assets and liabilities), on the one hand, and the sale only of the assets en bloc, on the other hand. The appellant takes the view that the General Court made a peremptory assertion without providing any real reasoning. However, I cannot see how the General Court could have made the situation any clearer.

45. With regard to the criticism alleging an inadequate statement of reasons, I would point out that the Court has consistently held that 'the statement of reasons on which a judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review'.[50] That requirement is fully satisfied here.

46. As for the purpose pursued, given the context in which the Sernam 2 Decision was adopted, it is, quite clearly and as the General Court recalled, to prevent distortions of competition.[51] The two scenarios envisaged in Article 3 of the Sernam 2 Decision were clearly conceived as alternatives, which led the Commission clearly to view the two options as equivalent from the point of view of their purpose and their effectiveness in re-establishing a situation compatible with free competition. The objective pursued by Article 3(1) of the Sernam 2 Decision is clearly explained in recital 200 et seq. of that decision. Those recitals essentially establish that Sernam benefited from aid which did not comply with the initial restructuring plan. Accordingly, in order to mitigate that distortion of competition, the Commission imposes 'compensatory measures'[52] and requires Sernam to withdraw from market segments with overcapacity as provided for in Article 3(1) of the Sernam 2 Decision.[53] It is wholly logical that the objective pursued by the second scenario is identical. Once again, recital 217 of that decision is the central element in understanding the decision's purpose, since that recital explains why the 'compensatory measures' required in the event that the first scenario is adopted would no longer be required if the assets were sold en bloc. In the latter scenario, the Commission takes the view that 'Sernam will no longer operate in its current legal form and will cede its market shares to the independent acquiring party (which will de facto continue its activities with Sernam's assets)'.[54] As the General Court rightly observed, that recital 'is part of the same section covering prevention of distortions of competition as … recitals 200 and 208 to 211'.[55] It is likewise clear from the wording of that recital, and contrary to what the appellant claims, that the Commission envisaged the takeover of the activity by an independent acquiring party, which would take over that activity on its own behalf, with Sernam in fact withdrawing from the market in favour of that party.

49 Emphasis added.

50 See, among many, the judgments of 20 January 2011, *General Química and Others* v *Commission* (C-90/09 P, EU:C:2011:21, paragraph 59 and the case-law cited) and of 15 January 2014, *Commission* v *Portugal* (C-292/11 P, EU:C:2014:3, paragraph 72 and the case-law cited).

51 See paragraph 194 of the judgment under appeal.

52 See point 42 of this Opinion.

53 See recital 215 of the Sernam 2 Decision.

54 Recital 217 of the Sernam 2 Decision.

55 Paragraph 193 of the judgment under appeal.

47. If the line of reasoning advanced by SNCF were followed, Article 3(2) of the Sernam 2 Decision would require neither the transfer of assets en bloc, excluding the liabilities, nor the interruption of Sernam's economic activity. This means that the Commission would have accepted that Sernam could be sold virtually in its entirety and continue its economic activity without requiring any compensatory measure at all (since the second scenario would be adopted), even though it had clearly required — in the event of Sernam's sale in its entirety — the adoption of a series of measures to reduce Sernam's presence on the market. Such an interpretation is inconsistent and deprives Article 3(2) of the Sernam 2 Decision of all substance and all effectiveness. Of course, as SNCF argues, the consequence of the transfer of assets is the continuation of 'the activity' in the sense of a takeover of the market shares occupied by Sernam by another interested undertaking. Nevertheless, divested of its assets, Sernam clearly could not continue to occupy its former position on the market. In addition, I would tend to consider, as stated by the intervener in support of the Commission, that the interpretation advocated by SNCF consists of a kind of implicit admission that the transfer operations led to the continuation of Sernam's activity without the implementation of any of the compensatory measures needed to eliminate the threat to competition.

48. In summary, Article 3 envisaged, on the one hand, Sernam's continued existence or the possibility of Sernam being sold in its entirety (assets and liabilities) and, therefore, the conditions laid down in paragraph 1 had to be observed or, on the other hand, the situation of a sale of assets en bloc, in which case those conditions would no longer be required, because Sernam would thus have ceded its market shares to the purchaser. A sale of assets en bloc together with some of the liabilities would not make it possible to interrupt Sernam's activity; however, if that activity was to continue, compensatory measures were required. SNCF sold Sernam's assets en bloc as well as 'the quasi-entirety of its liabilities'[56] without offering any compensatory measure capable of offsetting the disruption of competition. The outcome of the operation is neutral from that point of view, as it were, although it is conceptually far closer to a sale of Sernam in its entirety — a sale to which were attached strict and clear conditions concerning withdrawal from certain market segments with overcapacity.

49. Accordingly, the line of reasoning of the General Court was not vitiated by any error of law where it held that 'the fact that, if there were to be a sale of the assets en bloc, it would no longer be necessary to impose withdrawal from the road sector with overcapacity, can only be explained by the fact that, in the event of a sale en bloc of Sernam's assets at market price to a company having no legal link with [SNCF], through a transparent and open procedure, Sernam disappeared economically from the market, taking with it the distortion of competition associated with the granting of Sernam's restructuring aid', since '"[the ceding of] market shares to the independent acquiring party" … must be viewed as putting an end to the distortion of competition, that is to say, Sernam's subsidised activity'.[57]

50. Nor did the General Court contradict itself when it acknowledged that recital 217 of the Sernam 2 Decision could have given the 'appearance of continuance of the economic activity' because it immediately stated that that appearance did not stand up to analysis, given that 'the activity [involved] a completely different player than Sernam, namely the purchaser, integrating Sernam's assets into its own business strategy, without which the recipient's market shares cannot be regarded as having been "ceded"'.[58] The judgment under appeal is therefore not vitiated at this point by a contradiction of reasons, in particular in the light of the actual identity of the purchaser of Sernam's assets.

51. As for the appellant's reliance on the *SMI* and *CDA* judgments, in so far as the General Court may be criticised for not having examined the legality of the decision contested before it in the light of statements contained in the case-law of the Court which simply reproduced the view expressed by the Commission in the context specific to each of those cases — quod non —, the appellant's understanding of those judgments is based on a partial reading, since, although the Commission has

56 Paragraph 197 of the judgment under appeal.

57 Paragraph 194 of the judgment under appeal.

58 Paragraph 218 of the judgment under appeal.

invariably argued that the sale of a company's assets en bloc to one and the same purchaser could enable that purchaser to continue the subsidised economic activity, which could have the result of perpetuating the distortion of competition, the Commission at the same time acknowledged that particular vigilance had to be exercised and that the risk of circumvention could be ruled out if the transfer had occurred following an unconditional procedure open to all competitors, which is precisely one of the conditions laid down in Article 3(2) of the Sernam 2 Decision.

52. For all those reasons, I therefore propose that the first and third parts of the first ground of appeal together be rejected.

(b) Second part of the first ground of appeal

(1) The judgment under appeal

53. In paragraph 90 of the judgment under appeal, the General Court found that the time for assessing whether the sale had taken place was necessarily the time of the actual transfer of the assets, since the objective pursued by Article 3(2) of the Sernam 2 Decision, read in the light of recital 217 of that decision, was to oblige Sernam to divest itself of the entirety of its assets and to free up its market shares. According to the General Court, a formalistic interpretation of Article 3(2) of the Sernam 2 Decision would block its intended effect and create the risk of the actual transfer of the assets being postponed to a point in time long after the conclusion of the sale, in the legal sense of the term.

(2) Summary of the arguments of the parties

54. According to the appellant, the sale was indeed concluded on 30 June 2005, meaning that the time limit laid down in Article 3(2) of the Sernam 2 Decision was therefore observed. That decision made no reference to an actual transfer of the assets on 30 June 2005, but simply provided that the sale had to be effected no later than that date. In addition, under French law and in particular Article 1583 of the Civil Code, a sale takes place on conclusion of the agreement as to the thing and the price to be paid, even where that thing has not yet been delivered or paid for. In finding, in paragraph 90 of the judgment under appeal, that the time to be taken into account for assessing whether the sale had indeed taken place on 30 June 2005 was the time of the transfer of the assets, the General Court significantly expanded upon the wording of Article 3(2) of the Sernam 2 Decision and distorted the concept of 'sale' contained in that article.

55. For its part, the Commission contends that this second part of the first ground of appeal should be rejected.

(3) Analysis

56. A time limit was among the conditions laid down in order that the EUR 503 million in aid for the restructuring of Sernam could continue to be regarded as compatible, since Article 3(2) of the Sernam 2 Decision provides in that regard that, in the event of a sale of Sernam's assets en bloc, that sale had to take place by 30 June 2005.

57. Assuming that the General Court's assessment of the date on which the sale occurred is not simply an assessment of the facts, the appellant has failed to demonstrate a flaw in the General Court's analysis. Although in the context of the measures connected with offsetting the State aid, there is no question of imposing a Community definition of the concept of a 'sale' and the sale must necessarily

be organised according to the conditions laid down in national law,[59] the Commission and the European Union judicature are nevertheless entitled to require that those conditions do not undermine the practical effect of EU law. It is precisely that risk which was identified by the General Court when it held, in paragraph 90 of the judgment under appeal, that the interpretation proposed by SNCF 'would block its intended effect and give rise to the risk of the actual transfer of the assets being postponed to a point in time long after the conclusion of the "sale" in the legal sense of the term'. It also follows from the information in the case file that, on 30 June 2005, the offer made by Sernam's management team had been forwarded to SNCF and only 'accepted in principle by the SNCF General Management on the same day'.[60] Finally, since the scenario envisaged by Article 3(2) of the Sernam 2 Decision is an alternative to that envisaged by Article 3(1) of that decision and, if that second scenario applies, the conditions laid down for the first would no longer apply, it was perfectly logical, and did not unduly expand upon the wording of Article 3(2) of the Sernam 2 Decision, as SNCF alleges, for the General Court to interpret the time limit contained therein as requiring that the actual transfer of the assets take place on 30 June 2005. For all those reasons, the second part of the first ground of appeal must be rejected.

2. The second ground of appeal, alleging that the General Court erred in law in wrongly holding that the tender submitted by the management team could not be regarded as resulting from an open and transparent procedure

(a) The judgment under appeal

58. In paragraphs 163, 164 and 174 of the judgment under appeal, the General Court held, in essence, in order to reject the complaint that Sernam's management team had participated in the tendering procedure from the outset and that the offer submitted by that team was indeed the outcome of a transparent and open process, that only the consortium established by candidate 5 and Sernam's management team had initially taken part in the tendering procedure and submitted a preliminary offer, and not the members of the management team individually. In addition, it was the project proposed by the consortium which had been initially selected following the second round of the tendering procedure. The General Court thus rejected the argument seeking to demonstrate that the management team had participated from the outset of the procedure, because it did not participate in that procedure in an autonomous capacity and it did not submit the offer independently. The General Court concluded that that offer could therefore not be regarded as resulting from an open and transparent procedure.

