Provisional text

JUDGMENT OF THE COURT (First Chamber)

7 March 2018 (*)

(Appeal — State aid — Aid implemented by the French Republic in favour of Sernam — Restructuring and recapitalisation aid, guarantees and waiving of Sernam's financial debts by SNCF — Decision declaring that aid incompatible with the internal market and ordering its recovery — Sale of assets en bloc — Concept of 'sale' — Confusion between object and price of the sale of assets en bloc — Open and transparent procedure — Private investor test — Application of that principle to an assignment of assets en bloc — Compensatory measures)

In Case C−127/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 February 2016,

SNCF Mobilités, formerly Société nationale des chemins de fer français (SNCF), established in Saint-Denis (France), represented by P. Beurier, O. Billard, G. Fabre and V. Landes, avocats,

applicant,

The other parties to the proceedings being:

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

defendant at first instance,

French Republic,

Mory SA, in liquidation,

Mory Team, in liquidation,

established in Pantin (France), represented by B. Vatier and F. Loubières, avocats,

interveners at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.-C. Bonichot, S. Rodin and E. Regan (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 9 March 2017,

after hearing the Opinion of the Advocate General at the sitting on 20 July 2017,

gives the following

Judgment

1 By its appeal, SNCF Mobilités, formerly Société nationale des chemins de fer français ('SNCF'), asks the Court to set aside the judgment of the General Court of the European Union of 17 December 2015, *SNCF* v *Commission* (T−242/12, EU:T:2015:1003) ('the judgment under appeal'), by which that court rejected its action for annulment of Commission Decision 2012/398/EU of 9 March 2012 on State aid SA.12522 (C 37/08) — France — Enforcing the Sernam 2 Decision (OJ 2012 L 195, p. 19, 'the Sernam 3 Decision').

Background to the dispute

2 In the early 2000s, Sernam SA's financial situation, whose activity was structurally loss-making, required the implementation of a restructuring plan, based inter alia on commercial assistance and recovery measures taken by SNCF, which was State aid. By Decision of 23 May 2001 concerning State aid NN 122/2000 (ex NJ 140/2000) (OJ 2001 C 199, p. 15) ('the Sernam 1 Decision'), the European Commission approved restructuring aid for the Sernam group and declared compatible with the internal market an aid amount of EUR 503 million for Sernam's restructuring, initially envisaged as part of a planned takeover of Sernam by Geodis SA.

3 By correspondence of 17 June 2002, the French authorities informed the Commission that the aid approved under the Sernam 1 Decision had been implemented on different terms than those on the basis of which the Commission had taken its decision. Moreover, by letter of 8 July 2002, the Commission received a complaint concerning the Sernam file.

4 By letter of 30 April 2003, the Commission informed the French Republic of its decision to initiate the procedure provided for in Article 108(2) TFEU in respect of that aid (State aid — France — Invitation to submit comments pursuant to [Article 108(2) TFEU] concerning Aid C 32/03 (ex NN 122/2000) — 'Sernam 2: Revision of restructuring aid') (OJ 2003 C 182, p. 2).

5 By Commission Decision 2006/367/EC of 20 October 2004 on the State aid partly implemented by France for the Sernam company (OJ 2006 L 140, p. 1) ('the Sernam 2 Decision'), the Commission found that the Sernam 1 Decision had not been complied with, which constituted misuse of aid within the meaning of Article 1(g) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

6 As such, it found that EUR 41 million in amount of additional aid had been illegally paid out to cover certain losses subsequent to the Sernam 1 Decision and ordered its recovery. The Commission nevertheless also found that the French authorities had fulfilled a number of their objectives in accordance with the Sernam 1 Decision and that the aid under examination met the criteria for amending a restructuring plan provided for in point 3.2.4 of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2). The Commission therefore confirmed that the aid approved by the Sernam 1 Decision in the amount of EUR 503 million was compatible with the internal market subject to two conditions, being, first, that Sernam refocus on its rail transport activities and, second, that it replace its road transport activities by using the services of independent undertakings. Alternatively, the Sernam 2 Decision also provided for the possibility of a transfer of Sernam's assets en bloc.

