Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

15 January 2015*

(State aid — Aid for rescuing and restructuring firms in difficulty — Restructuring aid which the French authorities proposed to grant to SeaFrance SA — Increase in capital and loans granted by the SNCF to SeaFrance — Decision declaring the aid incompatible with the internal market — Concept of State aid — Private investor test — Guidelines on State aid for rescuing and restructuring firms in difficulty)

In Case T-1/12,

French Republic, represented initially by E. Belliard, G. de Bergues and J. Gstalter, and subsequently by G. de Bergues, D. Colas and J. Bousin, acting as Agents,

applicant,

v

European Commission, represented by V. Di Bucci, B. Stromsky and T. Maxian Rusche, acting as Agents,

defendant,

ACTION for annulment of Commission Decision 2012/397/EU of 24 October 2011 on State aid SA 32600 (2011/C) — France — Restructuring aid to SeaFrance SA granted by the SNCF (OJ 2012 L 195, p. 1),

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias, President, M. Kancheva and C. Wetter (Rapporteur), Judges,

Registrar: J. Weychert, Administrator,

having regard to the written procedure and further to the hearing on 19 June 2014,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

1 By Decision 2012/397/EU of 24 October 2011 on State aid SA 32600 (2011/C) — France — Restructuring aid to SeaFrance SA granted by the SNCF (OJ 2012 L 195, p. 1) ('the contested decision'), the European Commission declared incompatible with the internal market the rescue aid and the aid for the restructuring of SeaFrance, put in place and planned respectively, by the French Republic in favour of SeaFrance SA.

2 SeaFrance, now wound up, was a public limited liability company governed by French law, wholly owned by SNCF Participations SA, the holding company for the SNCF group, which in turn is wholly owned by the public industrial and commercial entity Société nationale des chemins de fer français (SNCF). SeaFrance operated maritime passenger and freight transport services between the ports of Calais (France) and Dover (United Kingdom). At the material time SeaFrance owned six vessels. It employed 1 550 staff in December 2009 and subsequently 1 100 in August 2010.

3 From 2008 onwards SeaFrance's financial situation steadily deteriorated due, inter alia, to adverse economic conditions, characterised by considerable fluctuations in the exchange rate between the Euro and Sterling, rising oil prices and a significant reduction in passengers and freight carried on cross-Channel routes. Those external conditions exacerbated SeaFrance's internal difficulties, which were due, inter alia, to excess capacity and a high staff costs/turnover ratio. A number of social movements which took place in 2010 further aggravated the company's situation.

4 In April 2010 safeguard proceedings were opened in respect of SeaFrance, which on 30 June 2010 were converted into judicial reorganisation proceedings. It is apparent from the contested decision that, in the context of those proceedings, three bids were submitted to the Paris Commercial Court (France) to enable SeaFrance to remain in business through the total or partial sale of its assets. The first bid, submitted jointly by two companies operating in the maritime transport sector, offered to take over three vessels and 460 employees for a token sum of EUR 3. The second, lodged by a trade union, offered to retain all the employees, purchase the SeaFrance vessels for a token sum of EUR 1 and not take over the company's liabilities. The details of the third bid, lodged by an undertaking in the maritime sector, were not given in the contested decision. None of those bids was considered satisfactory by SeaFrance's official receiver (recitals 10 to 15 in the preamble to the contested decision).

5 After the adoption of the contested decision on 24 October 2011, the Paris Commercial Court, on 16 November 2011, opened proceedings for the judicial winding up of SeaFrance. In the context of those proceedings a further call for bids was arranged for the take-over of the assets and activities of SeaFrance, but the only bid lodged in response to that call was considered unsatisfactory by SeaFrance's official receiver. The liquidation of SeaFrance's assets was therefore commenced, on completion of which those assets were sold to the company Eurotunnel.

6 The SNCF supported SeaFrance with various aid measures from the start of 2009. First, in February 2009, the SNCF concluded a cash facility agreement with SeaFrance, which was extended in February 2010. Secondly, on 15 July 2010, it granted SeaFrance a loan of EUR [*confidential*] million,[1] in order to enable it to exercise an option to purchase its vessel *Berlioz* and secure ownership of that asset.

1 — Confidential data omitted

7 The SNCF subsequently set up a credit line of EUR [*confidential*] million in favour of SeaFrance. That measure was notified to the Commission by the French authorities on 12 July 2010 as being rescue aid within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2, 'the guidelines on restructuring aid'), and the Commission approved it by Decision C(2010) 5837 of 18 August 2010 on State aid N 309/2010 — France.

8 Lastly, on 18 February 2011, the French authorities notified the Commission, in accordance with the guidelines on restructuring aid, of a restructuring aid package in favour of SeaFrance along with a restructuring plan. The restructuring plan provided, inter alia, for a reduction in capacity from six to four vessels, a reconfiguration of the available crossings which would result in almost a 30% reduction in the number of crossings each year, and the cutting of 725 jobs in order to limit the staff costs/turnover ratio. That restructuring was to be financed mainly by State aid in the form of an increase in SeaFrance's capital by EUR 223 million, entirely subscribed by SNCF Participations.

9 On 6 April 2011 the Commission received a complaint from one of SeaFrance's competitors concerning the latter's restructuring aid. On 22 June 2011 the Commission notified the French authorities that it had decided to initiate the formal investigation procedure laid down in Article 108(2) TFEU in respect of, first, the restructuring aid for SeaFrance notified on 18 February 2011 and, second, the measures taken by the SNCF previously, namely the cash facility agreement afforded in 2009 and the loan of EUR [*confidential*] million granted on 15 July 2010 ('the decision to initiate the formal procedure'). It also invited interested parties to submit comments under Article 108(2) TFEU through publication of a summary of that decision in the *Official Journal of the European Union* on 14 July 2011 (OJ 2011 C 208, p. 8).

10 By letters of 14, 22 July and 19 August 2011, the French authorities submitted to the Commission their observations on the doubts expressed in the decision to initiate the formal procedure, on the complaint and on the comments by interested parties, respectively.

