



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

4 September 2014*

(Appeals — Restructuring aid — European Commission's margin of assessment — Scope of review by the General Court of the European Union — Market economy private investor test — Requirement for a sectoral and geographical analysis — Sufficiently well-established practice — Long-term economic rationale — Making of additional redundancy payments)

In Joined Cases C-533/12 P and C-536/12 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 22 November 2012,

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

appellant,

the other parties to the proceedings being:

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

defendant at first instance,

European Commission,

defendant at first instance,

French Republic, represented by G. de Bergues, N. Rouam and J. Rossi, acting as Agents,

intervener at first instance (C-533/12 P),

and

French Republic, represented by G. de Bergues, D. Colas, N. Rouam and J. Rossi, acting as Agents,

appellant,

the other parties to the proceedings being:

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

applicant at first instance,

* Language of the case: French.

European Commission,

defendant at first instance,

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

intervener at first instance (C-536/12 P),

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: M. Wathelet,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 6 November 2013,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2014,

gives the following

Judgment

- 1 By their respective appeals the Société nationale maritime Corse Méditerranée (SNCM) SA ('SNCM') and the French Republic ask the Court of Justice to set aside the judgment of the General Court of the European Union in *Corsica Ferries France v Commission* (T-565/08, EU:T:2012:415) ('the judgment under appeal'), in so far as it annulled the second and third paragraphs of Article 1 of Commission Decision 2009/611/EC of 8 July 2008 concerning the measures C 58/02 (ex N 118/02) which France has implemented in favour of the Société nationale maritime Corse-Méditerranée (SNCM) (OJ 2009 L 225, p. 180; 'the decision at issue').

Background to the dispute and the decision at issue

- 2 The General Court made the following findings:

'Shipping companies at issue

- 1 ... Corsica Ferries France SAS ["Corsica Ferries"] is a shipping company operating regular services to Corsica from mainland France (Marseilles, Toulon and Nice) and Italy.
- 2 [SNCM] is a shipping company operating regular services to Corsica from mainland France (Marseilles, Toulon and Nice) and to North Africa (Algeria and Tunisia) from France and services to Sardinia. One of the main subsidiaries of SNCM is the Compagnie méridionale de navigation which is wholly owned by SNCM ...
- 3 In 2002, SNCM was 20% held by the Société nationale des chemins de fer (French National Railways) and 80% held by the Compagnie générale maritime et financière ("CGMF"), which in turn were wholly owned by the French State. When it opened its capital in 2006, two purchasers, Butler Capital Partners ... and Veolia Transport ..., assumed control of 38% and 28% of the

capital, respectively, whilst CGMF maintained a presence with 25%, and 9% of the capital was reserved for the employees. Since then, [Butler Capital Partners] has transferred its shares to [Veolia Transport].

Administrative procedure

- 4 By Decision 2002/149/EC of 30 October 2001 on the State aid awarded by France to [Société nationale maritime Corse-Méditerranée (SNCM)] (OJ 2002 L 50, p. 66 ...), the Commission of the European Communities found that aid of EUR 787 million granted to SNCM, during the period from 1991 to 2001, by way of public service compensation, was compatible with the common market under Article 86(2) EC. No action for annulment of that decision has been brought before the General Court.
- 5 By letter of 18 February 2002, the French Republic notified the Commission of a plan to grant aid for the restructuring of SNCM in an amount of EUR 76 million (“the 2002 Plan”).
- 6 By Decision 2004/166/EC of 9 July 2003 on aid which France intends to grant for the restructuring of [the Société nationale maritime Corse Méditerranée (SNCM)] (OJ 2004 L 61, p. 13; “the 2003 Decision”), the Commission approved, with conditions attached, two tranches of restructuring aid paid to SNCM in a total amount of EUR 76 million, one of EUR 66 million, payable immediately, and the other of a maximum amount of EUR 10 million, depending on the net result from disposals relating to, in particular, SNCM’s vessels.
- 7 [Corsica Ferries] brought an action for annulment of the 2003 Decision before the General Court on 13 October 2003 [(judgment of the General Court in *Corsica Ferries France v Commission*, T-349/03, EU:T:2005:221)].
- 8 By Decision 2005/36/EC of 8 September 2004 amending Decision [2004/166/EC on aid which France intends to grant for the restructuring of Société Nationale Maritime Corse-Méditerranée (SNCM)] (OJ 2005 L 19, p. 70 ...), the Commission amended one of the conditions imposed by Article 2 of the 2003 Decision. This concerned the condition relating to the maximum number of 11 ships of which SNCM was authorised to dispose. In [Decision 2005/36], the Commission authorised the replacement of one of those ships, the *Aliso*, by another, the *Asco*.
- 9 By decision of 16 March 2005, the Commission approved the payment of a second tranche of aid for restructuring, in an amount of EUR 3 327 400, on the basis of the 2003 Decision (“the 2005 Decision”).
- 10 By its judgment in ... *Corsica Ferries France v Commission* [(EU:T:2005:221)], the General Court annulled the 2003 Decision on the ground of an erroneous assessment of the minimal nature of the aid, due principally to calculation errors in the net proceeds from disposals, while rejecting all the other pleas in law alleging an insufficient statement of reasons and an infringement of Article 87(3)(c) EC and of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2; “the Guidelines”).
- 11 By letter dated 7 April 2006, the French authorities called on the Commission to find that, by reason of its nature as public service compensation, part of the restructuring aid agreed to under the 2002 Plan, in an amount of EUR 53.48 million, was not to be classified as a measure taken under a restructuring plan but as a measure not constituting aid in accordance with the judgment [in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415)] or as a measure independent of the 2002 Plan pursuant to Article 86(2) EC.