7 The operative part of the Sernam 2 Decision is worded as follows:

'Article 1

1. The State aid of EUR 503 million for … Sernam … approved in May 2001 is compatible with the common market under the conditions laid down in Articles 3 and 4.

2. The State aid of EUR 41 million provided by France to … Sernam … is incompatible with the common market.

Article 2

1. [The French Republic] shall take all the measures necessary to recover from the beneficiary the aid referred to in Article 1(2) that has already been unlawfully placed at the beneficiary's disposal.

2. Recovery shall take place immediately in accordance with the procedures of national law to the extent that these procedures permit the immediate and effective implementation of this Decision. The aid to be recovered shall include interest from the day on which the aid was placed at the beneficiary's disposal to the day on which the aid is recovered. Interest shall be calculated on the basis of the reference rate used for the calculation of the subsidy equivalent for aid granted for regional purposes.

Article 3

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

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

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

Sernam's own road transport resources and services means all of the road resources — i.e. road transport vehicles — of the Sernam company of which it has full ownership or which it leases or rents.

The companies that take over Sernam's road activities shall perform the road transport services using their own resources.

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

Article 4

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

Article 5

Within two months of the date on which this Decision is notified, [the French Republic] shall inform the Commission of the measures taken to comply with it.

Article 6

This Decision is addressed to the French Republic.'

8 SNCF decided to avail itself of the possibility provided for under Article 3(2) of the Sernam 2 Decision, which allowed for a transfer of Sernam's assets en bloc. According to the French authorities, Sernam's economic situation failed to elicit any proposals based on a positive valuation in the call for tenders

conducted on SNCF's behalf by a bank. All the offers submitted under that procedure concluded that the value was very negative. As no firm offer had been submitted, the decision was taken to continue the discussions solely with the consortium established by candidate 5 who was associated with Sernam's management team. On 15 June 2005, candidate 5 ultimately informed SNCF orally that it was not in a position to submit a takeover offer — not even a conditional one — before 30 June 2005.

9 On 30 June 2005, SNCF took the decision to conclude the sale with Financière Sernam, which was wholly owned by Sernam's management team.

10 The transfer process took place in four stages, as referred to in the memorandum of understanding signed on 21 July 2005 by SNCF, Sernam, Sernam Xpress SAS, one of 10 subsidiaries wholly owned by Sernam, and Financière Sernam. Firstly, SNCF recapitalised Sernam in the amount of EUR 57 million. Secondly, Sernam made a partial asset contribution to Sernam Xpress. That contribution covered all asset items, including the EUR 57 million recapitalisation, and Sernam's liabilities, except for certain financial liabilities representing an overall amount of EUR 38.5 million. In return, Sernam SA received a share in Sernam Xpress with a nominal value of EUR 100. Thirdly, immediately after the contribution was made, Sernam Xpress undertook a capital increase of EUR 2 million which was underwritten in full by SNCF. Following that operation, SNCF held the majority of the shares in Sernam Xpress. Fourthly, Sernam and SNCF assigned all of their shares in Sernam Xpress to Financière Sernam for EUR 2 million.

11 Following that transfer, Sernam was put into compulsory liquidation on 15 December 2005. The debt of EUR 41 million, corresponding to the State aid to be repaid under the Sernam 2 Decision, was included in the liabilities of the liquidation account of Sernam. Of that amount, SNCF was actually able to recover EUR 2.75 million at the end of the winding-up proceedings.

12 On 24 June 2005, a first complainant filed a complaint with the Commission concerning the misapplication of the Sernam 2 Decision. By letters of 10 April 2006 and 23 April 2007, another complaint was lodged with the Commission by a second interested party. Both complainants submitted in essence that the Sernam 2 Decision had been misapplied.