11 Next, by letter of 12 September 2011, the French authorities communicated to the Commission a modified restructuring plan. That plan provided, inter alia, for the sale of another vessel, a reduction of 922 in the total number of employees, a larger reduction in the number of crossings and reorganisation of sales and marketing activities, which would provide further savings. Also, in order to address the doubts expressed by the Commission in the decision to initiate the formal procedure concerning the inadequacy and uncertainty of SeaFrance's own contribution to the financing of its restructuring, the plan provided for modification of the measures for financing the restructuring: the increase in SeaFrance's capital was to be limited to EUR 166.3 million and be accompanied by a loan of EUR 99.8 million in order to finance the restructuring. Another loan, of EUR [*confidential*] million was also provided for. It was intended to replace the existing loan pertaining to the vessel *Molière*, in order to enable the purchase option on that vessel to be exercised early. Early exercise of that option would enable SeaFrance to acquire full ownership of that asset at the end of year [*confidential*] instead of year [*confidential*]. Both loans were to be granted at an interest rate of 6.05% for a period of 12 years, with constant capital repayments.

12 Lastly, by letter of 3 October 2011, the French authorities communicated to the Commission a new version of the modified restructuring plan. Under that new version, first, the amount of the loan of EUR 99.8 million was reduced to EUR 99.7 million and, secondly, the interest rate applied to both the loans set out in the modified restructuring plan was raised from 6.05% to 8.55%.

13 On 24 October 2011 the Commission adopted the contested decision and notified it to the French authorities on the same day. In recitals 16 and 17 in the preamble to that decision the Commission states that the contested decision concerns, first, the measures set out in the modified restructuring plan, namely the increase in SeaFrance's capital and the two loans, of EUR 99.7 million and EUR [*confidential*] million and, secondly, the rescue aid approved by its decision of 18 August 2010. That decision does not, however, cover either the cash facility agreement afforded by the SNCF to

SeaFrance or the loan that was granted it in order to enable it to exercise the option to purchase the vessel *Berlioz* (see paragraph 6 above), which are the subject of another procedure under Article 108(2) TFEU, initiated on 22 June 2011.

14 The operative part of the contested decision provides, inter alia, as follows:

'Article 1

The capital increase of EUR 166.3 million, the loan of EUR 99.7 million and the loan of EUR [*confidential*] million that the French Republic is planning to implement, through the SNCF, as restructuring aid in favour of SeaFrance constitute State aid within the meaning of Article 107(1) TFEU and are incompatible with the internal market.

Article 2

The loan granted by France, through the SNCF, as rescue aid in favour of SeaFrance, referred to in the Commission decision of 18 August 2010, constitutes aid which is incompatible with the internal market.

Article 3

1. France, through the SNCF, shall recover the aid referred to in Article 2 from the beneficiary, including the contractual interest due and not yet paid on the date of notification of the present decision.

…'

Procedure and forms of order sought

15 By application lodged at the Court Registry on 2 January 2012 the French Republic brought the present action.

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

17 The parties presented oral argument and answered the questions put by the Court at the hearing on 19 June 2014.

18 At the hearing, the Commission produced a document containing an exchange of e-mails between its services and the French authorities, in order to support the arguments put forward in response to the second plea of the action. The President of the Chamber decided to include that document in the case file and invited the French Republic to comment on the admissibility and content of that document no later than 26 June 2014. The decision as to the admissibility of that document was reserved.

19 The French Republic presented its observations within the time allowed.

20 The oral procedure was closed on 3 July 2014.

21 The French Republic claims that the Court should:

— annul the contested decision in its entirety;

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the action;

— order the French Republic to pay the costs.

Law

23 As a preliminary point, it should be noted that the four pleas which the French Republic puts forward in support of its action concern the Commission's assessment of two loans, one of EUR 99.7 million and the other of EUR [*confidential*] million set out in the modified restructuring plan (together, 'the loans at issue'). The French Republic does not deny that the measure increasing SeaFrance's capital by EUR 166.3 million constitutes State aid.

24 The first two pleas of the French Republic's action allege infringement of Article 107(1) TFEU in that the Commission classified the loans at issue as State aid. The third plea alleges errors of law and of fact in that the Commission held that the restructuring aid was incompatible with Article 107(3)(c) TFEU, interpreted in the light of the guidelines on restructuring aid. The fourth plea alleges infringement of Article 345 TFEU.

First plea: misinterpretation of the concept of State aid within the meaning of Article 107(1) TFEU in that the Commission held that the question whether the loans at issue were reasonable had to be considered together with the rescue aid and the recapitalisation

25 In the present plea, the French Republic claims, in essence, that the Commission was wrong to hold that, for the purposes of applying the private investor test, the loans at issue, the rescue aid granted to SeaFrance and the increase in the latter's capital, set out in the modified restructuring plan, had to be assessed jointly.

26 This plea divides into two parts: alleging, first, misinterpretation and, secondly, misapplication in the present case of the judgment of 15 September 1998 in *BP Chemicals* v *Commission*, T-11/95, ECR ('*BP Chemicals*'), EU:T:1998:199.

27 In the first part, the French Republic claims, in essence, in its application, that, since the judgment in *BP Chemicals*, paragraph 26 above (EU:T:1998:199), concerns only a decision not to initiate the formal investigation procedure and not the substantive application of the private investor principle, the criteria it establishes cannot be applied in the context of a formal investigation procedure to decide whether or not the measures investigated can be dissociated. At the hearing, taking into account the judgment of 19 March 2013 in *Bouygues and Bouygues Télécom* v *Commission*, C-399/10 P and C-401/10 P, ECR, EU:C:2013:175, the French Republic withdrew that part of the plea and this was noted in the minutes of the hearing.

28 In the second part of the plea, the French Republic claims that the Commission misapplied the judgment in *BP Chemicals*, paragraph 26 above (EU:T:1998:199), in the present case and wrongly found that the loans at issue could not effectively be dissociated from the rescue aid and the recapitalisation.