- 12 On 21 April 2006, the planned merger concerning the acquisition of joint control of SNCM by [Butler Capital Partners] and [Veolia Transport] was notified to the Commission pursuant to Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [(“the EC merger regulation”)] (OJ 2004 L 24, p. 1). The Commission authorised the merger on 29 May 2006 on the basis of Article 6(1)(b) of that regulation. ...
- 14 On 13 September 2006, the Commission decided to initiate the procedure under Article 88(2) EC in regard to the new measures carried out in favour of SNCM while incorporating the 2002 Plan (OJ 2006 C 303, p. 53 ...).
- 15 By [the decision at issue], the Commission found that the measures of the 2002 Plan constituted unlawful State aid within the meaning of Article 88(3) EC but were compatible with the common market under Article 86(2) EC and Article 87(3)(c) EC and that the measures of the 2006 privatisation plan (“the 2006 Plan”) did not constitute State aid within the meaning of Article 87(1) EC.

Measures in question

- 16 The decision [at issue] concerns the following measures:
 - under the 2002 Plan: the capital contribution of CGMF to SNCM for the sum of EUR 76 million in 2002, including EUR 53.48 million for public service obligations and the balance for restructuring aid;
 - under the 2006 Plan:
 - the negative sale price of SNCM by CGMF for the sum of EUR 158 million;
 - the capital contribution of CGMF of EUR 8.75 million;
 - the current account advance from CGMF for an amount of EUR 38.5 million for staff made redundant by SNCM in the event of a new social plan.

The decision [at issue]

- 17 In the decision [at issue], in particular at recitals 37 to 54, the Commission found that the operation of passenger transport services to Corsica was a market characterised by the fact that it was seasonal and concentrated. The competitive structure of the market had changed significantly following the arrival of [Corsica Ferries] in 1996. Since 2000, SNCM and [Corsica Ferries] constituted a *de facto* duopoly holding over 90% of the market share. In 2007, [Corsica Ferries] clearly overtook SNCM and transported an additional million passengers, in a market increasing steadily by 4% per annum. SNCM, together with [Compagnie méridionale de navigation], on the other hand, retained a near-monopoly in respect of freight transport.
- 18 The Commission found, at recitals 219 to 225 of the decision [at issue], that all the contributions received by SNCM through CGMF were financed via State resources, that they threatened to distort competition and that they had an effect on trade between Member States. Accordingly, it found that three of the four criteria of Article 87(1) EC had been fulfilled. It then examined, for each measure, the existence of a selective economic advantage and its possible compatibility with the common market.