(b) Summary of the arguments of the parties

59. SNCF claims that the General Court erred in law in that it wrongly found that the non-participation of the members of Sernam's management team in an autonomous capacity from the start of the procedure had the effect that the procedure conducted had not been open and transparent, as required by Article 3(2) of the Sernam 2 Decision, since it follows neither from that article nor from the Sernam 2 Decision or from EU law that the candidate finally selected had to have participated in an autonomous and independent capacity from the outset of the selection process. Having recalled the circumstances in which the procedure was conducted following the second selection round, SNCF argues that it follows both from practice and from case-law that the condition of the openness and transparency of a tendering procedure is satisfied where all the interested parties have been able to submit an offer, have had access to the same information and have been subject to the same deadline

59 As, moreover, the General Court observed in paragraph 102 of the judgment under appeal.

60 Recital 32 of the Sernam 3 Decision.

requirements.[61] Assuming that the principles applicable in the field of public contracts, in particular those enshrined in Directives 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts[62] and 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC,[63] are applicable, by analogy, to asset transfer procedures, EU law authorises the award of such a contract to an economic operator without prior publicity or competition following the failure of a procedure, even where the operator did not participate in that first procedure and without this constituting a breach of the principles of openness and transparency. Those principles should *a fortiori* be deemed to have been observed where the assets have been transferred to the last interested party, the only one to have made a firm offer, when it has participated in the process in its entirety, initially as part of a consortium from which the other party withdrew in the course of the procedure.

60. As for the Commission, it contends that this second ground of appeal should be rejected as inadmissible or, in the alternative, unfounded.

(c) Analysis

61. In the context of this second ground of appeal, the appellant challenges part of the analysis which led the General Court to conclude that the sale of Sernam's assets en bloc did not take place following an open and transparent procedure, as the Commission required. In its examination of the fifth part of the fourth plea in law raised in the action for annulment, the General Court considered four complaints. In the first complaint, SNCF claimed that the offer from Sernam's management team constituted the outcome of a transparent and open procedure, as that team participated in the tendering procedure from the beginning from within the consortium formed with candidate 5 and lodged only one offer, after its partner informed it that it was unable to submit a firm offer by the time limit set by the Commission. Two arguments were advanced in the context of that complaint, the second of which SNCF put forward separately.[64]

62. From the outset, I would point out that this second ground of appeal is directed against paragraphs 163 and 164 of the judgment under appeal, which simply state that it was the consortium made up candidate 5 and the management team which initially participated in the tendering procedure and that it was the content of the project proposed by that consortium which had been initially selected, with the General Court simply reproducing, in paragraph 164 of the judgment under appeal, a response provided by the French authorities to the Commission on 6 January 2012. This is therefore essentially a factual assessment, which is likewise clear from paragraph 16 et seq. of SNCF's application before the General Court. In any event, it is apparent from the appeal that SNCF claims, in the context of the second ground of appeal, that the General Court erred in law, not that it distorted the facts. This ground should therefore be rejected on the basis of its inadmissibility, since an appeal is traditionally confined to questions of law, save in the case of a distortion of the facts and evidence, which is not claimed. The same fate must befall this ground of appeal in so far as it is directed against the finding of the General Court contained in paragraph 174 of the judgment under appeal, by which the General Court rejected the argument aimed at establishing that the management team participated from the beginning of the tendering procedure because it did not participate in that procedure independently and did not submit the initial offer alone.

61 SCNF relies, in that regard, on the Decision of 3 July 2001 on State aid which Spain has implemented and is planning to implement for the restructuring of Babcock Wilcox España SA (OJ 2002 L 67, p. 50); the Decision of 27 February 2008 on State aid C 46/07 (ex NN 59/07 implemented by Romania for Automobile Craiova (OJ 2008 L 239, p. 12), paragraph 95 of the *SMI* judgment and paragraph 110 of the *CDA* judgment.

62 OJ 2014 L 94, p. 1.

63 OJ 2014 L 94, p. 65.

64 It is in fact in the context of the third ground of appeal of this appeal that SNCF disputes the General Court's finding that the firm offer by Sernam's management team differed greatly from the second-round offer made by the consortium led by candidate 5 and was much less favourable to the seller.

63. However, the General Court goes on to make a legal characterisation of the facts by inferring from those elements — the Sernam management team's non-independent participation from the outset of the procedure — that the offer by that team cannot be regarded as the result of a transparent and open procedure, within the meaning of Article 3(2) of the Sernam 2 Decision. That characterisation of the facts falls within the scope of the review conducted by the Court of Justice in the context of an appeal.[65]

64. As SNCF points out, EU law does not lay down the formal requirements which must be met by the procedure under which Sernam's assets were going to be transferred en bloc. However, Article 3(2) of the Sernam 2 Decision imposed one express restriction, that is the requirement for an open and transparent procedure.

65. Without there being any need to rule on whether the principles of EU law in the field of public procurement are applicable in the context of the implementation of Article 3(2) of the Sernam 2 Decision — in particular since (1) there is nothing to indicate that that was the premiss of the General Court's analysis, (2) SNCF's reliance on Directives 2014/23 and 2014/24 appears to be new, and (3) SNCF does not formally challenge it —, the answer which must be given to the appellant, who relies on the precedent established by the *SMI* judgment,[66] is that, although in that judgment the Court held that the fact that the sale of assets en bloc had not taken place immediately but occurred after the failure of several attempts with another company gave 'reason to suggest that the procedure followed was sufficiently open and transparent',[67] it did so in the context of a sale which had taken place under the supervision of a court, a fact which SNCF fails to state.

66. With regard to the calls for tender, SNCF refers to the Commission's practice and points out that the Commission attaches importance to the fact that 'all companies that might have had an interest in buying … were given the opportunity to bid and that [the undertaking] was sold to the highest bidder',[68] as well as to equal access to information.[69] However, where in the context of State aid, the Commission requires the organisation of an open and transparent procedure, that requirement would be deprived of its practical effect if it were to be regarded as satisfied where the procedure was initiated on an open and transparent basis, guaranteeing equal access to information to all interested parties. An open and transparent procedure must remain so throughout that process and cannot, as the appellant submits, be confined to providing the opportunity to submit an offer subject to the same conditions concerning information and time limits.[70]

67. In the present case, there is no doubt that the candidate to which Sernam's assets[71] were transferred did not participate in the procedure from the beginning. Accordingly, the mismatch between the initial candidates for the takeover and the candidate whose offer was finally accepted could legitimately lead the Commission, and then the General Court, to consider that the procedure

65 See, inter alia, the judgment of 10 May 2007, *SGL Carbon* v *Commission* (C-328/05 P, EU:C:2007:277, paragraph 41 and the case-law cited).

66 Judgment of 29 April 2004, *Germany* v *Commission* (C-277/00, EU:C:2004:238).

67 Paragraph 95 of the *SMI* judgment.

68 SNCF refers here to paragraph 102 of the Decision of 3 July 2001 on State aid which Spain has implemented and is planning to implement for the restructuring of Babcock Wilcox España SA.

69 SNCF refers here to paragraphs 67 to 71 of the Decision of 27 February 2008 on State aid C 46/07 (ex NN 59/07) implemented by Romania for Automobile Craiova.

70 In any event, because, in the course of the procedure, a candidate who had not participated in that procedure independently from the outset had been admitted to it, the question may also be asked whether, in the present case, the same time limits were genuinely applied to the participants in the procedure.

71 Together with the bulk of the liabilities: see, inter alia, point 48 of this Opinion.

conducted had not been transparent in so far as it culminated in the conclusion of the transfer with a candidate who did not initially participate in the call for tenders, since the competitive position of the other candidates could have been adversely affected as a result[72] and that change could have vitiated the procedure.

68. For all the foregoing reasons, the second ground of appeal must be rejected as in part inadmissible and in part unfounded.

3. The third ground of appeal, alleging that the General Court distorted the facts and erred in law, in wrongly holding that the tender of Sernam's management team was much less favourable for the vendor than the non-binding offers of the other candidates

(a) The judgment under appeal

69. It is apparent from paragraphs 165 and 166 of the judgment under appeal that, in order to reject the complaint that the tender submitted by the management team constituted the outcome of a transparent and open procedure, since that team — which participated in the process from the outset — lodged only one offer which was initially submitted jointly with candidate 5, with which it formed the consortium, the General Court relied on the fact that the management team's firm offer differed greatly from the second-round offer from the consortium led by candidate 5 and was much less favourable for the vendor. In order to reach that conclusion, the General Court referred to several elements contained in the correspondence between the Commission and the French Republic in 2005 and in 2012, and found that the difference between the two offers had to be assessed on the basis of the criterion of the target's recapitalisation as provisionally required from the appellant, which is estimated at a much higher amount in the Sernam management board's final offer by comparison with what had been proposed by the consortium led by candidate 5. According to the General Court and using identical perimeters, the negative second-round offer of the consortium amounted to EUR — 56.4 million, whereas that from the management team was EUR — 95.5 million.[73] It likewise rejected the argument that, once candidate 5 had withdrawn from the procedure, the discussions were logically continued with the 'last interested party' and found that SNCF should have turned to candidate 4, which had participated in the procedure from the start and submitted a preliminary second-round offer of EUR — 65.2 million.[74] The fact that the candidate did not submit a firm offer is irrelevant from the General Court's perspective, since the question being examined is solely whether the offer from Sernam's management team was the result of the tendering procedure.[75]

(b) Summary of the arguments of the parties

70. The appellant claims that the offer from Sernam's management team could not be regarded as the result of an open or transparent tendering procedure because it was much less favourable for the vendor than the preliminary second-round offers submitted by the other candidates. The General Court therefore erred in law and distorted the facts by ruling otherwise. SNCF submits that the preliminary offer submitted by the consortium was based on a cash level different from that on which candidate 4 based its preliminary second-round offer. SNCF therefore disputes the General Court's assessment of the recapitalisation requirements as evaluated by candidate 4. In the light of the

72 With regard to the question whether EU law precludes a contracting entity from allowing an economic operator that is a member of a group of two undertakings, which was pre-selected and which submitted the first tender in a negotiated procedure for the award of a public contract, to continue to take part in that procedure in its own name after the dissolution of that group, I would draw attention to the judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347), from which, despite the major differences in terms of the law applicable to the case then before the Court, some inspiration may be drawn.

73 See paragraph 167 of the judgment under appeal.

74 See paragraph 170 of the judgment under appeal.

75 See paragraph 173 of the judgment under appeal.

significant deterioration of Sernam's cash level between 31 December 2004 and 30 June 2005, candidate 4 inevitably reassessed Sernam's recapitalisation requirements, which were determined as being at a significantly higher level. Assuming that the firm offer submitted by Sernam's management team can be compared with the consortium's non-binding, second-round offer, the General Court thus made a serious error.

71. For its part, the Commission takes the view that this third ground of appeal is ineffective and, in the alternative, unfounded.