13 By decision of 16 July 2008, entitled 'State aid — France — State aid C 37/08 — Enforcing the Sernam 2 decision — Invitation to submit comments pursuant to Article [108(2) TFEU]' (OJ 2009 C 4, p. 5), the Commission opened the formal investigation procedure provided for in Article 108(2) TFEU, which led to the adoption of the Sernam 3 Decision on 9 March 2012.

14 In the latter decision, the Commission found that the EUR 41 million of aid incompatible with the internal market had not been recovered. It further found that the transfer process had not complied with the conditions laid down in Article 3(2) of the Sernam 2 Decision and concluded that the EUR 503 million in restructuring aid, which had been conditionally authorised under the Sernam 2 Decision, had been misused. The Commission further found that the measures implemented by SNCF for the purposes of completing that transfer was new State aid incompatible with the internal market. That new aid comprised SNCF's EUR 57 million recapitalisation of Sernam, SNCF's waiving of EUR 38.5 million in debt for Sernam and the guarantees provided by SNCF when Sernam's activities were transferred to Financière Sernam, with the exception of the guarantee granted to the railwaymen.

The procedure before the General Court and the judgment under appeal

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

16 The appellant put forward six pleas in law in support of its action for annulment: (i) infringement of its rights of defence, in that the Commission adopted a position in the Sernam 3 decision regarding the inapplicability of the private investor test, which had not been referred to in the decision to open the formal investigation procedure; (ii) infringement of the principle of the protection of legitimate expectations; (iii)

infringement of the duty to act within a reasonable time and of the principle of legal certainty; (iv) errors of law and of fact committed by the Commission in its finding that the transfer of Sernam's assets en bloc had not complied with the conditions laid down in Article 3(2) of the Sernam 2 Decision; (v) error of law on the part of the Commission in its finding that the obligation to recover the EUR 41 million in State aid declared incompatible in the Sernam 2 Decision had been transferred to Financière Sernam and its subsidiaries; and (vi) error of law on the part of the Commission in its finding that the measures provided for in the memorandum of understanding of 21 July 2005 constituted new State aid in favour of Sernam Xpress and Financière Sernam.

17 By the judgment under appeal, without ruling on the plea of inadmissibility raised by the Commission against the action at first instance, the General Court dismissed the action in its entirety, although it upheld SNCF's argument to the effect that the Commission had found, incorrectly that the transfer of Sernam's assets en bloc at a negative price did not constitute a sale. Thus, as is apparent from paragraphs 100 to 108 of the judgment under appeal, the General Court considered that the concept of 'sale' did not necessarily preclude the transfer referred to from being effected at a negative price.

Forms of order sought by the parties before the Court of Justice

18 By its appeal, SNCF claims that the Court should:

– declare the appeal admissible and well founded;

– set aside the judgment under appeal; and

– order the Commission to pay the costs.

19 The Commission, Mory SA and Mory Team contend that the appeal should be dismissed and that the applicant be ordered to pay the costs.

The appeal

The first ground of appeal

First part of the first ground of appeal

– *Arguments of the parties*

20 By the first part of the first ground of appeal, the applicant criticises the General Court for having found, in paragraphs 194 and 195 of the judgment under appeal, that the purpose of Article 3(2) of the Sernam 2 Decision was to interrupt Sernam's economic activity.

21 First of all, such a conclusion is based on an error of law. The sale of assets en bloc provided for in Article 3(2) of the Sernam 2 Decision implies that all of the undertaking's assets are transferred together at the same time to a single purchaser. Thus, the inevitable consequence of the concept of transfer of assets en bloc is the continuation of the undertaking's activities.

22 In that regard, the General Court also vitiated the judgment under appeal by failing to provide a sufficient statement of reasons and by failing to explain how a transfer of the entirety of Sernam's assets together at the same time to a single purchaser who, as indicated in recital 217 of the Sernam 2 Decision, was also supposed to take over the market shares ceded by Sernam, could have led to an interruption in its economic activities.