- 19 As regards the EUR 76 million notified in 2002, the Commission took the view, at recital 236 of the decision [at issue], that EUR 53.48 million could be considered to be public service compensation. In accordance with paragraph 320 of the judgment [in *Corsica Ferries France v Commission* (EU:T:2005:221)], the Commission evaluated that contribution in the light of the judgment in *Altmark* [*Trans and Regierungspräsidium Magdeburg*, (EU:C:2003:415)] and found, at recital 257 of the decision [at issue], that it indeed constituted State aid but was nevertheless compatible with the common market in accordance with Article 86(2) EC. The remaining EUR 22.52 million then had to be considered in terms of restructuring aid.
- 20 As regards the 2006 Plan, the Commission next applied, at recitals 267 to 352 of the decision [at issue], the market economy private investor test (“the private investor test”) to the negative sale price of EUR 158 million. In order to do so, it evaluated whether a hypothetical private investor, in the place of and instead of CGMF, would have preferred to recapitalise [SNCM] for that amount or place the company in liquidation and bear the costs thereof. It was therefore necessary to assess a minimum cost of liquidation.
- 21 The Commission took the view, at recitals 267 to 280 of the decision [at issue], that the cost of liquidation had necessarily to include the cost of a social plan, namely the cost of additional redundancy payments in addition to statutory obligations and obligations under agreements, in order to comply with the practice of large groups of undertakings today and to not harm the brand image of the holding company to which it belongs and its ultimate shareholder. It therefore calculated, with the help of an independent expert, the cost of those additional redundancy payments by carrying out a comparison with social plans implemented recently in France by groups of undertakings such as Michelin and Yves Saint-Laurent.
- 22 At recital 350 of the decision [at issue], the Commission found that the negative sale price was the result of an open, transparent, unconditional and non-discriminatory selection procedure, and that, in that regard, it constituted a market price. Consequently, accepting the premiss of the cost of liquidation being limited to redundancy payments alone, it concluded, at recital 352 of that decision, that the cost of liquidation was higher than the negative sale price and that the capital contribution of EUR 158 million did not therefore constitute State aid within the meaning of Article 87(1) EC.
- 23 As regards the capital contribution of EUR 8.75 million from CGMF, the Commission took the view, at recitals 356 to 358 of the decision [at issue], that since the contribution of the private purchasers was significant and concurrent, it could be automatically excluded that this was in the nature of aid. Next, it stated that the fixed rate of profitability constituted an adequate return on the capital invested and that the existence of a clause to cancel the sale was not such as to call into question the equal treatment. It concluded, at recital 365 of that decision, that CGMF’s capital contribution, in an amount of EUR 8.75 million, did not constitute aid within the meaning of Article 87(1) EC.
- 24 Next, the Commission observed, at recitals 372 to 378 of the decision [at issue], that the measures involving aid to individuals, up to EUR 38 million, deposited in an escrow account would be carried out should a new social plan be implemented by the purchasers and that the measures did not reflect the implementation of the staff reductions provided for under the 2002 Plan. According to the Commission, that aid could be paid only to individuals whose employment contract with SNCM had been terminated prematurely. Those measures did not therefore constitute charges arising out of the normal application of the social legislation applicable to cases where employment contracts have been terminated. The Commission concluded that that aid to individuals, approved of by the State in the exercise of its public authority and not by the State in its capacity as shareholder, therefore fell within the Member States’ social policy and by the same token did not constitute aid within the meaning of Article 87(1) EC.

- 25 As regards the balance of EUR 22.52 million notified under restructuring aid, namely the balance of EUR 76 million notified under the 2002 Plan and of the EUR 53.48 million considered to be compatible with the common market pursuant to Article 86(2) EC ..., the Commission found, at recital 381 of the decision [at issue], that this constituted State aid within the meaning of Article 87(1) EC. Next, it assessed the compatibility of that measure with the Guidelines.
- 26 The Commission stated, at recitals 387 to 401 of the decision [at issue], that, in 2002, SNCM was indeed a firm in difficulty within the meaning of point 5(a) and of point 6 of the Guidelines and that the 2002 Plan was capable of helping the company restore its viability, in accordance with points 31 to 34 of the Guidelines.
- 27 In respect of the avoidance of undue distortions of competition (points 35 to 39 of the Guidelines), the Commission took the view, at recital 404 of the decision [at issue], that there was no excess capacity on services by sea to Corsica and that it was therefore not necessary to contribute to its improvement. It considered next, at recital 406 of the contested decision, that the restructuring plan significantly reduced the firm's presence on the market. The criteria relating to the prevention of undue distortions of competition was therefore also satisfied.
- 28 At recitals 410 to 419 of the decision [at issue], the Commission observed that the need for aid, calculated at the minimum under points 40 and 41 of the Guidelines, was limited to EUR 19.75 million on 9 July 2003, subject to the net proceeds of the disposals provided for by the 2003 Decision. To that end, the Commission began by calculating SNCM's cash-flow requirements for its restructuring plan. According to the Commission, the cost of the restructuring plan was determined at EUR 46 million. Next, it deducted all the disposals made between 18 February 2002 (date of notification of the 2002 Plan) and 9 July 2003 (date of adoption of the 2003 Decision), namely EUR 26.25 million, to arrive at an amount of EUR 19.75 million.
- 29 As regards the compensatory measures, the Commission found that almost all the conditions provided for under the 2003 Decision concerning the acquisitions, the use of the fleet, the disposal of assets, the prohibition on offering lower fares than those of each of its competitors ... and the limitation on the number of round trips on routes departing from Corsica had been complied with. In so far as those conditions had been satisfied and the amount of the aid notified was substantially less than the amount approved in 2003, the Commission did not consider it appropriate to impose additional obligations. Accordingly, after having taken account of the amount of the additional disposals provided for under the 2003 Decision, the Commission found, at recital 434 of the decision [at issue], that the final restructuring balance, established at EUR 15.81 million, was State aid compatible with the common market pursuant to Article 87(3)(c) EC.
- 30 The enacting terms of the decision [at issue] read as follows:

“Article 1

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

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

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

Article 2

This Decision is addressed to the French Republic.”