(c) Analysis

72. The appellant's intention, in the context of this third ground of appeal, is to demonstrate that the General Court wrongly held that the firm offer submitted by Sernam's management team was much less favourable than that submitted by the consortium formed with candidate 5, before the latter withdrew from the procedure, or than the preliminary offer of candidate 4 resulting from the second round. In that regard, it is again necessary to assess whether the sale of Sernam's assets took place following an open and transparent procedure. Having considered, in my analysis of the second ground of appeal, that, since Sernam's management team did not participate in the selection procedure from the beginning and in an autonomous capacity, the ultimate selection of its offer was therefore not, for that reason alone, the result of a transparent and open procedure, contrary to the requirement laid down in Article 3(2) of the Sernam 2 Decision, it must be stated that even if the Court were to hold — quod non — that the General Court erred in law or distorted the facts in holding that the offer by Sernam's management team was less favourable, this could not call into question the conclusion which it reached and which I have just recalled. I therefore concur with the Commission's view that this third ground of appeal is ineffective. [76]

73. For the sake of completeness, I would add, as the Commission points out, that the General Court found in paragraphs 166 and 168 of the judgment under appeal that the second-round offer submitted by the consortium formed with candidate 5 proposed to inject 'a significant amount' of capital into Sernam, whereas the management team's offer made provision only for a much smaller injection. That part of the judgment is not challenged in the appeal. The key difference between the offers is therefore indeed significant, rendering ineffective any error in law or distortion relating to the evaluation of the recapitalisation requirements between the offers.

74. Finally, assuming that this falls within the scope of the review conducted by the Court of Justice in the context of an appeal, the General Court cannot be criticised for not having taken into account the different cash levels of Sernam on which the various offers were based, since SNCF did not advance that argument before the General Court. The General Court cannot have distorted facts which were not brought before it. As for the General Court's comparison of the management team's firm offer with the non-binding, second-round offer of the consortium, the appellant does not put forward any complaint based in law in that regard and seems, on the contrary, to acknowledge that such a comparison may be made. [77]

75. For all those reasons, the third ground of appeal must be rejected.

76 Furthermore, this does not appear to be disputed by the appellant because it did not respond in its reply to the position taken by the Commission.

77 See paragraph 86 of the appeal, in which the form of words used by the appellant contains the expression 'assuming that'.

4. The fourth ground of appeal, alleging that the General Court erred in law and provided an inadequate and contradictory statement of reasons, in holding that the Commission had not confused the subject matter and the price of the sale of Sernam's assets

(a) The judgment under appeal

76. In paragraph 153 of the judgment under appeal, as part of its examination of the fourth part of the fourth plea in law,[78] alleging an error of law committed by the Commission in so far as it found, in recital 117 of the Sernam 3 Decision, that the transfer was not limited to Sernam's assets by virtue of the fact that it had been increased by EUR 57 million net, the General Court stated that the Commission had not confused the subject matter of the sale and its price, since that amount was an addition to Sernam's assets achieved by means of the successive recapitalisations of Sernam and then Sernam Xpress. It also found, in the following paragraph, that the Commission could not be criticised for not having specified in its decision that it did not want a negative price, since the negative price results from the fact that the obligation to sell only Sernam's assets was not observed, as is also clear from the 'cash free, debt free' valuations made by the candidates at the end of the first round of the tendering procedure, which had all led to positive price proposals.[79] On that basis, the General Court concludes that those positive valuations show that, had SNCF confined itself to selling the assets without the liabilities, their sale price would have been positive or nil, but not negative.[80]

(b) Summary of the arguments of the parties

77. According to SNCF, by finding, in recital 117 of the Sernam 3 Decision, that, as a result of recapitalisation of Sernam and Sernam Xpress, a net sum of EUR 57 million had been added to the assets and that such an addition was not authorised by Article 3(2) of the Sernam 2 Decision, the Commission confused the subject matter of the sale (the assets en bloc) and the (negative) price paid to acquire them. Taking that premiss as its starting point, the appellant claims that the General Court, in paragraph 153 of the judgment under appeal, simply stated that the Commission had not laboured under any confusion of the kind alleged by SNCF, without substantiating that proposition and simply by making peremptory assertions. SNCF also submits that that conclusion constitutes an error in law and that paragraph 153 appears to contradict the line of reasoning developed by the General Court in the context of the second part of the fourth plea in law.[81]

78. SNCF disputes that the sale of the assets was increased by EUR 57 million net and explains that the recapitalisation in that amount[82] constitutes not an addition to the assets transferred but the negative price paid to acquire Sernam's assets en bloc. Although it conceded, in paragraphs 103 and 107 of the judgment under appeal, that State aid law is not concerned with the legal forms that transactions may take but rather focuses on their economic reality, and it acknowledges the possibility of a sale at a negative price in return for prior recapitalisation by the vendor, the General Court refused to regard the recapitalisation of Sernam as being included in the negative price paid for the transfer of assets en bloc, on the basis of an analysis founded exclusively on the legal form of that contribution.

78 Alleging errors of law and of fact made by the Commission in so far as it found that the transfer of the assets en bloc had not complied with the conditions laid down in Article 3(2) of the Sernam 2 Decision.

79 See paragraphs 155 to 157 of the judgment under appeal.

80 See paragraph 158 of the judgment under appeal.

81 Alleging errors of law and of fact made by the Commission in so far as it found, in recitals 99 to 102 of the Sernam 3 Decision, that the transfer of Sernam's assets en bloc at a negative price did not constitute a sale.

82 More precisely, a recapitalisation of EUR 59 million, from which EUR 2 million was subtracted and paid by Financière Sernam to acquire Sernam's assets en bloc: see paragraph 93 of the appeal.

79. The General Court's reasoning is vitiated by a second error of law. Whereas the General Court held that the negative price was the result of the fact that the obligation to sell only Sernam's assets, to the exclusion of its liabilities, had not been observed, SNCF submits that, since the transfer en bloc entailed the continuation of Sernam's activity, the existence of 'badwill',[83] which reflects the structurally loss-making nature of the activity transferred, and the automatic transfer of the contracts of employment, as provided for in French law, means that the activity necessarily has a negative value. The negative price is therefore due not to the addition of certain liabilities but simply to the actual wording of Article 3(2) of the Sernam 2 Decision which, by requiring that the assets be transferred en bloc, authorises the transfer of a structurally loss-making activity, including the operating costs linked to the continuation of the contracts of employment of personnel.

80. In its reply, SNCF adds that the view that the sale could take place at a positive price is an unsupported conjecture constituting a distortion of the facts, since all the offers submitted were broadly negative.

81. For its part, the Commission is of the view that this fourth ground of appeal is in part inadmissible and in part unfounded.

(c) Analysis

82. SNCF's argument consists in the submission that the recapitalisation is one of the elements of the sale of Sernam's assets en bloc at a negative price. I shall therefore make the point from the outset that the recapitalisation of Sernam by SNCF, as an addition to the assets, is not disputed from a factual perspective.[84] In paragraph 153 of the judgment under appeal, the General Court stated that 'the amount of EUR 57 million net injected by the successive recapitalisations of Sernam and then Sernam Xpress was … an addition to the assets of Sernam and then Sernam Xpress'. This is a finding of fact that is not in dispute between the parties. It is therefore difficult to criticise the General Court for any inadequacies in its statement of reasons. Moreover, the General Court infers the lack of confusion between the subject matter of the sale and its price from the wording of recital 117 of the Sernam 3 Decision, referred to in the previous paragraph of the judgment under appeal.

83. Furthermore, nor does it appear contradictory to hold, on the one hand, that EU law does not preclude a sale from taking place at a negative price, as the General Court did in paragraph 107 of the judgment under appeal and, on the other hand, that a recapitalisation which took place in the circumstances described in paragraph 153 is incompatible with Article 3(2) of the Sernam 2 Decision. These are two completely different matters. The first statement was made in the context of the analysis concerning the condition of 'sale' required by that article, with the Commission disputing that a sale can take place at a negative price. That issue must be distinguished from the issue whether an addition of assets was authorised by the Commission in its Sernam 2 Decision. In other words, although, in interpreting the concept of 'sale of assets en bloc', the General Court first of all considered the concept of 'sale', the parts of the judgment which are contested in this ground of appeal are more concerned with the concept of 'assets en bloc'. It is clear from the heading of the fourth part of the fourth plea in law raised before the General Court that that court then examined the question whether the Commission could reasonably take the view, in recital 117 of the Sernam 3 Decision, that the transfer limited to Sernam's assets had been unduly increased by EUR 57 million. It should be recalled that, after setting out the facts, recital 117 of that decision concluded that 'such an addition [was] not authorised by Article 3(2) of the Sernam 2 Decision'.

83 That is the spread that may exist between the acquisition price paid in cash or in shares and the value of the eligible assets and liabilities acquired, taken individually (see paragraph 223 of the judgment under appeal).

84 See paragraph 93 of the appeal.

84. The General Court's assessment in paragraph 154 of the judgment under appeal that the negative price is a consequence of the addition of the liabilities to the sale of Sernam's assets forms, in turn, part of a factual assessment in relation to which the appellant has not alleged a distortion of the facts in this ground of appeal. Furthermore, although SNCF disputes, in general terms, that the sale of assets en bloc necessarily had to be effected to the exclusion of the liabilities, it logically does not dispute that Sernam's sale included the vast majority of those liabilities. As I have already stated, the sale as envisaged by Article 3(2) of the Sernam 2 Decision had in fact to be understood as relating solely to Sernam's assets, to the exclusion of its liabilities. The mere fact that liabilities were included in the sale is sufficient to take the view that the conditions laid down in that article were not met. In any event, I would also point out that, at the hearing before the General Court, SNCF acknowledged that 'when an asset is sold individually, it has[,] by definition[,] a value which can be positive or nil but cannot be negative'.[85] It is therefore difficult to envisage the appellant re-opening a debate, at the appeal stage, on a statement which merely draws from its own position the appropriate conclusions.

85. For all those reasons, the fourth ground of appeal must be rejected.

5. The fifth ground of appeal, alleging that the General Court erred in law and distorted the operative part of the Sernam 2 Decision, in holding that the entry in the liabilities of Sernam's liquidation account of the amount corresponding to the recovery of the EUR 41 million in aid was incompatible with Article 4 of the Sernam 2 Decision

(a) The judgment under appeal

86. In paragraph 237 et seq. of the judgment under appeal, the General Court examined the complaint alleging that none of the criteria to support a finding of economic continuity between Sernam and Sernam Xpress was met in the present case. After recalling recital 144 of the Sernam 3 Decision, in which the Commission had concluded that 'all the criteria evidencing economic continuity within the meaning of the decision and the *Seleco* judgment[86] [were] therefore met', the General Court examined each of those elements one by one.