23 Moreover, at the reply stage, the applicant criticises the Commission for arguing that the purpose of the transfer of Sernam's assets en bloc is to interrupt its activities, whereas the Commission itself explained in

the cases that gave rise to the judgments of 29 April 2004, *Germany* v *Commission* (C−277/00, EU:C:2004:238, paragraphs 68 to 70), and of 19 October 2005, *CDA Datenträger Albrechts* v *Commission* (T−324/00, EU:T:2005:364, paragraph 73) that the effect of such a transfer was the continuation of an undertaking's economic activity

24 Next, the applicant takes the view that recital 217 of the Sernam 2 Decision states clearly the purpose of the transfer of Sernam's assets en bloc, viz, that Sernam no longer operate in its current legal form and cede its market shares to an independent acquiring party. The objective pursued, as evidenced by Article 3(2) of that decision, read in the light of recital 217 thereof, is therefore to sever for the future all capital links between SNCF and its subsidiary in order to avoid the grant of new State aid.

25 In stating, in paragraphs 194 and 195 of the judgment under appeal, that the purpose of the transfer of Sernam's assets en bloc was to interrupt its economic activity, the General Court upheld a purpose that has no basis in either the operative part or the statement of reasons for the Sernam 2 Decision. The applicant further criticises the General Court for having referred, in paragraph 218 of the judgment under appeal, to a purchaser integrating Sernam's assets into its own business strategy, whereas that condition is not to be found in the wording of recital 217 of the Sernam 2 Decision, which refers only to an independent acquiring party, that is to say, one not having a legal link to SNCF. In so doing, the General Court upheld an interpretation that departs from the wording of that decision, even though it is not in the least ambiguous.

26 The Court of Justice's case-law restricts the use of the interpretation of the operative part of an act in the light of the reasons that led to its adoption in the event that the operative part is not sufficiently explicit (judgment of 19 June 1980, *Roudolff*, 803/79, EU:C:1980:166, paragraph 7). In applying that principle of interpretation in the present case, when the wording of Article 3(2) of the Sernam 2 Decision does not so warrant, the General Court distorted that decision.

27 Lastly, the General Court vitiated the judgment under appeal by giving a contradictory statement of reasons inasmuch as it held, in paragraphs 194 and 195 of that judgment, that recital 217 of the Sernam 2 Decision established clearly that the purpose of the transfer of assets en bloc was to interrupt Sernam's economic activity, whilst having also held, in paragraph 218 of the judgment under appeal, that that same recital could 'give the appearance of continuance of [its] economic activity'.

28 The Commission, supported by Mory SA and Mory Team, contends that the first part of the first ground of appeal must be rejected.

– *Findings of the Court*

29 It is appropriate, at the outset, to reject the criticism of the methods of interpretation applied by the General Court. In paragraphs 86 and 87 of the judgment under appeal, it recalled, in support of its method, that according to the Court of Justice's settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (see, inter alia, judgment of 27 September 2017, *Nintendo*, C−24/16 and C−25/16, EU:C:2017:724, paragraph 70 and the case-law cited) and, moreover, the operative part of a Union act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (judgment of 25 October 2011, *eDate Advertising and Others*, C−509/09 and C−161/10, EU:C:2011:685, paragraph 55 and the case-law cited).

30 Inasmuch as the applicant criticises the General Court, including when it alleges a distortion of Article 3(2) of the Sernam 2 Decision, for having made errors of law in its assessment of the purpose of that article, it must be borne in mind that, in paragraph 191 of the judgment under appeal, the General Court observed that it is apparent from recitals 200 and 208 to 211 of that decision, which are part of a section entitled 'Preventing distortion of competition — Specific compensatory measures', that that decision was aimed at establishing compensatory measures due to the aid that benefited Sernam and its misuse, by requiring it to '[withdraw permanently] from market segments with overcapacity', so that a 'a

company that would have had to give up its business on account of the stated difficulties would [not] be enabled to artificially occupy market shares for which there is a very strong demand, to the detriment of financially sound competing companies'.