29 It should be noted that, since aid, as defined in Article 107(1) TFEU, is a legal concept which must be interpreted on the basis of objective factors, the European Union Courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see judgments of 22 December 2008 in *British Aggregates* v

Commission, C-487/06 P, ECR, EU:C:2008:757, paragraph 111 and the case-law cited, and of 17 December 2008 in *Ryanair* v *Commission*, T-196/04, ECR, EU:T:2008:585, paragraph 40 and the case-law cited).

30 For a measure taken in respect of an undertaking to be classified as State aid within the meaning of Article 107(1) TFEU, four conditions must be met. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage accruing exclusively to certain undertakings or certain sectors of activity. Fourth, it must distort or threaten to distort competition (see judgment of 29 September 2000 in *CETM* v *Commission*, T-55/99, ECR, EU:T:2000:223, paragraph 39 and the case-law cited; see also, to that effect, judgment of 23 March 2006 in *Enirisorse*, C-237/04, ECR, EU:C:2006:197, paragraphs 38 and 39 and the case-law cited).

31 However, it is also clear from settled case-law that the conditions which a measure must meet in order to be treated as aid for the purposes of Article 107(1) TFEU are not met if the recipient undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources. In the case of public undertakings, that assessment is made by applying, in principle, the private investor test (see judgment of 5 June 2012 in *Commission* v *EDF and Others*, C-124/10 P, ECR, EU:C:2012:318, paragraph 78 and the case-law cited).

32 According to case-law, when it examines application of the private investor test the Commission must always examine all the relevant features of the transaction at issue and its context (see judgment of 13 September 2010 in *Greece* v *Commission*, T-415/05, T-416/05 and T-423/05, ECR, EU:T:2010:386, paragraph 172 and the case-law cited).

33 Where the private investor test is to be applied to several consecutive measures of State intervention, the Commission must examine whether those interventions are so closely linked that they are inseparable from one another and that therefore those interventions must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention (see, to that effect, judgment in *Bouygues and Bouygues Télécom* v *Commission*, paragraph 27 above, EU:C:2013:175, paragraph 103).

34 Examination as to whether several consecutive measures of State intervention are inseparable must be carried out in the light of the criteria laid down by case-law, including, inter alia, the chronology of those interventions, their purpose and the circumstances of the beneficiary undertaking at the time of those interventions (see, to that effect, judgment in *Bouygues and Bouygues Télécom* v *Commission*, paragraph 27 above, EU:C:2013:175, paragraph 104, and judgment in *BP Chemicals*, paragraph 26 above, EU:T:1998:199, paragraphs 170 to 178).

35 Moreover, it must be remembered that the assessment by the Commission of whether an investment satisfies the private investor test may involve a complex economic appraisal. When the Commission adopts a measure involving such an appraisal, it enjoys a wide discretion and judicial review is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether there was any error of law, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or any misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (see judgment in *Ryanair* v *Commission*, EU:T:2008:585, paragraph 28 above, paragraph 41 and the case-law cited).

36 It is in the light of those principles that it is necessary to examine the main argument put forward in the context of the second part of the first plea, in which the French Republic complains that the Commission failed to examine all the elements of fact and of law that are relevant for assessing whether the measures taken in favour of SeaFrance can be dissociated, in particular the interest rates and the collateral for the loans at issue. The French Republic thus complains that the Commission

presumed in the contested decision that, since the loans at issue had the same purpose as the recapitalisation of SeaFrance and they were granted at the same time as the recapitalisation, whilst SeaFrance's situation remained unchanged, those loans could not be dissociated from the recapitalisation and the rescue aid and, consequently, it presumed that those loans would not have been granted by a private investor.

37 The merits of that argument must be examined in two stages. First, it is necessary to determine whether the Commission was right to find that the loans at issue could not be dissociated from the recapitalisation and the rescue aid and could not therefore be considered to be autonomous measures for the purposes of the private investor test. In other words, it is necessary to determine whether the Commission correctly defined the subject to which it would apply that test. Secondly, it is necessary to determine whether the Commission correctly applied the private investor test to the measures referred to in the contested decision.

38 First, as regards whether the Commission was right to find that the loans at issue could not be dissociated from the recapitalisation and the rescue aid, it should be noted first of all that in recital 129 in the preamble to the contested decision, in response to the French authorities' arguments that the loans at issue were granted under market conditions and therefore met the private investor test, the Commission stated as follows:

'… [I]n the present case, the SNCF has already granted aid to SeaFrance, notably rescue aid, and is planning to grant new aid, i.e. the recapitalisation. The loans pursue the same purpose as the other aid measures, i.e. the rescue and restructuring of SeaFrance. They will be granted at a time when SeaFrance is a firm in difficulty and at the same time as the restructuring aid. This is self-evident as regards the loan of EUR 99.7 million, which is intended — just like the recapitalisation — to enable SeaFrance to meet its current capital requirements. However, it is also true of the loan of EUR [*confidential*] million, which serves to refinance and exercise the purchase option under the leasing contract for the vessel *Molière* earlier than provided for. In fact, the financing of means of production, here the vessel, is closely linked to the day-to-day activities of SeaFrance. Through the refinancing and early purchase under the leasing contract, SeaFrance aims to reduce its operating costs, which comes under the restructuring of the company. Consequently, the loan of EUR [*confidential*] million also comes under the logic of restructuring SeaFrance'.

39 Next, in recitals 130 to 132, the Commission recalled the rules set out clearly in the judgment in *BP Chemicals*, paragraph 26 above (EU:T:1998:199).

40 Lastly, in recital 133, the Commission considered whether recapitalisation constituted State aid and found that, '[s]ince the two loans have the same purpose as the recapitalisation, i.e. the financing of the restructuring costs, and since the economic situation of the company is unchanged (it is in difficulty) and the loans are granted at the same time as the recapitalisation, these loans cannot reasonably be dissociated from the rescue aid and the recapitalisation'.