87. With regard to the subject matter of the transfer, the General Court stated, in the light of its earlier findings in paragraphs 134 to 137 of the judgment under appeal, that the Commission was correct in finding that the undertaking in its entirety had been transferred, contrary to Article 3(2) of the Sernam 2 Decision.[87]

88. With regard to the identity of the shareholders, the General Court upheld the analysis of the Commission, which concluded that the contribution from Sernam to Sernam Xpress had taken place within the appellant's group.[88]

89. With regard to the moment at which the transfer was carried out, the General Court recalled, first, that the moment of implementation of a decision involving the possibility of a sale of assets en bloc of the aid recipient, and also the obligation to recover unlawful and incompatible aid, seems at least as opportune for circumventing the recovery obligation as the phase involving the formal investigation

85 Paragraph 155 of the judgment under appeal.

86 Judgment of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission* (C-328/99 and C-399/00, EU:C:2003:252).

87 See paragraph 240 of the judgment under appeal.

88 See paragraph 243 of the judgment under appeal.

procedure, in the course of which the alleged operations aimed at circumvention had been carried out in the *Seleco*, *SMI* and *CDA* cases [89] relied on by the appellant, [90] and, secondly, that it had previously held that the operation had complied with neither the time limit nor the detailed rules set out in Article 3(2) of the Sernam 2 Decision. [91]

90. With regard to the economic logic, the General Court also stated that the conditions laid down in Article 3(2) of the Sernam 2 Decision had not been observed, that Sernam's business activities had not been interrupted, and that, therefore, the purpose of that article had not been observed. [92] It also held that the appellant could not rely on its national law to justify the inclusion of the liabilities in the sale, which was to exclude them. [93]

91. With regard to the price, the General Court held, in essence, that the negative price paid could not be regarded as a market price resulting from a transparent and open tendering procedure, since the General Court has already held that the Sernam management team's offer was not the result of a transparent and open procedure. [94] It also recalled that that negative price of EUR 57 million was perceived as operating aid enabling the losses of Sernam Xpress to be covered for the years 2005 to 2008, and that that price was accompanied by the write-off of Sernam's debts amounting to EUR 38.5 million. [95] The General Court went on to reject, first, the probative value of the various independent expert reports relied on by SNCF and intended to confirm that the transfer price was a market price [96] and, secondly, the arguments advanced by SNCF against the last two sentences of recital 145 of the Sernam 3 Decision, on the basis that they are superfluous, since those sentences are simply an 'additional indicator' that the contractual balance between SNCF and Financière Sernam did not correspond to market conditions. [97] The General Court also held that the Commission had been correct in concluding that the transfer of activities from Sernam to Sernam Xpress had had the consequence that Sernam Xpress continued to benefit from the competitive advantage linked with the receipt of the aid granted, as there was economic continuity between the two companies. [98] Furthermore, in response to the reliance on the case-law on sales of shares, following which — according to the French Republic — requiring the undertaking sold to repay the unlawful and incompatible aid would ultimately amount to penalising the purchaser of that undertaking, that is Financière Sernam, which, in paying the market price, should have already paid for that aid, the General Court held that the Commission had found that the sale of the shares in Sernam Xpress to Financière Sernam had not had the effect of releasing Sernam Xpress from its obligation to repay the EUR 41 million in aid. After all, the obligation to repay the EUR 41 million in aid was not transferred to Financière Sernam as purchaser of the shares in Sernam Xpress, but as its legal successor after the merger of 30 June 2011 and the transfer of all assets and liabilities that followed it, while the economic continuity between Sernam and Sernam Xpress was demonstrated to the requisite legal standard by the Commission. [99] Lastly, the General Court held to be ineffective SNCF's reliance on the private investor test which, in the General Court's view, is unrelated to the obligation to recover the EUR 41 million, but rather concerns the entirely different matter of the categorisation of the new aid. [100] In conclusion, the General Court held that it was entirely consistent with the judgment in *Commission* v *Spain* [101] for

89 Respectively, judgment of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission* (C-328/99 and C-399/00, EU:C:2003:252), the *SMI* judgment and the *CDA* judgment.

90 See paragraph 246 of the judgment under appeal.

91 Paragraph 247 of the judgment under appeal, in which the General Court refers to paragraphs 84 to 93 and 110 to 187 of that judgment.

92 See paragraph 251 of the judgment under appeal.

93 See paragraph 252 of the judgment under appeal.

94 See paragraph 255 of the judgment under appeal.

95 See paragraph 256 of the judgment under appeal.

96 See paragraphs 257 to 260 of the judgment under appeal.

97 See paragraphs 261 and 262 of the judgment under appeal.

98 See paragraphs 263 to 265 of the judgment under appeal.

99 See paragraphs 266 to 270 of the judgment under appeal.

100 See paragraphs 271 and 272 of the judgment under appeal.

101 Judgment of 11 December 2012, *Commission* v *Spain* (C-610/10, EU:C:2012:781).

the Commission to take the view that merely entering the aid declared unlawful and incompatible in the liabilities of the liquidation account had not been sufficient to eliminate the distortion of competition, and to reject the complaint alleging that none of the criteria of economic continuity had been met in the present case.[102]

92. Finally, in paragraph 275 et seq. of the judgment under appeal, the General Court examined the complaint alleging that that entry was consistent with Article 4 of the Sernam 2 Decision, recalled the judgment in *Commission* v *Spain*,[103] according to which aid must be recovered from the company which carries on the economic activity of the undertaking which initially benefited from the advantage associated with the grant of State aid and which retains the actual benefit thereof, and concluded that, in a situation of recovery of State aid, the allusion to the continued existence of Sernam had to be understood as referring to the continuation in Sernam's economic activity. The General Court therefore rejected the complaint, since the entry in the liabilities of Sernam's liquidation account of the unlawful and incompatible aid was inconsistent with Article 4 of the Sernam 2 Decision.

(b) Summary of the arguments of the parties

93. SNCF again claims that the General Court distorted the operative part of the Sernam 2 Decision in holding that Article 4 of that decision 'could only be alluding to the continuation in Sernam's economic activity',[104] even though the wording of that article is clear and unambiguous, makes no reference to the interruption of that activity and simply draws a distinction depending on whether or not Sernam company, as a legal person, continues to exist; this is fully justified in the light of the settled case-law that, where an undertaking that has benefited from State aid sells its assets to a third party and at a market price, the benefit of the aid is included in the price, so that the actual enjoyment of the aid is retained by the vendor.[105] By distorting Article 4 of the Sernam 2 Decision, the General Court also committed an error of law which should result in the judgment under appeal being set aside.

94. In addition, the appellant points out several errors of law committed by the General Court in the latter's examination of the conditions for economic continuity between Sernam and the party acquiring the assets en bloc,[106] even though the Commission is not, in any event, required to take all of those factors into account.[107]

95. With regard to the identity of the shareholders, SNCF recalls that the conditions laid down in Article 3(2) of the Sernam 2 Decision did not allow it to sell Sernam's assets en bloc to Financière Sernam for reasons connected with specific features of French law.[108] The contribution and disposal process, preceded by a recapitalisation if the price is negative, reflects the economic reality of a transfer of Sernam's assets en bloc to Financière Sernam at their market value. By finding that the question of economic continuity must be assessed between Sernam and Sernam Xpress, the General Court artificially divided a single operation, the sole economic logic of which was the transfer of the ownership of Sernam's assets en bloc. The General Court thus infringed the principle that State aid law is not concerned with the legal forms that transactions may take but rather focuses on their economic reality, and vitiated its judgment by contradictory reasons in the light of the principle

102 See paragraphs 273 and 274 of the judgment under appeal.

103 Judgment of 11 December 2012, *Commission* v *Spain* (C-610/10, EU:C:2012:781).

104 Paragraph 278 of the judgment under appeal.

105 The appellant refers in that regard to the judgment of 20 September 2001, *Banks* (C-390/98, EU:C:2001:456, paragraph 77) and to paragraph 80 of the *SMI* judgment.

106 Concerning the definition of those conditions, SNCF refers to the judgments of 13 September 2010, *Greece and Others* v *Commission* (T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 135) and of 28 March 2012, *Ryanair* v *Commission* (T-123/09, EU:T:2012:164, paragraph 155).

107 As the General Court pointed out in paragraph 235 of the judgment under appeal.

108 Detailed in paragraph 116 of the appeal.

restated in paragraph 107 of the judgment under appeal, that a sale may be effected at a negative price. Sernam Xpress was simply the vehicle set up to allow transfer of the ownership of Sernam's assets en bloc to Financière Sernam. Furthermore, Financière Sernam merged with Sernam Xpress as soon as the operation was completed. The General Court failed to take into account that Financière Sernam has ownership of and uses the Sernam assets held in Sernam Xpress and that Financière Sernam's shareholders and Sernam's shareholders are not the same.

96. With regard to the market price, SNCF claims that the General Court erred in law by refusing to take account of the market price paid for Sernam's assets, even though, in accordance with the case-law, the existence of a market price is one of the most significant criteria for a finding that there was no economic continuity. In that regard, the appellant relies in particular on the *SMI* and *CDA* judgments. [109]

97. With regard to the subject matter of the transfer, the General Court incorrectly found that the undertaking had been transferred in its entirety, since Sernam's assets en bloc were transferred along with only the operating liabilities.

98. With regard to the moment at which the transfer was carried out, SNCF submits that no circumvention can be alleged since the Commission itself provided for the possibility of a transfer of Sernam's assets en bloc and those assets were transferred at a market price.

99. With regard to the economic logic of the transaction, the General Court was wrong to find that Article 3(2) of the Sernam Decision required that Sernam's economic activity be interrupted, whereas the possibility of a transfer of assets en bloc specifically enabled the transfer of Sernam's activity. The General Court cannot argue that the logic of the transaction ran counter to the objectives of that decision even though that transaction was allowed under Article 3(2) of the Sernam 2 Decision.

100. SNCF concludes that the General Court erred in law and distorted Article 4 of the Sernam 2 Decision in holding that the entry in the liabilities of Sernam's liquidation account of the amount corresponding to the EUR 41 million in aid declared incompatible by the Sernam 2 Decision was inconsistent with Article 4 of that decision.

101. For its part, the Commission takes the view that this ground of appeal is in part ineffective and in part inadmissible

(c) Analysis

102. Article 4 of the Sernam 2 Decision provided that any sale of Sernam was to be effected at market price and following a transparent procedure that is open to all its competitors, and that, if those conditions were observed, the 'Sernam company' would, if 'Sernam' continued to exist, be responsible for paying back the aid of EUR 41 million. [110] In the Sernam 3 Decision, the Commission verified whether the procedure for the recovery of the incompatible aid chosen by France, that is to say entering the debt to the State in the liabilities of the liquidation account of Sernam in fact enabled the distortion of competition to be eliminated. [111] Finding that Article 4 of the Sernam 2 Decision drew a distinction depending on whether or not Sernam's economic activity was interrupted, the Commission examined the transfer of Sernam's activities to Financière Sernam in the light of the criteria and principles established in the *SMI*, *CDA* and *Seleco* judgments in order to determine whether it was appropriate to extend the recovery to Financière Sernam and its subsidiaries. That analysis is

109 Respectively, paragraphs 66, 70, 78, 84, 86 and 93 to 95 of the *SMI* judgment and paragraphs 97 to 99 of the *CDA* judgment.