The action before the General Court and the judgment under appeal

- 3 By application lodged at the Registry of the General Court on 17 December 2008, Corsica Ferries asked the General Court to annul the decision at issue. The applicant put forward essentially two pleas in law in support of its application.
- 4 The first plea in law alleges an interpretation of Article 287 EC that is too broad, which results in an inadequate statement of reasons for the decision at issue as well as in an infringement of the rights of the defence and of the right to an effective legal remedy. The second to sixth pleas in law allege an infringement of Articles 87 EC and 88 EC and of the Guidelines. Those pleas concern, respectively, the capital contribution of EUR 53.48 million as public service compensation, the disposal of SNCM at a negative price of EUR 158 million, the capital contribution from CGMF of EUR 8.75 million, the aid measures to individuals of EUR 38.5 million and the balance of EUR 22.52 million notified as restructuring aid.
- 5 The General Court upheld the third to sixth pleas adduced by Corsica Ferries in support of its annulment action and annulled the second and third paragraphs of Article 1 of the decision at issue.

Forms of order sought and procedure before the Court

- 6 By its appeal, SNCM claims that the Court should:
 - set aside, in part, the judgment under appeal on the basis of Article 265(1) TFEU and Article 61 of the Statute of the Court of Justice of the European Union, in so far as it annuls the second and third paragraphs of Article 1 and of the decision at issue; and
 - order Corsica Ferries to pay the costs.
- 7 Corsica Ferries contends that Court should:
 - declare the appeals in these joint actions to be unfounded and dismiss them; and
 - order the appellants to pay all the costs.
- 8 The French Republic claims that the Court should:
 - set aside the judgment under appeal in so far as it annulled the second and third paragraphs of Article 1 of the decision at issue;
 - give final judgment in the matter itself, or refer the case back to the General Court; and
 - order the respondent to pay the costs.

- 9 By order of the President of the Court of 24 January 2013, Cases C-533/12 P and C-536/12 P were joined for the purposes of the written and oral procedure and the judgment.

The appeals

- 10 SNCM, in Case C-533/12 P, and the French Republic, in Case C-536/12 P, both contest the judgment under appeal with four grounds which largely overlap. It is therefore appropriate to deal with them together.

The first ground of appeal: errors of law relating to the disposal of SNCM at a negative sale price

–Arguments of the parties

- 11 By its first ground of appeal, relating to the disposal of SNCM at a negative price of EUR 158 million, SNCM claims that the General Court erred in law in failing to have regard to the Commission's margin of assessment and, in its interpretation contrary to Article 345 TFEU of the market economy private investor test, it distorted the decision at issue and failed to fulfil its obligation to state reasons.

Failure to have regard to the Commission's margin of assessment and the scope of the General Court's powers of review

- 12 According to SNCM, the General Court disregarded the discretion which the Commission enjoys when it applies the market economy private investor test. In the decision at issue, in establishing that there was no aid in the negative price, the Commission made a comparison between the negative price of the disposal and the additional redundancy payments which would have been granted by the State in the event of SNCM's liquidation. That calculation is based on information provided by the parties and by an independent expert. By calling into question the Commission's conclusions, the General Court disregarded the margin of assessment which the Commission enjoys when assessing complex economic issues and therefore erred in law.
- 13 Corsica Ferries claims that, as regards the classification of State aid and the scope of Article 107(1) TFEU, the European Union judicature must, in principle, carry out a comprehensive review in this area.

–Findings of the Court

- 14 As regards the Commission's margin of assessment and judicial review, the General Court, in paragraph 88 of the judgment under appeal, referred to settled case-law on the scope and nature of its review of the term 'State aid'.
- 15 According to that case-law, 'State aid', as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the European Union judicature must in principle, having regard both to the specific features of the case before it 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. The European Union judicature must, *inter alia*, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see judgments in *France v Ladbroke Racing and Commission*, C-83/98 P, EU:C:2000:248, paragraph 25; *Commission v Scott*, C-290/07 P, EU:C:2010:480, paragraphs 64 and 65; and *BNP Paribas and BNL v Commission*, C-452/10 P, EU:C:2012:366, paragraph 100 and the case-law cited).

- 16 The General Court, in paragraphs 90 to 108 of the judgment under appeal, was right to carry out a review of the objective factors taken into consideration by the Commission in the decision at issue in order to ensure a proper application of Article 107 TFEU in accordance with the case-law cited in the preceding paragraph.
- 17 Moreover, as the Advocate General stated in point 39 of his Opinion, it must be observed that, contrary to the claims of SNCM, the General Court did not in any way call into question the work of the independent expert which afforded the basis of the decision at issue.
- 18 After considering that decision, the General Court found that the Commission had not sufficiently substantiated its reasoning and that it had relied on factors which were neither objective nor verifiable. SNCM's argument that the General Court disregarded the Commission's margin of assessment or substituted its own reasoning for that of the expert appointed by the Commission must therefore be rejected.
- 19 It follows from the foregoing that the General Court correctly carried out the full review required of it for the purposes of the case-law cited in paragraph 15 above.