41 Although that reasoning is expressed briefly, it must be said, first of all, that the Commission's findings regarding the chronology and the purpose of the measures, and regarding SeaFrance's situation, contain no errors of assessment.

42 So far as the chronology of the measures is concerned, it is common ground between the parties that the loans at issue coincided with the recapitalisation and that those three measures were set out in the same restructuring plan submitted for consideration by the Commission six months after the implementation of the rescue aid.

43 It is also common ground between the parties, so far as the situation of the recipient company is concerned, that from 2008 onwards SeaFrance encountered major financial difficulties, which resulted, on 30 June 2010, that is to say before notification of the rescue aid, in judicial reorganisation

proceedings being opened in respect of that company. The judicial reorganisation proceedings remained open until proceedings were opened for winding up by the court, following the adoption of the contested decision (see paragraphs 4, 5 and 7 above). Hence, SeaFrance's major financial difficulties existed both when it received the rescue aid and when the SNCF planned to grant it the three other aid measures set out in the restructuring plan.

44 So far as the purpose of the measures is concerned, it is common ground that the loan of EUR 99.7 million had the same purpose as the recapitalisation, namely, to finance the restructuring. As regards the loan of EUR [*confidential*] million, the French Republic's argument that that loan was in order to obtain property, namely to secure an asset by exercising early the purchase option on the vessel *Molière*, and, hence, had a different purpose from that of the recapitalisation, must be rejected. The Commission was right to find that that loan came under the logic of restructuring SeaFrance, since it served to refinance and to exercise the purchase option under the leasing contract for the vessel *Molière* earlier than scheduled, and was thus designed to reduce the operating costs linked to financing the means of production. Furthermore, the Commission was right to state in the defence that, whilst it maintained that the sole objective of that loan was to replace an off balance sheet commitment linked to the payments to be made by SeaFrance under the leasing contract, the French Republic failed to produce any evidence to show that, before that loan, the SNCF was already directly exposed to and liable for such payments.

45 Next, several elements noted by the Commission in the contested decision which formed part of the context of the restructuring of SeaFrance corroborate, in any event, the finding that the loans at issue, the rescue aid and the recapitalisation had to be assessed jointly for the purposes of the private investor test.

46 In that regard, first, it is clear from the contested decision that, after the SNCF granted SeaFrance the credit line of EUR [*confidential*] million, accepted by the Commission as being rescue aid, the French authorities submitted an initial restructuring plan for SeaFrance on 18 February 2011 (recitals 1, 2 and 24 in the preamble to the contested decision). That plan, which set out only one aid measure, namely an increase in SeaFrance's capital of EUR 223 million, entirely underwritten by SNCF Participations, was criticised by the Commission in the decision to initiate the formal procedure on the ground that SeaFrance's own contribution to its restructuring was too low and uncertain (recitals 4, 24 and 149 in the preamble to the contested decision). It is also clear from the contested decision that, in order to address those criticisms, on 12 September 2011 the French authorities submitted a restructuring plan that had been modified in so far as the capital increase originally set out was reduced to EUR 166.3 million, to be underwritten by SNCF Participations, and that reduction was offset by a loan of EUR 99.7 million granted by the SNCF designed to finance the restructuring of SeaFrance as part of its own contribution (recitals 24, 27, 28 and 150 in the preamble to the contested decision). It would appear, therefore, that the loans at issue, in particular the loan of EUR 99.7 million, were only granted because of a rearrangement of the sole aid measure set out originally.

47 Secondly, it is clear from the contested decision that the SNCF, which acted in the dual roles of provider of the aid and provider of the funds intended to form part of the beneficiary's own contribution, was alone in supplying SeaFrance with the resources needed to finance the restructuring. No private investor outside the SNCF acted alongside the SNCF in that transaction. In that regard, the Commission also stated that, despite its requests, the French authorities failed to produce an example of a loan offer from an independent financial institution (recital 138 in the preamble to the contested decision).

48 The context of the restructuring of SeaFrance, in particular the evolution of the restructuring plan, thus shows that, in order to make up for the almost total absence of SeaFrance's own contribution to the financing of its restructuring, the French authorities, instead of looking for an external investor or creditor, or because it failed to find one, proposed a solution whereby it was the SNCF which, alone, provided almost all of that own contribution, namely EUR 99.7 million out of a total own

contribution of EUR [*confidential*] million (see recital 150 in the preamble to the contested decision and paragraphs 63 and 79 below), acting as if it was an external creditor. Such a solution, based merely on a rearrangement of the aid measure originally set out, and the SNCF acting in a dual capacity, on one hand, through SNCF Participations, as a publicly owned company providing aid and, on the other hand, as a purported private investor — which was at the same time the sole private investor intervening in the rescue and restructuring of SeaFrance —, cannot be accepted, since it precludes application of the own contribution rules laid down in the guidelines on restructuring aid.

49 Lastly, contrary to what the French Republic contends, the interest rates and the collateral for the loans at issue are not relevant elements which the Commission was required to take into account when examining whether those loans could be dissociated from the recapitalisation and the rescue aid. Examination of the conditions for granting the loans at issue is in fact a matter of analysing the return on those loans, that is to say, of applying the private investor test. Examination of whether the loans at issue can be dissociated from the two other measures is, however, intended to establish whether the private investor test must be applied to those loans, considered as an autonomous investment, or to all the measures referred to in the contested decision taken as a whole. That examination therefore constitutes a preliminary step before the application of the private investor test.

50 Similarly, it is apparent from the case-law cited in paragraph 33 above that, contrary to what the French Republic contends, formal differences between a loan and recapitalisation do not preclude those measures from being regarded as inseparable. The decisive factor is not the form which the State interventions concerned take but the fact that those interventions, with regard in particular to their chronology, their purpose and the undertaking's circumstances at the time of the interventions, are so closely linked that they are inseparable from one another.