110 Corresponding, essentially, to additional aid paid on account of the delay in Sernam's linkage to Geodis, of which the French authorities informed the Commission only in their annual report of 2002, and without that additional sum being the subject of a full re-notification for the file (see, in particular, recital 176 of the Sernam 2 Decision).

111 See recital 37 of the Sernam 3 Decision.

contained in recitals 143 to 151 of the Sernam 3 Decision. As has been shown, the Commission concluded that the transfer of the activities from Sernam to Sernam Xpress had the consequence that Sernam Xpress continued to benefit from the competitive advantage linked with the receipt of the aid granted, because there was economic continuity between the two companies, and, in the Commission's view, the transfer corresponds to an evasion of the recovery order imposed on Sernam.[112] Following the merger between Sernam Xpress and Financière Sernam, the obligation regarding recovery was transferred to the latter which, together with its subsidiaries, is continuing the business of Sernam and Sernam Xpress and is therefore continuing to benefit from the aid of EUR 41 million initially granted to Sernam.[113]

103. The General Court reviewed the above analysis made by the Commission, referring to it in paragraph 237 et seq. of the judgment under appeal. It is against that part of that judgment that this fifth ground of appeal is directed, although the line of argument advanced by the appellant is sometimes confused, often repetitive and does little to identify clearly the errors of law specifically criticised, mingling issues of fact and of law.

104. I shall respond immediately to the complaint alleging that, in incorrectly interpreting Article 4 of the Sernam 2 Decision, the General Court distorted that provision and erred in law. In accordance with the maxim 'he who can do most can also do least', I shall examine only the alleged error of law, since an analysis of the distortion would necessarily be more superficial.

105. In order to hold that Article 4 of the Sernam 2 Decision made recovery of the aid from Sernam conditional on the continuation of the latter's economic activity, the General Court referred not only to the wording of that article but also to its context, namely that of the recovery of State aid. In view of the settled case-law of the Court of Justice, SCNF could not have been unaware that the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded.[114] In addition, the desired outcome when restoring the situation prior to the payment of the unlawful aid is, generally speaking, the preservation of the effectiveness of the provisions of the Treaties concerning State aid.[115] In that connection, the mere elimination of Sernam as a legal person is by no means a guarantee of the disappearance of the activity subsidised. Finally, as the General Court recalled,[116] the aid must be recovered from the company which carries on the *economic activity* of the undertaking which initially benefited from the advantage.

106. Accordingly, the General Court's contextualised interpretation of Article 4 of the Sernam 2 Decision both uses a traditional method of interpretation available to the European Union judicature and is also devoid of any error of law. The complaint alleging that the General Court erred in law by incorrectly interpreting Article 4 of the Sernam 2 Decision must therefore be rejected.

107. Having confirmed that Sernam remained, in the Commission's view, responsible for recovering the EUR 41 million in aid if its economic activity was continuing, it remains to be ascertained whether the criteria necessary for such continued activity were properly analysed by the General Court. As is clear from paragraph 236 of the judgment under appeal, SNCF 'do[es] not dispute [the] method of analysing economic continuity' set out in paragraphs 234 and 235 of that judgment.

112 See, in particular, recital 148 of the Sernam 3 Decision.

113 See recital 150 of the Sernam 3 Decision.

114 See, inter alia, paragraph 77 of the *SMI* judgment.

115 Judgment of 20 September 2001, *Banks* (C-390/98, EU:C:2001:456, paragraph 75).

116 See paragraph 277 of the judgment under appeal, citing the judgment of 11 December 2012, *Commission* v *Spain* (C-610/10, EU:C:2012:781).

(1) The subject matter of the transfer

108. SNCF misreads the judgment under appeal in asserting that the General Court found the criterion relating to the subject matter of the transfer to be met because Sernam was transferred in its entirety, contrary to Article 3(2) of the Sernam 2 Decision. In paragraph 240 of the judgment under appeal, the General Court held that that criterion had to be regarded as being met not simply because the transfer had taken place contrary to Article 3(2) of the Sernam 2 Decision, but, on the contrary, because it had just held, in its examination of the third part of the fourth plea in law, that the Commission had been correct in finding that Sernam in its entirety had been transferred.[117] Moreover, by taking the view that its complaint is intended to demonstrate merely that the General Court's argument is ineffective, SNCF does not put forward a complaint seeking to contest the truth of the finding made by the General Court. As the Commission points out, SNCF has not in that regard called into question paragraph 137 of the judgment under appeal, in which the General Court concludes that 'the Commission therefore made no error of law or fact as to the subject matter of the operation in stating, in recital 116 of the [Sernam 3] [D]ecision, that the transfer of activities did not constitute a sale of assets, but rather a transfer of Sernam in its *entirety* (assets and liabilities), barring a few exceptions'.[118]

(2) The identity of the shareholders

109. It is clear from the diagram reproduced in point 23 of this Opinion that the appellant, which was asked by the Commission to transfer the assets of its subsidiary, Sernam, had another subsidiary named Sernam Xpress, and that it was to that subsidiary that Sernam's assets were transferred. SNCF therefore transferred the undertaking which was the recipient of the aid to one of its subsidiaries.

110. SNCF claims that the General Court analysed the criterion of the identity of the shareholders vis-à-vis the relationship between Sernam and Sernam Xpress and not that between Sernam Xpress and Financière Sernam. It explains that Sernam Xpress was merely a vehicle for conveying Sernam's assets and that intermediation by Sernam Xpress was made necessary by the combination of legal constraints under national and Community law.

111. I would, however, point out that Sernam's assets were transferred in their entirety to Sernam Xpress, and that SNCF does not dispute that that transfer took place. Moreover, and as the General Court rightly pointed out, the Commission did not base its reasoning on the economic continuity between Sernam and Financière Sernam. In particular, the Commission found that that criterion was met not because Sernam's shareholders were the same as Financière Sernam's shareholders, but because of the identity between the shareholders of Sernam and Sernam Xpress. In addition, the Commission reached the conclusion that Financière Sernam must be regarded as responsible for recovering the EUR 41 million in aid solely because it merged with Sernam Xpress; however, at the end of the analysis, it is actually Sernam Xpress which is primarily held responsible for recovery.[119] In those circumstances, the arguments advanced by SNCF seeking to demonstrate that Sernam's shareholders and Financière Sernam's shareholders are not the same are ineffective. The allegation of infringement of the principle that State aid law is not concerned with the legal forms taken by transactions but rather focuses on their economic reality likewise cannot succeed for those same reasons.

117 In the light of the case-law recalled in paragraph 234 of the judgment under appeal, and which SNCF does not challenge, the transfer of the contracts of employment invoked on several occasions by SNCF is also an indication that at least a substantial part of the subject matter of the transfer relates to Sernam.

118 Emphasis added.

119 See recital 149 of the Sernam 3 Decision.

(3) The moment at which the transfer was carried out

112. It must be stated at this juncture that, although the view may be taken that the transfer took place after the adoption of the Sernam 2 Decision and for the purposes of its implementation, the fact remains that, from the moment at which the French authorities were aware of that decision, they knew that they were required to recover the EUR 41 million in aid, and therefore acknowledging that, when the transfer took place after the final decision, an intention to evade the obligation of recovery cannot be ruled out does not constitute an error in law on the part of the General Court, especially since SNCF has failed to identify any specific rule of law which the General Court thereby infringed.

(4) The economic logic of the transaction

113. In this connection, the appellant disputes that the General Court was able to conclude that the transaction had not interrupted Sernam's economic activity and that, therefore, the purpose of Article 3(2) of the Sernam 2 Decision had not been observed, even though, according to SNCF, that article allowed for the transfer of Sernam's activity. In so doing, it does no more than briefly repeat the arguments which have already been advanced, analysed and rejected in the context of the first ground of this appeal, to which I therefore refer.

(5) The transfer price

114. In this connection, SNCF criticises the General Court for having refused to take into account the market price paid for Sernam's assets, even though, in SNCF's view, that price is, 'in accordance with case-law, one of the most significant criteria for a finding that there was no economic continuity'. [120] In the arguments advanced by it, the appellant simply paraphrases the Commission's summary, in recital 137 et seq. of the Sernam 3 Decision, of the case-law on the sale of activities which have benefited from aid. SNCF draws particular attention to the finding of the General Court in the case of *CDA* [121] that, where a purchase price in line with the market was paid by the purchaser, it is impossible to conclude that that purchaser retained the actual benefit of the competitive advantage.

115. First, I am not convinced that the General Court can be criticised for not having taken into account that criterion, since it did in fact carry out an analysis to determine whether that criterion was observed in the present case before finding that it was not.

116. Secondly, although SNCF, indeed rightly, pointed out that the market price criterion is one of the most significant, it has perhaps forgotten that it is not, in any event, a sufficient criterion for a finding that there is no economic continuity, with the result that even if an error of law could be identified in the General Court's analysis of the criterion of the price paid in the analysis of economic continuity, it would not be sufficient to defeat that analysis in its entirety, still less, as the appellant claims, to set aside the judgment under appeal.

117. Thirdly, again referring to paragraphs of the *SMI* judgment, [122] in which the Court also took into consideration the nature of the procedure conducted to arrive at the award at the alleged market price, SNCF does not dispute the correlation established by the General Court, in paragraph 255 of the judgment under appeal, between the requirement of a transparent and open procedure, on the one hand, and the requirement of a market price, on the other hand. It is apparent from the analysis conducted in the context of the second ground of this appeal that the procedure, which was intended to lead to the sale of Sernam's assets en bloc, did not exhibit all the features of a transparent and open procedure.

120 See points 120 and 125 of the appeal.

121 Paragraphs 97 to 99.

122 Paragraphs 93 to 95.

(6) Conclusion concerning the fifth ground of appeal

118. Since none of the complaints put forward in the context of this fifth ground of appeal can succeed, the ground of appeal must be rejected.

6. The sixth ground of appeal, alleging that the General Court erred in law, provided an inadequate statement of reasons and distorted the facts, in holding that the private investor principle was not applicable to the transfer of Sernam's assets en bloc

(a) The judgment under appeal

119. The sixth ground of appeal is directed against paragraph 283 et seq. of the judgment under appeal, in which the General Court examined the first part of the sixth plea in law in the action for annulment,[123] alleging that the Commission erred in law in declaring the private investor test to be inapplicable to the present case.