The market economy private investor test

– Arguments of the parties

- 20 Concerning the interpretation of the market economy private investor test, SNCM alleges that the General Court imposed on the Commission an obligation to define the economic activities of the Member State concerned, 'in particular at the geographic and sectoral level', in order to verify that the conduct of that Member State was that which a market economy investor would have adopted. SNCM claims that the relevant criterion taken from the case-law for establishing that test is that of the size of the investor and not the size of the sector in which the investor operates. The General Court thus disregarded the fundamental principle of non-discrimination with reference to the system of property ownership, laid down in Article 345 TFEU, which forms the basis of the private investor test.
- 21 Corsica Ferries claims that the General Court cannot be criticised for having required a sectoral and geographical definition of the economic activities in question in order to be able to establish whether the Commission had indeed based its assessment of the measures in question on 'all the relevant information'.
- 22 The French Republic claims that the General Court erred in law in finding that in principle the Commission could not take into account the risk that the brand image of the State, as a global economic actor in the private sector, would be adversely affected in the context of the reasonable private investor test. It also submits that, by requiring the existence of a sufficiently well-established, or even settled practice among the investors of the sector concerned on the basis of objective and verifiable factors, the General Court imposed a requirement which goes beyond what is necessary for the proper application of the private investor test as laid down by the case-law.
- 23 Like the French Republic, SNCM considers that by setting out, in paragraphs 86, 87, 95 and 96 of the judgment under appeal, criteria entirely of its own making, such as the carrying out of a sectoral and geographical analysis, the demonstration of a sufficiently well-established practice and a standard of proof which is too high for the purpose of demonstrating that there is a probability of indirect material benefit, the General Court erred in law in its interpretation of the market economy private investor test.

- 24 SNCM claims in addition that, in finding, in paragraphs 101 to 108 of the judgment under appeal, that the Commission has not demonstrated that the French State's conduct was motivated by a reasonable probability of obtaining an indirect material benefit, even in the long term, the General Court required an excessively high standard of proof. In order to determine whether the privatisation of a public undertaking for a negative sale price includes elements of State aid, it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been led to make capital contributions of the same size or whether it would instead have chosen to wind it up.
- 25 According to SNCM, the indirect benefit which the French State is capable of obtaining from the measure in question must be regarded as having been established by the comparison between the likely costs of a liquidation and the negative price of the disposal.
- 26 Furthermore, according to SNCM, the General Court required a standard of proof that was practically impossible to meet. SNCM claims that it was impossible to quantify precisely the damage suffered in the event of the deterioration of the brand image of the Member State concerned. Such quantification relies inherently on information that is difficult to predict in advance, in particular because it has to rely on the reaction of other economic actors, such as the customers, users, suppliers or staff of SNCM, and also other public undertakings.
- 27 According to Corsica Ferries, the General Court gave full effect to the prudent private investor test, which is based on the premiss that it can be demonstrated that the conduct of the Member State is guided by prospects of long-term profitability, that is to say, the long-term economic rationale of the conduct of the State in question can be demonstrated. Consequently, the General Court found against the Commission because it had failed to establish, to the requisite legal standard in the decision at issue, the reasonable probability that the French State would obtain indirect material benefit, even in the long term, from the operation in question.
- 28 Concerning the definition of the French State's economic activities, SNCM also claims that the General Court distorted the decision in that it found that the Commission did not define, to the requisite legal standard, the State's economic activities in relation to which it was necessary to assess the economic rationale of the measures at issue. As regards the terms 'sufficiently well established practice' and 'settled practice', according to SNCM, the judgment under appeal is characterised by an inadequate statement of reasons, as the General Court did not define those terms.

– Findings of the Court

- 29 It is settled case-law that investment by public authorities in the capital of undertakings, in whatever form, may constitute State aid, for the purposes of Article 87 EC, where the conditions of that article have been fulfilled (judgments in *Spain v Commission*, C-278/92 to C-280/92, EU:C:1994:325, paragraph 20, and *Italy and SIM 2 Multimedia v Commission*, C-328/99 and C-399/00, EU:C:2003:252, paragraph 36 and the case-law cited).
- 30 However, it is also settled case-law that it follows from the principle of equal treatment of public undertakings and private undertakings that 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 (judgment in *Italy and SIM 2 Multimedia v Commission*, EU:C:2003:252, paragraph 37 and the case-law cited). Thus, the conditions which a measure must meet in order to be treated as 'aid' for the purposes of Article 107 TFEU are not met if the recipient public 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 in *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 78 and the case-law cited).