51 Secondly, as regards the application of the private investor test to the measures forming the subject of the contested decision, it should be noted that, in recitals 133 and 134 in the preamble to the contested decision, the Commission stated as follows:

> '(133) France does not dispute the fact that the recapitalisation constitutes aid, as it has no prospect of obtaining a return corresponding to that which a private investor would have demanded. This also emerges from the table in recital 35, which indicates the financing need for the period 2011-2017. In fact the company would be unable to distribute dividends during this period. In view of the considerable costs entailed in the payment of the interest and principal on the loans [at issue] and the low profit margin provided for in the restructuring plan, this situation would be very likely to continue beyond 2017 until the repayment of the loans in full in 2023. However, a private investor in a traditional industry such as maritime transport would not accept the entire absence of return on an investment amounting to EUR 166.3 million for a [twelve]-year period. …
>
> (134) Taken as a whole, the return on the rescue aid[,] the recapitalisation and the two loans is below the return that a private market economy investor would require. In fact, as explained, the SNCF cannot expect any return on the recapitalisation before 2023. …'

52 The analysis of the return that might be expected on the measures referred to in the contested decision, given in recitals 133 and 134 in the preamble to the contested decision, is brief and concentrates solely on the recapitalisation.

53 However, first, the Commission did correctly apply the private investor test to the inseparable set of measures comprising the loans at issue, the recapitalisation and the rescue aid. In taking into account the effect which payment of the interest and repayment of the loans at issue had on the return on the recapitalisation, the Commission undertook an overall analysis of the return which the SNCF, as the sole private investor, could expect from the measures it put in place or planned as part of the rescue and restructuring of SeaFrance, taken as a whole. Thus, it was able to conclude, without committing a

manifest error of assessment, that the overall expected rate of return on that inseparable set of measures did not match the return which would be expected by a private investor, without having to enter into a specific analysis of the question whether the conditions for granting each of the loans at issue complied with market conditions.

54 Secondly, for the reasons set out in paragraph 48 above, the elements of the context of the restructuring of SeaFrance referred to in paragraphs 46 and 47 above support the finding that a private investor in a market economy would not have implemented in respect of SeaFrance all the measures implemented by the SNCF, referred to in the contested decision.

55 It is clear from the above considerations that the Commission examined, in accordance with the case-law cited in paragraph 32 above, the overall context in which the loans at issue were granted to SeaFrance. It is also clear from those considerations that, contrary to what the French Republic contends, the Commission did not presume, but rather it demonstrated, with regard to the purpose and chronology of the loans at issue and the circumstances of the recipient company, whilst taking into account other relevant information on the case file, such as the evolution of the restructuring plan, the dual role of the SNCF and the absence of a private investor from outside the SNCF group, that the loans at issue could not reasonably be dissociated from the recapitalisation of SeaFrance and from the opening of a credit line for that company by way of rescue aid and, consequently, be regarded as an autonomous investment for the purposes of the private investor test.

56 It is also clear from the above considerations that, by making available to SeaFrance jointly the loans at issue, the recapitalisation and the rescue aid, the French State, acting through the SNCF, obtained an advantage for SeaFrance which the latter could not have obtained under normal market conditions. The Commission was right, therefore, in recital 142 in the preamble to the contested decision, to classify those loans as State aid.

57 The French Republic's arguments based on the Commission's past practice are not such as to call that finding into question.

58 Indeed, according to case-law, the question whether a measure constitutes State aid must be assessed solely in the context of Article 107(1) TFEU and not in the light of an alleged earlier decision-making practice of the Commission (judgment of 15 November 2011 in *Commission* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, ECR, EU:C:2011:732, paragraph 136). It would be particularly difficult moreover to take as a basis the Commission's past practice in the area of rescue aid and restructuring, in which the assessment of each case depends to a great extent on the individual financial circumstances of the beneficiary of the aid, the general economic situation in the sector in which it operates and the regulatory framework in which it exists.

59 It follows that the French Republic cannot take the Commission's past practice as a basis for demonstrating an error which the latter has allegedly committed in its assessment of the existence of State aid in the present case.

60 In any event, it is not possible to detect any error in the contested decision from the examination of the merits of those arguments which is set out below.

61 First, the French Republic claims that the Commission's past practice gives no justification for the general application of the solution adopted in the judgment in *BP Chemicals*, paragraph 26 above (EU:T:1998:199). Thus, in the Decision of 26 May 2010 on aid for the restructuring of SNCB's freight activities (N° 726/2009) ('the SNCB-freight Decision'), involving a parent company providing aid in circumstances similar to those which were examined in the contested decision, the Commission did not carry out an overall analysis of the aid measures but rather accepted that a loan granted by the SNCB to its new subsidiary, created as part of the restructuring of freight activities and accompanying recapitalisation of that subsidiary by the SNCB, was granted under market conditions. That loan did

not therefore constitute State aid and could be taken into account as being part of that subsidiary's own contribution to the restructuring. In the view of the French Republic, that difference in the analysis of similar cases, which cannot be explained by differences in the relevant legal framework, conflicts with the principles of legal certainty, good administration and equal treatment.

62 It should be noted that, in its argument based on the SNCB-freight decision, the French Republic criticises the Commission, in essence, for not accepting, in the contested decision, that the EUR 99.7 million loan granted by the SNCF to SeaFrance could form part of SeaFrance's own contribution to the financing of its restructuring, although in the SNCB-freight decision it held that a loan which the SNCB had granted to its freight subsidiary, since it was granted under market conditions, was not State aid and could be included in that subsidiary's own contribution to the financing needs of the restructuring.