120. The General Court observed that the Commission's decision not to apply the private investor test is based on two grounds set out in recitals 154 and 155 of the Sernam 3 Decision, and began by examining SNCF's arguments relating to the second ground,[124] in which SNCF claimed that the Commission had found that the negative price agreed between SNCF and Financière Sernam attested to the fact that a divestment of a loss-making activity was involved which could not be the equivalent of a compensatory measure and that the negative price corresponded to operating aid, which was therefore inherently ill-suited to reducing distortions of competition. In the Commission's view, the incorrect implementation of the compensatory measures set out in Article 3 of the Sernam 2 Decision rendered the private investor test inapplicable.[125]

121. With regard to that second ground, the General Court first turned its attention to the plea in law alleging that the sale of the assets en bloc did not constitute an alternative to the compensatory measures provided for in Article 3(1) of Sernam 2 Decision.[126] In that connection, first, the General Court pointed out that Article 3(2) of that decision constituted the implementation of one of the two alternative conditions for comparability of the restructuring aid proposed by the Commission and an alternative equivalent to the conditions set out in Article 3(1), since the two paragraphs pursue exactly the same objective of compensating for distortions of competition (the withdrawal from the road market with overcapacity in the scenario envisaged in Article 3(1) of the Sernam 2 Decision or the end of Sernam's subsidised activity in the event of the implementation of Article 3(2) of that decision, that is to say a sale of Sernam's assets en bloc). The General Court concludes from this that the sale of Sernam's assets en bloc may be considered equivalent to the measures provided for in Article 3(1) of the Sernam 2 Decision.[127] Secondly, the General Court rejected SNCF's argument that it was the continuation of Sernam in its legal form prior to the transfer which justified compliance with the compensatory measures set out in Article 3(1) of the Sernam 2 Decision, finding that it was the continuance of the economic activity of the recipient of restructuring aid on the market, and not the mere fact that its legal personality was maintained, which justified such compliance.[128] Thirdly, the General Court took the view that, since the condition relating to the sale of the assets en bloc excludes

123 Alleging that the Commission committed an error of law, in finding that the measures provided for in the memorandum of understanding of 21 July 2005 concerning the transfer en bloc of Sernam's assets constituted new State aid in favour of Sernam Xpress-Financière Sernam.

124 See paragraph 288 of the judgment under appeal.

125 See paragraphs 287 and 288 of the judgment under appeal.

126 See paragraph 293 et seq. of the judgment under appeal.

127 See paragraph 297 of the judgment under appeal.

128 See paragraphs 298 and 299 of the judgment under appeal.

liabilities, the possibility of obtaining a negative price was by definition precluded, and there was no need to require that the Commission specify explicitly that it did not envisage a transfer at a negative price.[129] The General Court therefore rejected the first complaint directed at recital 155 of the Sernam 3 Decision.

122. Next, the General Court responded to the second ground, directed at that recital and alleging that the implementation of a compensatory measure is the responsibility of the recipient of the aid, or of the State shareholder, but not the State as a public authority.[130] The General Court then held that the sale of Sernam's assets en bloc pursuant to Article 3(2) of the Sernam 2 Decision was not a decision that a private investor would have taken in normal market conditions, with a view to maximising profit or minimising losses in an economically rational manner, since the underlying logic of the compensatory measures is to prevent any excessive distortion of competition brought about by the grant of restructuring aid declared conditionally compatible by the Sernam 2 Decision.[131] The General Court also pointed out that the compensatory measures could bind the recipient of the aid or its shareholder to a less than optimal solution from an economic perspective, which a private investor in a normal market situation would not envisage, and verified that that was the case here.[132] It inferred from this that the economic logic of the sale of the assets en bloc differed from the logic of a private operator.[133] Finally, the General Court stated that Article 3(2) of the Sernam 2 Decision required the sale not of an entire loss-making company, but only of the assets having a positive economic value. The offer from Sernam's management team included recapitalisation requirements, write-off of debts and guarantees from the vendor specifically because Sernam in its entirety had been sold with a need for financing. Those measures are therefore a direct result of the infringement of Article 3(2) of the Sernam 2 Decision and are unrelated to the application of the private investor test.[134] The General Court therefore also rejected the second complaint directed at recital 155 of the Sernam 3 Decision.

123. In view of the fact that it had just found that the second ground relied on by the Commission to refuse to apply the private investor test was lawful, the General Court held that it was no longer necessary to examine the other arguments relating to the first ground in the context 'of recovery' of State aid.[135]

(b) The first part of the sixth ground of appeal

(1) Summary of the arguments of the parties

124. SNCF claims that, by simply reproducing the statement of reasons for the Sernam 3 Decision explaining why the Commission refused to apply the prudent private investor principle to the transfer of Sernam's assets en bloc, the General Court failed to respond to the complaint made that the reasons stated conflict with each other. According to SNCF, if the transfer of the assets en bloc constitutes a compensatory measure, it is a condition for the compatibility of the aid for the restructuring of Sernam. It infers from this that Article 3(2) of the Sernam 2 Decision, which lays down those conditions, cannot be regarded as contributing towards an aid recovery situation. The Commission could not refuse to apply the private investor principle because of the alleged existence of a recovery situation. However, in paragraph 312 of the judgment under appeal, the General Court did not take a

129 See paragraphs 300 and 301 of the judgment under appeal.
130 See paragraph 303 et seq. of the judgment under appeal.
131 See paragraphs 305 and 306 of the judgment under appeal.
132 See paragraphs 307 and 308 of the judgment under appeal.
133 See paragraph 309 of the judgment under appeal.
134 See paragraph 310 of the judgment under appeal.
135 See paragraph 312 of the judgment under appeal.

view on that complaint, finding that 'it [was] no longer necessary to examine the other arguments relating to the first ground relied on by the Commission to justify the non-applicability of the private investor test in the context "of recovery" of the State aid'. That failure to provide a response vitiates the statement of reasons for the judgment under appeal.

125. In its reply, SNCF finally claims that the General Court did not rule on the contradictory reasons forming the basis of the Commission's decision not to apply the private investor test, in that the Commission could not take that view both because of the existence, on the one hand, of a recovery situation (suggesting that the aid is incompatible) and, on the other hand, of a compensatory measure (suggesting that the aid is compatible).

126. The Commission contends that this first part must be rejected.

(2) Analysis

127. It is clear from recitals 154 and 155 of the Sernam 3 Decision that the Commission considered that it was not appropriate to apply the principle of the private investor in a market economy, with a view to exempting, where appropriate, the measures provided for in the memorandum of understanding of 21 July 2005 from the classification as State aid, because it was of the opinion, first, that those measures had been adopted 'in a situation of recovery of the aid'[136] and, secondly, that the sale of Sernam's assets en bloc provided for in Article 3(2) of the Sernam 2 Decision was perceived as an equivalent to the compensatory measures, although it was clear from the Community guidelines on State aid for rescuing and restructuring firms in difficulty[137] that the divestment of a loss-making activity cannot be considered as such a measure, with the result that the negative price paid during Sernam's transfer corresponded to operating aid to the undertaking, which is inherently ill-suited to reducing distortions of competition.[138]

128. The analysis conducted by the General Court observed that structure, whilst reversing its order of examination. Accordingly, the General Court began by examining the appellant's arguments linked to the ground of inapplicability of the private investor test contained in recital 154 of the Sernam 3 Decision. As I pointed out above, the General Court rejected each of the arguments intended to dispute the well-founded nature of that recital, and accordingly confirmed that the Commission had been right to consider that it was not required to apply that test to the measures at issue.

129. Once the General Court had ruled thus, the fate assigned by it to the appellant's arguments directed against the ground contained in recital 154 of the Sernam 3 Decision no longer had any effect on the treatment of the complaint alleging that the Commission erred in law by declaring the private investor test inapplicable, those arguments therefore being rendered ineffective. This is why the General Court, without vitiating its reasoning by a failure to state reasons or a refusal to give a ruling, considered that it was no longer necessary to examine the arguments relating to the first ground relied on by the Commission to justify the non-applicability of the private investor test in the alleged context of recovery of the State aid.

130. As for the criticism made of the General Court that it neither detected nor declared unlawful the contradiction between the two grounds on which the Commission relied to find the private investor test to be inapplicable, and which was put forward by SNCF at the reply stage, I shall simply state that such a contradiction was not raised before the General Court. In any event, as the Commission

136 Recital 154 of the Sernam 3 Decision.

137 Communication from the Commission — Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty (OJ 2004 C 244, p. 2).

138 See recital 155 of the Sernam 3 Decision.

pointed out, the Sernam 2 Decision is a multi-faceted decision falling both within a context of recovery of the EUR 41 million in aid and of conditionality of the restructuring aid. The General Court cannot therefore be criticised for not having identified a contradiction which not only does not exist but which, in addition, appears not to have been raised before it.

131. Consequently, the first part of the sixth ground of appeal must be rejected.

(c) The second part of the sixth ground of appeal

(1) Summary of the arguments of the parties

132. SNCF submits that, by confirming the approach adopted by the Commission that the private investor principle was not applicable in so far as the transfer of the assets was provided for as a compensatory measure, the General Court seriously distorted the Sernam 2 Decision. In that regard, the appellant puts forward four complaints.

133. First, Article 3(2) of the Sernam 2 Decision provided that the transfer en bloc of Sernam's assets was to be effected at a market price and following a transparent and open tendering procedure, which actually amounts to applying the private investor principle, which is thus at the very heart of that article. The General Court therefore distorted the facts and the substance of the Sernam 2 Decision by substituting its own statement of reasons.

134. Secondly, by holding that the transfer of Sernam's assets en bloc had to exclude all liabilities and that, therefore, the possibility of obtaining a negative price was by definition precluded, the General Court distorted the Sernam 2 Decision, as the appellant submitted in the context of the first ground of appeal. In addition, by requiring that the transfer of Sernam's assets en bloc be effected at market price, and it being entirely possible for that price to prove to be negative,[139] Article 3(2) of the Sernam 2 Decision never required that the transfer take place at a nil or positive price, and accordingly the General Court added a condition not provided for in that article, which it thus distorted.

135. Thirdly, by holding, in paragraph 100 of the judgment under appeal, that the only requirement imposed by Article 3(2) of the Sernam 2 Decision was that the price paid be a market price, and then, in paragraph 301 of the same judgment, that the sale price could not, by definition, be negative, the General Court vitiated its judgment by stating contradictory reasons.

136. Fourthly, assuming that a teleological interpretation of Article 3(2) of the Sernam 2 Decision must be applied, it makes no difference, from that point of view, whether the market price is negative or positive. In that regard, SNCF points to recital 217 of the Sernam 2 Decision, from which it is clear that the purpose is to allow a third party, by means of the transfer of Sernam's assets en bloc, to take over Sernam's market shares so that Sernam will no longer operate on the market in its previous legal form. In view of that purpose, it is irrelevant whether that transfer takes place at a positive price or a negative price. The market shares occupied by Sernam were indeed ceded to an independent acquiring party, at a market price and following a transparent and open tendering procedure. The General Court therefore distorted the Sernam 2 Decision by holding that the transfer of Sernam's assets en bloc could not, by definition, be effected at a negative price.

139 The appellant relies in that regard on the judgments of 28 January 2003, *Germany* v *Commission* (C-334/99, EU:C:2003:55, paragraph 133) and of 13 May 2015, *Niki Luftfahrt* v *Commission* (T-511/09, EU:T:2015:284, paragraph 139).