- 31 According to the case-law of the Court of Justice, it is necessary to distinguish between, on the one hand, the role of a Member State as shareholder of an undertaking and, on the other, that of the State acting as a public authority. The applicability of the private investor test ultimately depends on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking (see judgments in *Spain v Commission*, EU:C:1994:325, paragraph 22, and *Commission v EDF*, EU:C:2012:318, paragraphs 80 and 81).
- 32 Therefore, it is necessary to assess whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been led to make capital contributions of the same size (judgment in *Italy and SIM 2 Multimedia v Commission*, EU:C:2003:252, paragraph 38 and the case-law cited).
- 33 For that purpose it is necessary to assess whether the measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the Member State concerned, and only the benefits and obligations linked to the situation of the State as shareholder — to the exclusion of those linked to its situation as a public authority — are to be taken into account (judgment in *Commission v EDF*, EU:C:2012:318, paragraph 79).
- 34 Moreover, if there is no possibility of comparing the situation of a public authority with that of a private undertaking, ‘normal market conditions’ must be assessed by reference to the objective and verifiable elements which are available (judgments in *Chronopost and Others v Ufex and Others*, C-83/01 P, C-93/01 P and C-94/01 P, EU:C:2003:388, paragraph 38, and *Commission v EDF*, EU:C:2012:318, paragraphs 101 and 102).
- 35 For the purposes of the assessment of the private investor test, the General Court considered in paragraph 86 of the judgment under appeal that it is for the Commission to define the economic activities of the Member State concerned, in particular at the geographic and sectoral level, in relation to which the long-term economic rationale of that Member State’s conduct has to be assessed. In addition, in paragraphs 95 to 100 of that judgment, the General Court held that it is only a ‘sufficiently well-established practice’ or a ‘settled practice’ of private undertakings which can be used to apply that test.
- 36 In that regard, it must be stated that those requirements are not absolute, but, in some circumstances, they may identify a private investor comparable to the public undertaking to which the private investor test is applied.
- 37 In using those terms, the General Court did not impose specific requirements with regard to the nature of the evidence with which it may be demonstrated that a rational private investor in a situation as close as possible to that of the public undertaking would have made the capital contribution at issue, but found, in paragraphs 93 and 94 of the judgment under appeal, that the Commission had not defined, to the requisite legal standard, the French State’s economic activities in relation to which it was necessary to assess the economic rationale of the measures at issue in the present case, and that it was impossible for the General Court to review the long-term economic rationale of the negative sale price at issue in the present case.
- 38 The General Court correctly identified the criterion of the long-term economic rationale of a decision of a Member State to confer an economic advantage on an undertaking as a criterion which must, in any event, be fulfilled in order to pass the private investor test. In doing so, it did not infringe Article 345 TFEU.

- 39 According to the case-law, when contributions of capital by a public investor disregard any prospect of profitability, even in the long term, such contributions must be regarded as aid within the meaning of Article 107 TFEU, and their compatibility with the common market must be assessed on the basis solely of the criteria laid down in that provision (see, to that effect, judgment in *Italy v Commission*, C-303/88, EU:C:1991:136, paragraph 22).
- 40 Contrary to what the French Republic maintains, the General Court, in paragraph 85 of the judgment under appeal, did not rule out, as a matter of principle, that the protection of the brand image of a Member State as a global investor in the market economy could, under specific circumstances and with a particularly cogent reason, constitute justification for demonstrating the long-term economic rationale of the assumption of additional costs such as additional redundancy payments.
- 41 However, the General Court was right to find, in paragraph 85 of the judgment under appeal, that summary references to the brand image of a Member State, as a global player, are not enough to support a finding that there is no aid, for the purposes of EU law.
- 42 The first ground of appeal of SNCM cannot be upheld either in that it criticises the General Court for having imposed on the Commission, in paragraphs 101 to 108 of the judgment under appeal, an excessive standard so far as concerns proof of the fact that the conduct of the French State was motivated by a reasonable probability of obtaining a material benefit, even in the long term. It is clear from the judgment under appeal that the Commission merely stated that the brand image of the French State would be affected due to social problems. Given what has been stated, in particular in paragraph 41 above, such arguments cannot be upheld.
- 43 Thus the General Court was entitled to find, in paragraph 108 of the judgment under appeal, that the French State's long-term economic rationale has not been demonstrated to the required legal standard.
- 44 So far as concerns the allegation of distortion, SNCM has not demonstrated that the General Court distorted the Commission's decision, that is to say, that its interpretation was clearly erroneous.
- 45 So far as concerns SNCM's criticism that the General Court failed to fulfil its obligation to state reasons, in that it did not define the terms 'sufficiently well-established practice' or 'settled practice', it must be stated, as the Advocate General did in point 62 of his Opinion, that those terms are clear and refer to a factual assessment, and that it is easy to see that only one or a few examples do not constitute a 'sufficiently well-established practice' or a 'settled practice'.
- 46 Accordingly, the first ground of appeal must be rejected in its entirety.

Second ground of appeal: errors of law relating to the capital contribution of EUR 8.75 million

Arguments of the parties

- 47 SNCM claims that the General Court distorted the decision at issue in failing to take account of all the relevant factors, in particular the issues of the fixed yield and the effect of the cancellation clause, in its assessment of the comparable nature of the investment conditions of the simultaneous capital contributions.
- 48 According to SNCM, the issue of the fixed yield was examined by the Commission in paragraphs 361 to 363 of the decision at issue. The Commission thus found that a fixed yield of 10% of the French State's capital investment in SNCM constituted, for a private investor, an adequate long-term profitability of the capital invested.