63 In that regard, first of all, in addition to the fact that, unlike the restructuring of SeaFrance, the restructuring of the SNCB's freight activities was not carried out as part of rescuing a firm in difficulty but as part of a vast industrial and commercial plan for restructuring the sector, it should be noted that there was a significant difference in the relevant regulatory framework. The restructuring of the SNCB's freight activities was subject to the Community guidelines on State aid for railway undertakings (OJ 2008 C 184, p. 13). Those guidelines constitute a specific regulatory framework for the rail transport industry, derogating from the guidelines on restructuring aid, inter alia as regards the level of the aid recipient's own contribution. Paragraph 82 of those guidelines provides that the Commission may accept lower own contributions than those provided for in the guidelines on aid for restructuring. It is on that basis that the Commission accepted the SNCB's freight subsidiary's own contribution of between 15% and 25% of financing needs for the restructuring (see recitals 246 to 249 in the preamble to the SNCB-freight decision). Next, although the Commission agreed in the SNCB-freight decision that part of the SNCB's freight subsidiary's own contribution should be made up of a loan granted by the SNCB under market conditions, it is clear from recital 113 in the preamble to that decision that, in order to meet the financing needs for the restructuring, that subsidiary was also to obtain from a credit establishment an external credit line in the amount of EUR 50 million. Thus, unlike SeaFrance's restructuring plan, the restructuring plan for the SNCB's freight activities provided for intervention by players outside the SNCB group. Lastly, the amount of the loan which the SNCB planned to grant to its freight subsidiary represented a relatively small part of the own contribution. In fact, that loan was EUR 25 million and the total amount of the freight subsidiary's own contribution was EUR 135 million for a total restructuring cost in the order of EUR 490 million (see recital 248 in the preamble to the SNCB-freight decision). On the other hand, according to SeaFrance's modified restructuring plan, the loan of EUR 99.7 million represented between 85% and 95% of SeaFrance's own contribution to the financing of its restructuring, given that the total amount of that contribution was EUR [*confidential*] million, with a total restructuring cost of EUR [*confidential*] million (see recitals 35 and 150 in the preamble to the contested decision).

64 It is clear from those observations that, contrary to what the French Republic contends, the case assessed by the Commission in the SNCB-freight decision was not similar to the case it assessed in the contested decision. Any alleged difference in their analysis cannot therefore be considered to be contrary to the principles of legal certainty, good administration and equal treatment.

65 Secondly, the French Republic claims that in its earlier decisions the Commission dissociated various measures announced simultaneously and separated them from each other for the purposes of applying the private investor test. In that regard, it cites Commission Decision 2009/613/EC of 8 April 2009 on the measures C 7/07 (ex NN 82/06 and NN 83/06) implemented by the United Kingdom in favour of Royal Mail (OJ 2009 L 210, p. 16, 'the Royal Mail decision'), in which the Commission distinguished between various aid measures planned for the Royal Mail on the ground that they pursued different objectives, and Commission Decision 2009/973/EC of 13 July 2009 on the restructuring aid for Combus AS (OJ 2009 L 345, p. 28, 'the Combus decision'), in which the Commission held that two

injections of capital made in May 1999 and in January 2001 were to be regarded as two separate measures, although the government providing the aid considered that those measures had the same objective, namely the restructuring and recapitalising of Combus AS with a view to its privatisation.

66 With regard to the Royal Mail decision, although, despite the arguments put forward by the United Kingdom of Great Britain and Northern Ireland, the Commission concluded in that decision that it was appropriate to dissociate, for the purposes of their analysis in the light of the private investor principle, the measures taken by the United Kingdom with regard to the Royal Mail in 2007, namely a modification to the loan facilities, a measure concerning the pension scheme for Royal Mail employees and a shareholder loan, it is clear from recitals 101 and 102 in the preamble to that decision that that finding was based on a detailed examination of the nature, the objectives and the chronology of those measures, made in paragraphs 5.2, 5.3 and 5.4 of that decision. On completion of that examination, the Commission concluded that the 2007 loan facilities represented the continuation of measures granted in 2003, whilst the pensions measure had been introduced in 2007. Moreover, due to the particularities of the aid for the financing of the pension schemes, that measure was not subject to the rules applicable to restructuring aid. As regards the shareholder loan, the Commission agreed that it had been granted later than the other measures and for a different purpose.

67 As regards the Combus decision, suffice it to say that, in that decision, the Commission dismissed the Kingdom of Denmark's arguments that the two capital injections made in 1999 and 2001 in favour of Combus constituted a single aid measure and had to be assessed together, mainly on the ground that the first of those capital injections, since it had not been notified to the Commission and did not form the subject of a restructuring plan complying with the rules applicable at that time, should be considered to be unlawful aid incompatible with the internal market (see recitals 287, 318 and 328 in the preamble to that decision).

68 Thus, examination of the decisions relied on by the French Republic merely demonstrates that both the fact that the Commission did not apply the reasoning based on the judgment in *BP Chemicals*, paragraph 26 above (EU:T:1998:199), in the SNCB-freight decision, and the fact that, in the Royal Mail and Combus decisions, it rejected, on the basis of that reasoning, the arguments of the United Kingdom and the Kingdom of Denmark and decided to dissociate the measures at issue in those decisions for the purposes of examining them, is explained by the particular circumstances of each of those decisions, which are not comparable to the circumstances of the present case.

69 It follows from all the foregoing considerations that the first plea must be dismissed.

Second plea: infringement of the concept of State aid within the meaning of Article 107(1) TFEU in that the Commission held incorrectly that the French authorities did not show that, considered in isolation, the loans at issue were granted at a market rate

70 In the second plea, the French Republic claims, in essence, that the Commission was wrong to hold that the loans at issue, considered in isolation, had not been granted at a market rate. The arguments which the French Republic puts forward in the context of the present plea are based on the assertion that a loan granted by a public body, which complies with the rate set by the Commission in its communication on the revision of the method for setting the reference and discount rates (OJ 2008 C 14, p. 6, 'the communication on reference rates') of 19 January 2008, must be regarded as a loan granted at a market rate. Such a loan does not therefore create any advantage for the beneficiary and cannot be classified as State aid.

71 This plea divides into two parts, in which the French Republic criticises the Commission, first for not applying the communication on reference rates and, secondly, for incorrectly finding that in order to be in line with market conditions the rate on the loans should be around 14%.