137. At the reply stage, SNCF adds that, in the light of the content of its recent notice on the notion of State aid,[140] the Commission could not claim that the private investor test was not confused with the condition of a sale at a market price following a transparent and open procedure, even though, in the context of a sale of assets by a public undertaking, the private investor principle itself requires the achievement of a market price, the existence of which may be presumed where the price is the result of such a procedure. Furthermore, SNCF argues that, contrary to the Commission's claim, a single asset could be transferred at a negative price and that the overall value of the assets transferred en bloc could, in the present case, also prove to be negative, given the structurally loss-making nature of the activity and the obligations attached to that transfer.

138. For its part, the Commission contends that this second part must be rejected.

(2) Analysis

139. In the context of this second part, SNCF complains, in essence, that the General Court distorted Article 3(2) of the Sernam 2 Decision because (1) it did not accept that, by requiring that the transfer take place at a market price following a transparent and open procedure, that article itself bore the seeds of the application of the private investor test; (2) it interpreted that article as requiring the transfer solely of Sernam's assets and that that transfer could not be effected at a negative price; and (3) the teleological interpretation adopted by the General Court is similarly incapable of justifying the General Court's exclusion of a sale at a negative price. Furthermore, SNCF criticises the contradictory reasons stated by the General Court.

140. In paragraph 292 of the judgment under appeal, the General Court stated that the applicability of the private investor test depends on the Member State having conferred, in its capacity as shareholder and not solely in its capacity as public authority, an economic advantage on an undertaking belonging to it, it being understood that interventions by the State which are intended to honour its obligations as a public authority cannot be compared to those of a private investor in a market economy. In particular, the nature and subject matter of that measure may be relevant in that regard, as may its context, the objective pursued and the rules to which the measure is subject.[141]

141. It will be remembered that that test is applied 'in order to determine whether, because of its effect, the economic advantage granted, in whatever form, through State resources to a public undertaking distorts or threatens to distort competition and affects trade between Member States.'[142] Thus, the private investor test will be carried out only if the advantage has been conferred by the State in its capacity as shareholder, since the Court has held that 'an economic advantage must … be assessed in the light of the private investor test if, on conclusion of an overall assessment, it appears that, notwithstanding the fact that the means used were instruments of State power, the Member State concerned has conferred that advantage in its capacity as shareholder of the undertaking belonging to it'.[143] Accordingly, 'the applicability of the private investor test to a public intervention depends not on the way in which the advantage was conferred, but on the classification of the intervention as a decision adopted by a shareholder of the undertaking in question'.[144]

142. However, in the context of the present case, it must be observed that the General Court was right to confirm, as follows from point 46 et seq. of this Opinion, the compensatory objective of the scenario envisaged in Article 3(2) of the Sernam 2 Decision. The sale of Sernam's assets en bloc did appear to be an alternative to the refocusing of its activities provided for in Article 3(1) of that same decision,

140 Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ 2016 C 262, p. 1, in particular paragraphs 74 and 84 thereof).

141 See paragraph 292 of the judgment under appeal and the case-law cited.

142 Judgment of 5 June 2012, *Commission* v *EDF* (C-124/10 P, 'the *EDF* judgment', EU:C:2012:318, paragraph 89).

143 Judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, 'the *ING* judgment', EU:C:2014:213, paragraph 30).

144 Paragraph 31 of the *ING* judgment.

since Article 3 is devoted entirely to the conditions which had to be observed in order for the restructuring aid granted to Sernam to be compatible. Its assets were therefore transferred en bloc only because the Sernam 2 Decision made provision for an alternative order. It is therefore of little relevance that the actual content of Article 3(2) of the Sernam 2 Decision reflects, as SNCF claims, an supposed application of the private investor principle. To require that compensatory measures be implemented in circumstances that seek to re-establish healthy competition therefore forms part of the very essence of the compensatory mechanism, but makes no presumption whatsoever regarding the role of the State at the time of their implementation. Moreover, it also follows from the analysis set out above that the sale of Sernam's assets en bloc had to take place to the exclusion of all liabilities. Although it is true that a market price may indeed prove to be a negative price, the appellant has failed to demonstrate that if only Sernam's assets had been transferred their price would nevertheless have been negative. In that regard, it must nonetheless be pointed out that the argument summarised in point 137 of this Opinion directly contradicts SNCF's oral argument presented at the hearing before the General Court and set out in point 84 of this Opinion. Furthermore, although the General Court found that, in the present case, the market price referred to in Article 3(2) of the Sernam 2 Decision could not be negative as a matter of necessity, it did so because it rightly considered that the Commission envisaged, as a form of compensation, that only Sernam's assets would be transferred. Contrary to SNCF's claim, the General Court did not add any condition to Article 3(2) of the Sernam 2 Decision. On those same grounds, the argument alleging a contradiction of reasons between paragraphs 100 and 301 of the judgment under appeal must be rejected. In addition, with regard to the argument alleging that a teleological interpretation of Article 3(2) of the Sernam 2 Decision was adopted, I repeat that the purpose pursued by that article has already been examined in point 46 et seq. of this Opinion. It is therefore not difficult to understand how a negative price — which presupposed a recapitalisation of Sernam by SNCF, and thus a new injection of liquid assets — would be diametrically at odds with the compensatory objective pursued.

143. Finally, it is necessary to respond to the argument advanced by SNCF which, relying on the latest version of the Commission Guidelines on State aid for rescuing and restructuring firms in difficulty, claims that structural compensatory measures should, in principle, take 'the form of divestments on a going concern basis of viable stand-alone businesses that, if operated *by a suitable purchaser*, can compete effectively in the long term'.[145] Apart from the fact that that argument was not raised before the General Court, I consider reliance on it to be entirely revealing of the bias of SNCF's line of argument in the context of this appeal, which appears to disregard completely the overall nature of the situation and is based on the premiss that the assets were transferred in a manner wholly consistent with the conditions laid down in the Sernam 2 Decision and that all the measures adopted had the effect of limiting the distortions of competition, as was required. However, that was not the case, in particular given — as seen above — the subject matter of the transfer, the identity of the purchaser and the nature of the procedure followed. In those circumstances, the negative price paid, which, in a different context, could perhaps prove to be entirely justified, appears in this case to be a further addition to the already well developed body of evidence that the French authorities, acting through SNCF, did not behave as they were required to do by EU law.

144. Accordingly, since the General Court's reasoning is vitiated by neither any distortion nor contradictory reasons, the second part of the sixth ground of appeal must be rejected

145 See paragraph 80 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1). Emphasis added.

(d) The third part of the sixth ground of appeal

(1) Summary of the arguments of the parties

145. The third part alleges that several errors of law were committed by virtue of the alleged non-applicability of the prudent private investor test, since the transfer of Sernam's assets en bloc was equivalent to a compensatory measure. In SNCF's view, the implementation of such a measure falls to the beneficiary of the aid, who may be either a public or a private undertaking, and not the State in its capacity as public authority. There is no justification for a refusal to apply the private investor test when implementing a compensatory measure. By finding otherwise, the General Court infringed Article 107(1) TFEU. SNCF recalls the traditional case-law on the review conducted by the judicature in matters of State aid and on the constituent elements of such aid[146] as well as the facts that gave rise to the *ING* judgment,[147] in which the Court held that the fact that the initial capital injection into an undertaking in difficulty made by the State constituted State aid did not in any way detract from the State's obligation to behave as a prudent private investor, adhering to a requirement of economic rationality, when amending the repayment terms of the capital injection.

146. The General Court therefore vitiated its judgment by a manifest error of law by finding, in paragraphs 306 and 307 of the judgment under appeal, that, since the logic of the compensatory measures is to prevent any excessive distortion of competition, those measures could bind both the recipient of the aid and its shareholder to a less than optimal solution from the point of view of pure profitability, which a private investor in a normal market situation would not envisage. Although by adopting the Sernam 2 Decision the Commission expected SNCF to achieve a specific objective, SNCF was required, in its capacity as Sernam's shareholder, to behave in an economically rational manner to achieve that objective, as would any private shareholder. In that regard, SNCF points out that the case-law of the Court[148] takes account of the fact that private investors are subject to legal obligations or constraints and adopt the most economically rational behaviour. The objective of implementing compensatory measures is not akin to an obligation incumbent on the public authority, but it does apply to any beneficiary, whether private or public, of State aid intended for restructuring. In the present case, SNCF's conduct should therefore be compared to that of a private shareholder in the same circumstances, that is to say a shareholder required to transfer en bloc the assets of a subsidiary which benefited from restructuring aid, and the Commission could therefore not evade its obligation to examine the economic rationality of the contested measures.[149] That requirement of economic rationality must also be imposed in the case of a public undertaking. In view of the fact that compulsory liquidation proved to be more costly than the implementation of that compensatory measure, it is clear that a private shareholder would have acted as SNCF did. SNCF therefore submits that the General Court infringed Article 107(1) TFEU by finding, in paragraph 309 of the judgment under appeal, that 'the compensatory logic of the sale of Sernam's assets en bloc … differed from the logic of a private investor seeking to maximise its profits or, as in this case, minimise its losses'. The General Court should have found that the Commission was obliged to assess the economic rationality of all the measures adopted by SNCF when Sernam's assets were transferred en bloc. It thus could not find that SNCF's entering claims in the liabilities of the liquidation account of Sernam granted an advantage to Sernam Xpress and then to Financière Sernam without applying the private investor test.[150] Similarly, the General Court could not rule out application of the private investor principle to the guarantees of liabilities granted to the transferee on the disposal of Sernam's assets en bloc without determining whether such guarantees would have been acceptable to a private vendor in a

146 In particular, SNCF refers to the judgments of 9 December 1997, *Tiercé Ladbroke* v *Commission* (C-353/95 P, EU:C:1997:596); and of 16 May 2000, *France* v *Ladbroke Racing and Commission* (C-83/98 P, EU:C:2000:248, paragraph 25), and the *EDF* judgment (paragraph 78).

147 Paragraphs 32 to 37.

148 In particular, the *EDF* judgment (paragraph 79).

149 By analogy, the appellant cites the *ING* judgment.

150 See paragraph 323 of the judgment under appeal.

market economy.[151] Furthermore, nor could the General Court rule out the application of that principle to the contested measures solely on the ground that they were a direct result of the infringement of Article 3(2) of the Sernam 2 Decision and accordingly were unrelated to the application of the private investor test,[152] because such a finding is based on the erroneous premiss that the transfer of assets en bloc enabled new State aid to be granted to Sernam Xpress and to Financière Sernam.

147. At the reply stage, SNCF adds that, although a private investor's obligation to transfer the assets of an undertaking en bloc was imposed on that private investor by the public authority in the light of the State aid from which it benefited, it is clear that that private investor would fulfil that obligation in the most economically rational way and that, in accordance with the principle of equal treatment, a public undertaking should be able to do the same. In response to the Commission, according to which that principle does not apply in this case because any decision concerning the conditional compatibility of aid is addressed to the State responsible for ensuring that the undertaking benefiting from aid complies with the compensatory measures, SNCF submits that it is clear from the Guidelines on aid for rescuing and restructuring firms in difficulty[153] that it is the company which must fully implement the restructuring plan and discharge any other obligation laid down in the Commission decision.[154] Finally, despite the clear factual differences between the judgments in *EDF* and *ING*[155] and the present appeal, SNCF emphasises that those judgments are relevant to the resolution of the question of principle raised in the context of this part of the sixth ground of appeal.