31 As held by the General Court in paragraph 192 of the judgment under appeal, it follows that the purpose of Article 3(1) of the Sernam 2 Decision was 'to eliminate Sernam's presence on a market with overcapacity in order to prevent distortions of competition associated with the granting of the EUR 503 million in restructuring aid', by requiring the takeover of Sernam's road transport activities by other undertakings and the diversification of Sernam's activities towards rail freight.

32 The following must also be borne in mind: first, in paragraph 193 of the judgment under appeal, the General Court noted that recital 217 of the Sernam 2 Decision, referring as it did to the ceding of market shares to the independent acquiring party, like recitals 200 and 208 to 211 of that decision, was in the part thereof covering prevention of distortions of competition; and, second, it observed in paragraph 194 of that judgment that 'the two paragraphs of Article 3 of the Sernam 2 Decision, which are set out as alternatives, made the restructuring aid of EUR 503 million conditional and pursued the same objective of preventing distortions of competition brought about by that aid'.

33 Therefore, the General Court was correct in inferring therefrom, in paragraphs 194 and 195 of the judgment under appeal, that the purpose of the sale of Sernam's assets en bloc provided for in Article 3(2) of the Sernam 2 Decision, read in the light of recital 217 thereof, was the interruption of Sernam's economic activity and its elimination, which made compliance with the conditions laid down in Article 3(1) of that decision superfluous.

34 With regard to the obligation to provide an adequate statement of reasons, the Court has consistently held that the statement of reasons on which a judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review (see, inter alia, judgment of 4 April 2017, *European Ombudsman* v *Staelen*, C−337/15 P, EU:C:2017:256, paragraph 83 and the case-law cited).

35 It is clear that paragraphs 191 to 195 of the judgment under appeal, as summarised in paragraphs 30 to 33 of the present judgment, impart to the requisite legal standard the reasons why the General Court considered that the purpose of the transfer of Sernam's assets en bloc was to interrupt its economic activity.

36 Nor can the applicant's argument consisting of maintaining that the General Court gave a contradictory statement of reasons be upheld. It should be noted that, although the General Court considered, in paragraph 218 of the judgment under appeal that, according to recital 217 of the Sernam 2 Decision, the party acquiring the assets en bloc could de facto continue its own activities with Sernam's assets, which could give the appearance of continuance of its economic activity, it immediately added 'that the activity had to involve a completely different player than Sernam, namely the purchaser, integrating Sernam's assets into its own business strategy, without which the recipient's market shares cannot be regarded as having been "ceded"'.

37 In so adding, moreover, the General Court merely confirmed, without distorting the Sernam 2 Decision, that the application of Article 3(2) of that decision presupposes the sale of Sernam's assets to an independent acquiring party.

38 Moreover, the argument to the effect that the position maintained by the Commission in its response differs from what it defended in the cases that gave rise to the judgments of 29 April 2004, *Germany* v *Commission* (C−277/00, EU:C:2004:238, paragraphs 68 to 70), and of 19 October 2005, *CDA Datenträger Albrechts* v *Commission* (T−324/00, EU:T:2005:364, paragraph 73), which fails to show how the General Court made an error of law in its assessment of the purpose of the Article 3(2) of the Sernam 2 Decision, must be rejected as inadmissible (see, by analogy, judgment of 14 December 2016, *SV Capital* v *ABE*, C−577/15 P, EU:C:2016:947, paragraph 69).

39 In the light of all the foregoing considerations, the first part of the first ground of appeal must be rejected as in part inadmissible and in part unfounded.