72 In that regard, it must be stated that the assessment of the loans at issue, in isolation, from the point of view of whether the rate applied to those loans was adequate in relation to a market rate, was made in the contested decision for the sake of completeness. After finding in recital 134 in the preamble to the contested decision that the loans constituted State aid since, taken as a whole with the recapitalisation and the rescue aid, they would not bring the SNCF the return that a private market economy investor would require, the Commission stated in the same recital that, '[e]ven if, considered individually, the return on the two loans corresponded to market conditions — which is not the case –, this would not be sufficient for the measures as a whole to be regarded as satisfying the private market economy investor principle'. The Commission then examined, in recitals 135 to 141 in the preamble to the contested decision, what rate should be applied to the loans at issue considered in isolation in order to be in line with market conditions. At the end of that examination it concluded that that rate should be around 14%, which was higher than the 8.5% rate proposed by the French authorities.

73 It is clear from case-law that where some of the grounds in a decision on their own provide a sufficient legal basis for the decision, any errors in the other grounds of the decision have no effect on its operative part. It is, moreover, settled case-law that a plea which, even if it were well founded, is incapable of bringing about the annulment which the applicant seeks must be rejected as ineffective (see order of 26 February 2013 in *Castiglioni* v *Commission*, T-591/10, EU:T:2013:94, paragraphs 44 and 45 and the case-law cited). In the present case, it is clear from paragraphs 55 and 56 above that the Commission was right to find that the loans at issue could not be dissociated from the recapitalisation and the rescue aid and that, taken as a whole, those measures constituted State aid. Any errors on the part of the Commission in assessing the loans at issue in isolation cannot therefore affect the lawfulness of the contested decision. The French Republic's second plea must therefore be rejected as being ineffective, without it being necessary to rule on the admissibility of the document produced by the Commission at the hearing (see paragraph 18 above).

Third plea: errors of law and of fact in that the Commission held that the restructuring aid was incompatible with Article 107(3)(c) TFEU, interpreted in the light of the guidelines on restructuring aid

74 In the third plea, the French Republic claims, in essence, that the Commission committed errors of law and of fact in assessing whether the restructuring aid for SeaFrance was compatible with the internal market, since it found that the requirement, laid down in the guidelines on restructuring aid, that the beneficiary's own contribution must be real, free of aid and as high as possible, was not met.

75 In that regard, it is appropriate to recall the rules governing the beneficiary's own contribution laid down in points 7, 43 and 44 of the guidelines on restructuring aid.

76 First of all, point 7 of the guidelines on restructuring aid provides that, '[w]ithin [the 2004 revision of the guidelines on restructuring aid], it is appropriate to reaffirm with greater clarity the principle that [the beneficiary's] contribution must be real and free of aid[; t]he beneficiary's contribution has a twofold purpose: on the one hand, it will demonstrate that the markets (owners, creditors) believe in the feasibility of the return to viability within a reasonable time period[; o]n the other hand, it will ensure that restructuring aid is limited to the minimum required to restore viability while limiting distortion of competition'.

77 Next, point 43 of the Guidelines on restructuring aid states that '[t]he amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs …; [; a]id beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions[; s]uch

contribution is a sign that the markets believe in the feasibility of the return to viability[; s]uch contribution must be real, i.e., actual, excluding all future expected profits such as cash flow, and must be as high as possible'.

78 Lastly, point 44 of the guidelines on restructuring aid sets the minimum levels required for the beneficiary's own contribution, which in the case of large firms is 50% of the financing needs for the restructuring. It provides also that, in exceptional circumstances, the Commission may accept a lower contribution.

79 In the present case, the Commission stated in recital 150 in the preamble to the contested decision that, according to the modified restructuring plan, SeaFrance's own contribution to its restructuring was EUR [*confidential*] million and consisted of a loan of EUR 99.7 million and the proceeds from the sale of three vessels, amounting to EUR [*confidential*] million. The Commission excluded the loan of EUR 99.7 million from that contribution, taking two factors into account.

80 First, it stated in recitals 158 and 160 in the preamble to the contested decision that, like the loan of EUR [*confidential*] million, the loan of EUR 99.7 million constituted State aid and could not therefore be taken into consideration as an own contribution, which must be free of aid.

81 Secondly, the Commission stated in recitals 161 and 163 in the preamble to the contested decision that, in any case, according to points 7 and 43 of the guidelines on restructuring aid, the beneficiary's own contribution must show that the markets believe in the feasibility of the recipient firm's return to viability. However, in the present case, since the authority granting the aid and the beneficiary's parent company constituted a single legal person, namely the SNCF, and the measures concerned were simultaneous, that purpose could not be complied with in the absence of a real contribution obtained from an investor or creditor external to the SNCF. In the Commission's view, the conduct of the authority granting the aid does not show that the markets believe in the beneficiary's return to viability.

82 The Commission concluded from this, in recital 165 in the preamble to the contested decision, that SeaFrance's own contribution, free of aid, was EUR [*confidential*] million, that is to say, less than [*confidential*] % of its restructuring cost, and that it was inadequate in terms of the provisions of point 44 of the guidelines on restructuring aid.

83 In that regard, first, the French Republic claims that the EUR 99.7 million loan does not constitute State aid, and states that the Commission was wrong to exclude that loan from SeaFrance's own contribution.

84 Next, the French Republic claims that, in order to meet the conditions laid down in the Commission guidelines, it is sufficient to show that the financing proposed as the beneficiary's own contribution is real, as high as possible and free of aid. It considers that, in claiming that the own contribution must also show that the markets believe in the feasibility of the beneficiary's return to viability, the Commission has made such belief a separate and additional condition to the condition that the own contribution must be free of aid and, consequently it has infringed the concept of own contribution.

85 Lastly, the French Republic claims that the Commission infringed the concept of own contribution when it stated, in recitals 161, 163 and 164 in the preamble to the contested decision, that the financing of SeaFrance's restructuring by the SNCF did not demonstrate that the markets believe in the feasibility of SeaFrance's return to viability, in particular, due to the fact that the authority granting the aid and the beneficiary of the aid's parent company, a provider of funds, constituted one and the same legal person.