- 49 Furthermore, according to SNCM, the Commission did in fact state why it considered that the cancellation clause could not call into question the equal treatment of the concurrent investors. Contrary to what the General Court found in paragraph 127 of the judgment under appeal, the Commission in fact stated that that clause concerned the complete disposal of SNCM to the private purchasers, and not the investments made simultaneously by the private purchasers and the State in the privatised SNCM. The cancellation clause thus concerns the disposal of SNCM and must be analysed in that context, and in those circumstances it cannot be taken into account in the analysis of the simultaneous investment of the State and of the private purchasers made following that disposal.
- 50 SNCM submits that when SNCM was disposed of a value was placed on the cancellation clause in the negative price of EUR 158 million. Since that disposal of SNCM took place at the market price, the cancellation clause had a value in that disposal price and could not be regarded as having conferred an advantage on the purchasers. Therefore, that clause should no longer be taken into account when assessing whether the French State's simultaneous investment is in keeping with the principle of equal treatment of investors; otherwise the value attributed to that clause would be counted twice.
- 51 As regards taking account of the context of the undertaking's privatisation in which the capital contribution of EUR 8.75 million to SNCM is set, SNCM submits that the commitments relating to the measures adopted by the French State in the course of the privatisation of SNCM, that is to say, the negative price of EUR 158 million and the current account advance of EUR 38.5 million, must not be taken into account a second time when assessing that capital contribution. Taking account of the negative price and the capital contribution again when assessing the current account advance is tantamount to double counting that price and that contribution.
- 52 The French Republic claims that the General Court erred in law in that it infringed Article 87(1) EC when it found that the Commission had not considered all the relevant factors in its analysis of the comparability of the capital contribution of CGMF, a public shareholder in SNCM, for an amount of EUR 8.75 million, and that of the private purchasers for an amount of EUR 26.25 million, and that the Commission should have taken into account the sale cancellation clause granted to those private buyers in the course of the privatisation of SNCM.
- 53 Corsica Ferries claims that the placing of a value on the cancellation clause in the negative price of EUR 158 million at the time of the disposal has no bearing on the General Court's reasoning or on the fact that the Commission refrained from conducting a thorough analysis of the economic impact of that clause in the decision at issue, so that, if a value had been placed on it in that negative price, *quod non*, the Commission should have explained this clearly and succinctly.

Findings of the Court

- 54 It must be observed that the General Court, in paragraph 117 of the judgment under appeal, was right to find that the mere fact that a capital contribution was made jointly and concurrently with private investors does not automatically exclude it from being classified as State aid. Other factors, in particular the equal treatment of public and private shareholders, must also be taken into account.
- 55 In paragraph 130 of the judgment under appeal, the General Court found that the sale cancellation clause is, at the least, capable of removing any uncertainty for the private purchasers in the event of the occurrence of one of the triggering events and that that clause, consequently, has an actual financial value. The General Court considered that that clause is therefore liable to alter the risk profiles of the capital contributions of the private purchasers and of CGMF and therefore to call into question the comparable nature of the investment conditions.
- 56 It must be stated that the appellants have failed to prove that the General Court erred in law in that regard.

- 57 The argument that the value of the cancellation clause was included in SNCM's sale price and that that clause could no longer be taken into account when assessing the comparability of the capital contributions of the public and private shareholders must be rejected.
- 58 As the General Court states in paragraph 111 of the judgment under appeal, the joint and concurrent subscription in question had already been provided for in the memorandum of understanding concerning the sale in question. Consequently, it is clear that the capital contribution in question was provided for in the context of the partial privatisation of SNCM.
- 59 As the French Republic acknowledges, if the sale cancellation clause is exercised, the original shareholder which has transferred its shares to the purchaser must reimburse him his capital contribution, and thus, unlike the original shareholder, the purchaser has the opportunity to recover his capital contribution in the event that the cancellation clause is exercised and to end his involvement with the public undertaking concerned.
- 60 In those circumstances, it is clear that the cancellation clause may produce effects on the conditions of that recapitalisation and affect the comparability conditions.
- 61 Since the General Court found evidence of those effects, it was right to conclude that, in the decision at issue, the Commission could not therefore refrain from conducting a thorough analysis of the economic impact of the sale cancellation clause. As the Advocate General observed in point 115 of his Opinion, the General Court was right to find that the Commission did not, or did not sufficiently, support its decision on the equal treatment of the public and private investments in SNCM.
- 62 Consequently, the second ground of appeal must be rejected and there is no need to examine the issue of the assessment of the yield from CGMF's capital contribution.