Second part of the first ground of appeal

– **Arguments of the parties**

40 By the second part of the first ground of appeal, the applicant complains that, in paragraph 90 of the judgment under appeal, the General Court interpreted the concept of 'sale' alluded to in Article 3(2) of the Sernam 2 Decision as referring to an actual transfer of the assets on 30 June 2005. Yet neither Article 3(2) nor recital 217 of the Sernam 2 Decision refers to such an actual transfer. Under French law, moreover, in particular Article 1583 of the French Civil Code, a sale results from the agreement between the purchaser and the vendor, once they have agreed on the object and price, even if that object has not yet been delivered or the price paid. Thus, in having attributed to the term 'sale' a meaning which, in going beyond the unambiguous wording used by the Commission, is not apparent from either the operative part or the reasons of the Sernam 2 Decision and comes up against the meaning attached to that term in the national legal orders, the General Court distorted the concept of 'sale', thereby erring in law.

41 The Commission considers that the second part of the first ground of appeal must be rejected.

– *Findings of the Court*

42 It should be noted that, as is apparent from paragraphs 30 to 33 of the present judgment, the purpose of Article 3(2) of the Sernam 2 Decision, read in the light of recital 217 thereof, was to ensure the actual ceding of market shares to an independent acquiring party

43 Thus, the General Court made no error of law in holding in paragraph 90 of the judgment under appeal that compliance with the temporal requirement laid down in Article 3(2) of the Sernam 2 Decision, under which that provision could apply in 'the scenario of Sernam sell[ing] its assets en bloc by 30 June 2005', required an actual transfer of the assets on that date and in holding, in paragraph 91 of that judgment, that that deadline had not been observed.

44 Therefore, the second part of the first ground of appeal must be rejected as unfounded.

Third part of the first ground of appeal

– *Arguments of the parties*

45 By the third part of the first ground of appeal, the applicant submits that the General Court made an error of law and vitiated the judgment under appeal by failing to give an adequate statement of reasons in holding, in paragraphs 118 and 124 of that judgment, that the sale of Sernam's assets en bloc, as provided for in Article 3(2) of the Sernam 2 Decision, covered solely assets.

46 In the first place, the applicant argues that, in merely reproducing Article 3(2) of the Sernam 2 Decision and recital 217 of that decision in order to state, in paragraph 117 of the judgment under appeal, that the Sernam 2 Decision establishes 'a clear contrast between a "sale of Sernam in its entirety (assets and liabilities)" and a "sale of the assets en bloc" of Sernam', and then conclude, in paragraphs 118 and 124 of that judgment, that the Commission had been correct in finding that the sale of assets en bloc covered solely the assets and excluded the liabilities, the General Court made a peremptory assertion and thereby vitiated that judgment by giving an inadequate statement of reasons.

47 In the second place, the applicant takes the view that the contrast drawn by the General Court between the sale of Sernam in its entirety, including assets and liabilities, and the sale of assets en bloc without the liabilities is incorrect.

48 First of all, that contrast is based on a distortion of Article 3(2) of the Sernam 2 Decision, which does not make any statement whatsoever specifying that the assets were to be sold alone and that all liabilities were excluded.

49 Next, the applicant disputes the General Court's conclusion in paragraph 119 of the judgment under appeal, to the effect that an interpretation of the sale of assets en bloc as also encompassing the liabilities would amount to a denial of the difference between the two alternative conditions set out in Article 3(1) and (2) of the Sernam 2 Decision and the two sale scenarios envisaged in recital 217 thereof.

50 The conditions attached to the first scenario, being a sale of Sernam in its entirety, were intended to mitigate the negative consequences for competitors of keeping Sernam on the market by requiring that Sernam's road transport activities be taken over by other undertakings and that it diversify its activities toward rail freight. Those conditions are not warranted in the second scenario, which involves a transfer of Sernam's assets en bloc, as Sernam will no longer operate in its previous legal form and will have ceded its market shares to an independent acquiring party. The conditions attached to each of those two scenarios are therefore quite different.

51 Lastly, the applicant submits that, given the purpose allegedly pursued by Article 3(2) of the Sernam 2 Decision, adding the liabilities to the assets has no bearing on the continuation of economic activity, but merely a potential impact on the valuation.