148. SNCF therefore claims that by refusing to apply the private investor test to the transfer of Sernam's assets en bloc because Article 3(2) of the Sernam 2 Decision related to a compensatory measure, the General Court vitiated its judgment with several errors of law.

149. The Commission contends that this third part of the sixth ground of appeal should be rejected.

(2) Analysis

150. The question raised here is whether the compensatory context in which the contested measures were adopted was sufficient to preclude the applicability of the private investor test even though, ultimately, the effect of those measures proved to be very far removed from the compensatory objective pursued by Article 3(2) of the Sernam 2 Decision.

151. I recall that, in recital 152 et seq. of the Sernam 3 Decision, the Commission examined the measures provided for in the memorandum of 21 July 2005,[156] in particular in view of the fact that those measures were adopted even though the Commission required that compensatory measures be implemented so that the aid for the restructuring of Sernam could be regarded as compatible.

152. The role of the State as shareholder of an undertaking, on the one hand, and of the undertaking acting as a public authority, on the other, must be distinguished, and the applicability of the private investor test 'ultimately depends, therefore, on the Member States concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an

151 See paragraph 327 of the judgment under appeal.

152 See paragraph 310 of the judgment under appeal.

153 Cited in footnote 137 of this Opinion.

154 The appellant relies in that regard in particular on point 47 of those guidelines.

155 Judgments of 5 June 2012, *Commission* v *EDF* (C-124/10 P, EU:C:2012:318) and of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213), respectively.

156 That is to say the recapitalisation of Sernam in the amount of EUR 57 million and of Sernam Xpress in the amount of EUR 2 million, the write-off of Sernam's debts to SNCF amounting to EUR 38.5 million and the guarantees granted by SNCF, such as the undertaking to complete, within a fixed time limit, the development of a site necessary for the running of the TBE, the coverage of any increase in rent for the new operating sites, the three-year extension of the right to return of railwaymen seconded within Sernam, the three-year extension of a social protocol and SNCF's guarantee of the continuity of the TBE and access to it.

undertaking belonging to it'.[157] As I have pointed out, it follows from the *EDF* judgment that it is for the Commission 'to carry out a global assessment, taking into account — in addition to the evidence produced by [the Member State concerned] — all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority. In particular, … the *nature* and *subject matter* of that measure are relevant in that regard, as is its *context*, the *objective* pursued and the *rules* to which the measure is subject'.[158] In other words, the applicability of the private investor test depends on the classification of the public intervention as a decision adopted by a shareholder of the undertaking in question.[159]

153. I am not convinced that the *ING* judgment[160] is sufficient on its own to resolve the issue to be determined in the present case, since the context in which it was given was relatively restricted and, in any event, unrelated to the compensatory objective which had to be pursued by any implementation of Article 3(2) of the Sernam 2 Decision. Moreover, in the Commission decision forming the subject matter of the action for annulment before the General Court in the *ING* case, the Commission had separately analysed the two measures (the initial aid, on the one hand, and the amendments to the repayment terms, on the other hand).[161]

154. Accordingly, the question examined in that judgment was whether the Commission could evade its obligation to assess the economic rationality of the amendment to the repayment terms in the light of the private investor test solely on the ground that the capital injection subject to repayment itself already constituted State aid.[162] That case is therefore silent on the applicability of the private investor test in a compensatory context strictly speaking, but was the opportunity for the Court to confirm the nature of the analysis to be conducted by the Commission to determine whether that test is applicable.

155. The judgments in *EDF* and *ING*[163] therefore indicate that the Commission must assess the situation in a comprehensive manner, as the General Court indeed recalled in paragraph 292 of the judgment under appeal and then verified.

156. I would point out first of all that, in its arguments devoted to this third part of the sixth ground of appeal, SNCF acknowledges that its intervention by means of the various measures referred to above occurred in a context of implementing compensatory measures at the express request of the Commission. As I also observed when examining the first ground of appeal, the compensatory measures imposed by the Commission, compliance with which is a condition of the compatibility of the aid for the restructuring of Sernam, are contained in a decision addressed to the State and pursue the objective of mitigating the distortion of competition caused by the grant of the aid. Because, as the Commission stated in its pleadings, the compensatory measures are intended to 'deprive the beneficiary of some of its competitive advantage' and to 're-establish in part the competitive situation', they are therefore imposed more in the public interest than in the interest of the beneficiary. In addition, like the Commission I tend to the view that the measures adopted pursuant to Article 3(2) of the Sernam 2 Decision concerned, initially, the obligation to implement the restructuring plan, subject to the conditions laid down by the Commission, so that the restructuring aid — which, by its nature, is undeniably an act by a public authority — is compatible.

157 Paragraphs 80 and 81 of the *EDF* judgment.

158 Paragraph 86 of the *EDF* judgment. Emphasis added.

159 Paragraph 31 of the *ING* judgment.

160 Judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213).

161 This could have had an impact on the solution adopted: see point 39 of the Opinion of Advocate General Sharpston in *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2013:870).

162 See paragraph 37 of the *ING* judgment.

163 Judgments of 5 June 2012, *Commission* v *EDF* (C-124/10 P, EU:C:2012:318) and of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213), respectively.

157. In those circumstances, and although I do not seek to make any presumption in that regard, it appears to me to be clear from an overall analysis of the situation, as required by the case-law, that is to say in the light of the nature and the subject matter of the measures, the context, the objective pursued and the rules to which those measures are subject, that the French State as shareholder in SNCF did not intervene in that capacity in this case.

158. At the reply stage, the appellant relies on an infringement of the principle of equal treatment between public and private undertakings. That claim appears to be out of time, at the very least in so far as SNCF's written pleadings before the General Court make no mention of it. In any event, I find it difficult to identify any such infringement. At the hearing before the Court of Justice, SNCF's representative presented its line of argument as follows: a public undertaking which pays a negative price in the event of a transfer would not comply with Article 3(2) of the Sernam 2 Decision, resulting in the legal consequences we are aware of concerning the compatibility of the initial aid, but would also be criticised for having granted new State aid, whereas a private undertaking which is required by the State acting in its capacity as public authority to implement compensatory measures on the basis of a Commission decision would likewise, by paying a negative price, not comply with the condition relating to compatibility, thereby giving rise to the same legal consequence; however, in neither case could it be criticised for having granted new aid, since that negative price would have been paid out of private funds. In other words, in the case of compensatory measures implemented by a private undertaking, the very existence of new aid is impossible and it is this which forms the basis of the difference in treatment.

159. I confess to finding that this reasoning borders on the absurd, since, by definition, by its very nature, in the absence of a commitment of public funds, there can be no question of State aid. Accordingly, the comparison as presented by SNCF appears irrelevant to me, especially since it focuses on the fact that the sale price was negative even though that was not the sole criticism made having regard to the conditions laid down in Article 3(2) of the Sernam 2 Decision.

160. For all those reasons, the third part of the sixth ground of appeal must also be rejected.

(e) Conclusion concerning the sixth ground of appeal

161. Since all three parts of the sixth ground of appeal have been rejected, the sixth ground of appeal must be rejected in its entirety.

7. The arguments relied on by the Commission concerning the admissibility of the action brought at first instance

162. In its response, the Commission claims, in essence, that, even though it submitted that the action before the General Court was inadmissible, the General Court did not take a view on that matter for reasons of procedural economy. In its submissions before the Court of Justice, the Commission claims that the Court is required to rule, where appropriate *ex officio*, on the public policy plea alleging a failure to have regard to the condition laid down in the fourth paragraph of Article 263 TFEU, in accordance with which an applicant may seek the annulment of a decision not addressed to it only if that decision is of direct and individual concern to it. However, the Sernam 3 Decision is not of direct and individual concern to the appellant and, in so far as the decision at issue is concerned, the appellant is in a situation equivalent to that of the company DEFI in the judgment in *DEFI* v *Commission*,[164] in particular on account of the fact that SNCF did not have autonomous decision-making powers.

164 Judgment of 10 July 1986 (282/85, EU:C:1986:316).

163. As interesting as it may appear, the question raised by the Commission concerning the admissibility of the action brought before the General Court does not, in my view, require further discussion for two main reasons. The first is related to the fact that the Commission does not draw any independent conclusion from the arguments advanced by it before the Court of Justice concerning the admissibility of the action brought before the General Court. The second concerns the fact that the General Court stated reasons for its decision not to rule beforehand on the admissibility of the action 'by way of procedural economy',[165] basing that decision inter alia on the *Boehringer* judgment.[166] It should be recalled that, in the context of an appeal against a judgment of the General Court in which the General Court had taken the view 'that it was not necessary to rule on the objection of inadmissibility raised by the Council since the [applicants'] claims … had in any event to be dismissed on the merits',[167] the Court of Justice held that 'it was for the [General Court] to assess … whether in the circumstances of the case the proper administration of justice justified the dismissal of the action on the merits … without ruling on the objection of admissibility …'.[168] Whatever legitimate concerns[169] may be expressed in the light of such case-law, which the Court of Justice has since applied in the context both of direct actions brought before it[170] and of the exercise of its own power of review in appeals,[171] it must nevertheless be noted that, in the context of this appeal, the Commission has not made any further criticisms of that line of case-law. Accordingly, since I intend to conclude that the appeal should be dismissed, there is no need to give further consideration to the question of the admissibility of SNCF's action before the General Court.

V. Costs

164. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

165. Under Article 138(1) of those Rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against the appellant and the appellant must, in my view, be unsuccessful, it should be ordered to pay the costs of the appeal.

166. Finally, Mory SA and Mory Team should bear their own costs pursuant to Article 140(3) of the Rules of Procedure of the Court of Justice.

VI. Conclusion

167. In the light of all the foregoing considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order SNCF Mobilités to pay the costs incurred by the European Commission;

(3) order Mory SA and Mory Team to bear their own costs.

165 Paragraph 419 of the judgment under appeal.

166 Judgment of 26 February 2002, *Council* v *Boehringer* (C-23/00 P, EU:C:2002:118).

167 Judgment of 26 February 2002, *Council* v *Boehringer* (C-23/00 P, EU:C:2002:118, paragraph 51).

168 Judgment of 26 February 2002, *Council* v *Boehringer* (C-23/00 P, EU:C:2002:118, paragraph 52).

169 See point 50 et seq. of the Opinion of Advocate General Bot in *Philips Lighting Poland and Philips Lighting* v *Council* (C-511/13 P, EU:C:2015:206).

170 See the judgment of 23 March 2004, *France* v *Commission* (C-233/02, EU:C:2004:173).

171 See the judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce* (C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 193).