86 It follows from the analysis of the first plea that the Commission was right to find that the loans at issue, the recapitalisation and the rescue aid, assessed jointly, constituted State aid. Therefore, the Commission was right to exclude the loan of EUR 99.7 million from SeaFrance's own contribution, without it being necessary to examine the French Republic's other arguments.

87 The French Republic claims, lastly, that the Commission was wrong to observe, in recital 166 in the preamble to the contested decision, that the French authorities had not invoked the exceptional circumstances clause provided for in point 44 of the guidelines on restructuring aid or provided any evidence of the existence of an exceptional situation of this kind.

88 That argument must be rejected. The French authorities did make a brief reference, in the notification of 18 February 2011 and in their letter of 12 September 2011, to point 44 of the guidelines on restructuring aid, which states that in exceptional circumstances and in cases of particular hardship, which must be demonstrated by the Member State, the Commission may accept a contribution below the 50% applicable to large firms.

89 However, in order to provide a reason for applying the exceptional circumstances clause contained in that point, those authorities merely stated, first, that the economic crisis affecting the United Kingdom market and the tightening of the financial markets led to particular difficulties for SeaFrance and, secondly, that in the SNCB-freight decision the Commission had accepted an own contribution of between 15% and 25%. Since the economic crisis and the tightening of the financial markets affect all firms, they cannot be described as exceptional circumstances or particular difficulties affecting a single firm. Nor can reliance on a precedent from the Commission's past practice demonstrate the existence of exceptional circumstances or that the firm receiving the restructuring aid was in particular difficulty. The Commission was therefore entitled to find that the French authorities did not provide any evidence of the existence of such circumstances.

90 It follows from the above that the third plea must be rejected.

Fourth plea: infringement of Article 345 TFEU

91 In the fourth plea, the French Republic claims that the Commission infringed Article 345 TFEU, which provides that the Treaties in no way prejudice the rules in Member States governing the system of property ownership and establishes, according to case-law, a principle of equal treatment for, on the one hand, undertakings wholly or partially owned by the State or publicly-owned institutions and, on the other hand, undertakings owned by private persons.

92 In the main argument put forward in the context of the present plea, the French Republic claims that the Commission infringed the principle of equal treatment in that, according to the contested decision, in order to receive restructuring aid a firm in difficulty which is a subsidiary of a publicly-owned undertaking is required to find financing on the market from creditors outside its group to supplement the aid received. However, in the same situation, a subsidiary of a privately-owned group can rely on public aid and the support of its shareholder to finance its restructuring, without the need to demonstrate that such financing is reasonable. Thus, the Commission based its decision on the presumption that the conduct of a public shareholder did not comply with market rules. The infringement of the principle of equal treatment for public and private undertakings is shown in the contested decision by the Commission's refusal to take into account the intrinsic features of the loans offered by the SNCF for the purposes of applying the private investor test. It is thus clear from the contested decision that a company such as SeaFrance, wholly owned by a public undertaking, cannot be granted a loan by its sole shareholder where that shareholder is also carrying out the recapitalisation of that undertaking.

93 That argument which the French Republic puts forward is based on a misinterpretation of the principle of equal treatment for public and private undertakings and a misunderstanding of the role played by the private investor test in the application of that principle, and must be rejected.

94 It should be noted that the private investor test ensues from the principle that the public and private sectors are to be treated equally, pursuant to which capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions, cannot be regarded as State aid (see judgment of 12 December 1996 in *Air France* v *Commission*, T-358/94, ECR, EU:T:1996:194, paragraph 70 and the case-law cited). Thus, the application of that test makes it possible to avoid discrimination whereby an advantage granted to an undertaking by means of State resources, but under market conditions, is regarded as State aid solely because those resources come from the State.

95 In the present case, the Commission did not base its decision on the presumption that the conduct of a public shareholder did not comply with market rules but on the finding that, since they came from State resources, the loans at issue may have constituted State aid. In order to avoid automatic classification of those loans as State aid, and thus infringement of the principle of equal treatment relied on by the French Republic, the Commission examined them in the light of the private investor test. Thus it found that the loans could not be dissociated from the other measures put in place or planned by the French State, through the SNCF, in favour of SeaFrance and that, considered jointly, the measures and the loans did not meet the private investor test.

96 Thus, the fact that SeaFrance could not be granted a loan by its sole shareholder, since that shareholder also carried out the company's recapitalisation, is not the result of infringement of the principle of equal treatment for private and public undertakings, but the result of the correct application of the private investor test.

97 The other arguments which the French Republic puts forward in the context of the present plea must also be rejected.

98 First, according to the French Republic, the Commission infringed the principle of equal treatment for public and private undertakings, when, on the ground that the loans of EUR 99.7 million and EUR [*confidential*] million were not offered by a player outside the SNCF, it requested the French authorities to produce an example of a loan offer from an independent financial institution, or a quote or a rate offer provided by a commercial bank, instead of applying to those loans a rate derived from application of the communication on reference rates.

99 That argument by no means demonstrates infringement by the Commission of the principle of equal treatment. The Commission's requests must be regarded purely as checks that the loans at issue meet the private investor test, carried out in accordance with the case-law requiring the Commission, where it appears that that test might be applicable, to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that test are met (see, to that effect, judgment in *Commission* v *EDF and Others*, paragraph 31 above, EU:C:2012:318, paragraph 104).

100 Secondly, the Commission infringed the principle of equal treatment for public and private undertakings by holding that the loans at issue could not be regarded as SeaFrance's own contribution to its restructuring, solely on the ground that they were not offered by a player outside the SNCF.

101 That argument is based on a misreading of the contested decision. As was stated in paragraph 80 above, the Commission excluded the loan of EUR 99.7 million from SeaFrance's own contribution on the ground that that loan cannot be considered to be free of aid.

102 It follows from the foregoing that the fourth plea must be dismissed.

103 The action must therefore be dismissed in its entirety.

Costs

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

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders the French Republic to pay the costs.

Gratsias Kancheva Wetter

Delivered in open court in Luxembourg on 15 January 2015.

[Signatures]