Third ground of appeal: error in law relating to the aid to individuals in the amount of EUR 38.5 million

Arguments of the parties

- 63 According to SNCM, the General Court distorted the decision at issue in finding that the Commission had claimed that the fact that the measure in question does not result from strict statutory obligations was, by its nature, liable to exclude its being in the nature of State aid within the meaning of Article 87(1) EC.
- 64 The General Court erred in law by encroaching on the Commission's margin of assessment in assessing complex economic situations. In finding, in paragraph 144 of the judgment under appeal, that 'the existence of the escrow account is such as to create an inducement for SNCM employees to leave the company or, at least, to leave it without negotiating their departure, particularly in view of the possible grant of additional redundancy payments ... all of which created an indirect economic advantage for SNCM', the General Court went beyond the review of a manifest error of assessment that is required in the case of an examination of complex economic situations.
- 65 The General Court did not give sufficient reasons for its decision regarding the advantage to SNCM. Its analysis of the escrow account in paragraph 144 of the judgment under appeal does not make it possible to understand the reasons why the Commission committed a manifest error of assessment by not classifying the measures involving aid to individuals as 'State aid'.
- 66 In addition, SNCM and the French Republic claim that the judgment under appeal is vitiated by a failure to state reasons. The General Court did not examine the Commission's finding that 'even when the amount of EUR 38.5 million is added to the State's capital contribution of EUR 142.5 million, the

adjusted negative selling price of EUR 196 million is still well below the cost of compulsory liquidation of SNCM'. The Commission established that the liquidation costs for the French State would have been higher than the negative price, even if the amount of the aid to individuals were added.

- 67 In that regard, by classifying the measures involving aid to individuals in the amount of EUR 38.5 million as 'State aid', for the purposes of Article 87(1) EC, without ascertaining, in the alternative, whether those measures met the reasonable private investor test, the General Court did not state the reasons for its decision to the requisite legal standard.
- 68 Corsica Ferries claims that it is precisely because the Commission was not able to determine the normal application of the additional social compensation for termination of the contract of employment through the escrow account mechanism that it was criticised by the General Court.

Findings of the Court of Justice

- 69 On the basis of the considerations set out in paragraphs 14 to 16 above, the Court of Justice considers that the examination carried out by the General Court in paragraph 144 of the judgment under appeal is in keeping with the requisite level of review.
- 70 As regards the argument of SNCM and the French Republic that the General Court should have ascertained, in the alternative, whether the amount of EUR 38.5 million was justified by the private investor test, it must be stated that the Court of Justice has not upheld the first ground of appeal concerning the classification of the additional redundancy payments in the amount of EUR 158 million.
- 71 As the Advocate General stated in point 132 of his Opinion, the amount of EUR 38.5 million in the escrow account is also intended to be paid, where appropriate, as additional redundancy payments.
- 72 However, the applicants do not raise any arguments that demonstrate that the nature of that sum of EUR 38.5 million is different from the sum of EUR 158 million assessed in the examination of the first ground of appeal concerning the application of the private investor test.
- 73 As regards, the reasons advanced by the Advocate General in points 122 to 137 of his Opinion, the Court of Justice considers that the General Court, in its analysis of the findings and arguments resulting from that plea, did not distort the decision at issue, and it provided reasons to the requisite legal standard for the judgment under appeal.
- 74 Consequently the third ground of appeal must be rejected.

The fourth ground of appeal: error in law relating to the balance for restructuring of EUR 15.81 million

Arguments of the parties

- 75 SNCM and the French Republic claim that the General Court's reasoning concerning the balance for restructuring of EUR 15.81 million is erroneous.
- 76 The applicants claim that the General Court's reasoning in paragraphs 148 to 153 of the judgment under appeal is based on the premiss that the Commission considered that the 2006 Plan was free of the elements that constitute State aid. Thus, by their appeals, the applicants seek to demonstrate that the General Court erred in law in its analysis of the measures of the 2006 Plan and failed to fulfil its obligation to state reasons.

Findings of the Court

- 77 It is clear from the applicants' pleadings that the fourth ground of appeal depends on the Court upholding the previous grounds advanced in support of their appeals.
- 78 In paragraphs 39, 55 and 66 above, the Court has rejected the first, second and third grounds of appeal and upheld the judgment under appeal.
- 79 In those circumstances, the fourth ground of appeal must be rejected as ineffective, and it is not necessary to examine the arguments put forward by the appellants.
- 80 Since none of the grounds of appeal raised by the appellants have been upheld, the appeals in Cases C-533/12 P and C-536/12 P must be dismissed.

Costs

- 81 In accordance with the first paragraph of Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall make a decision as to costs. 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.
- 82 Since Corsica Ferries has applied for costs against SNCM and the French Republic and the latter have been unsuccessful in their pleas, they must be ordered to pay the costs.

On those grounds, the Court (Fifth Chamber) hereby

1. **Dismisses the appeals;**
2. **Orders Société nationale maritime Corse-Méditerranée (SNCM) SA and the French Republic to bear their own costs and to pay those incurred by Corsica Ferries France SAS in equal shares.**

[Signatures]