**Economic Regulation Law – State aid and transport and infrastructures – Teaching materials EELR 5**

**State Aid – Market economy private investor test**

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. Laprévote, 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,

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 it 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-Méditérrannée (SNCM) SA and the French Republic to bear their own costs and to pay those incurred by Corsica Ferries France SAS in equal shares.**

**The procedure of control of state aid: case SeaFrance**

JUDGMENT OF THE GENERAL COURT (Eighth Chamber) - 15 January 2015 – Case Sea France

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

**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](http://curia.europa.eu/juris/document/document.jsf?text=&docid=161383&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=669340" \l "Footnote1)) in order to enable it to exercise an option to purchase its vessel *Berlioz* and secure ownership of that asset.

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.**