52 If the purpose of the Article 3(2) of the Sernam 2 Decision had been to interrupt Sernam's economic activity, it would have had to refer to a method of transfer by which that objective could be achieved, such as a transfer of assets separately or in batches.

53 The Commission takes the view that the third part of the first ground of appeal must be rejected.

– *Findings of the Court*

54 As regards, in the first place, the argument alleging the incorrectness of the General Court's contrast between the sale of Sernam in its entirety, including assets and liabilities, and the sale of assets en bloc excluding liabilities, it should be remembered at the outset that, as observed in paragraphs 30 to 33 of the present judgment, Article 3(1) and (2) of the Sernam 2 Decision set out two alternative options pursuing the same purpose, namely the interruption of Sernam's economic activity in a market where there is overcapacity.

55 In that regard, recital 217 of the Sernam 2 Decision makes it clear that if Sernam's activities were to continue in a context in which it was sold in its entirety, including assets and liabilities, the conditions laid down in Article 3(1) of that decision would apply. By contrast, they would not apply in the event of a transfer of Sernam's assets en bloc, since the interruption in its activities would result from the ceding of its market shares to an independent acquiring party and its disengagement from a sector where there is overcapacity.

56 Thus, the General Court was correct in holding in paragraph 117 of the judgment under appeal that the Sernam 2 Decision established a clear contrast between the sale of Sernam in its entirety, including assets and liabilities, and the sale of its assets en bloc, and in inferring therefrom, in paragraphs 118 and 124 of that judgment, that the transfer of Sernam's assets en bloc referred to in Article 3(2) of the Sernam 2 Decision, read in the light of recital 217 thereof, had to be construed as excluding the liabilities.

57 Contrary to what the applicant suggests, and as alluded to by the General Court in paragraph 119 of the judgment under appeal, a contrary interpretation would amount to a denial of the difference between the two alternative conditions set out in Article 3(1) and (2) of the Sernam 2 Decision.

58 As observed by the Advocate General in point 47 of his Opinion, if the applicant's line of reasoning were followed, it would be possible to sell Sernam almost in its entirety and for it to continue its activity,

without it being necessary to implement the compensatory measures provided for in Article 3(1) of the Sernam 2 Decision, thereby depriving Article 3(2) of that decision of any effectiveness.

59 As regards, in the second place, the applicant's assertion of a failure to provide a statement of reasons in the judgment under appeal, suffice it to state that, in the light of the case-law referred to in paragraph 34 of the present judgment, the judgment under appeal satisfied the requirements of providing a statement of reasons by which the General Court is bound, since in paragraphs 117 to 119 of that judgment it set out the reasons why it considered that the sale of assets en bloc covered solely the assets.

60 Having regard to the foregoing, the third part of the first ground of appeal must be rejected as unfounded and the first ground of appeal must accordingly be rejected in its entirety.

The second ground of appeal

Arguments of the parties

61 By the second ground of appeal, the applicant criticises the General Court for having made an error of law in holding, in paragraphs 163 and 164 of the judgment under appeal, that the transfer of Sernam's assets en bloc had not resulted from an open and transparent tendering procedure, as required by Article 3(2) of the Sernam 2 Decision, on the ground that it was the consortium made up of candidate 5 and Sernam's management team who had initially participated in the tendering procedure, and not its members individually, and that accordingly the management team had not participated autonomously in the procedure from the beginning. Neither the Sernam 2 Decision nor EU law requires the ultimately successful candidate following a tendering procedure to have participated autonomously in the procedure from the beginning.

62 The applicant observes that candidate 5 and Sernam's management team had, within a consortium, been associated with the tendering procedure from the start of that procedure and had proposed the least negative value for the assets en bloc. It was only after candidate 5 withdrew that Sernam's management team decided to pursue the process and submit on their own the takeover offer initially put forward by the consortium. The applicant thus takes the view that such circumstances meet the requirements of an open and transparent tendering procedure as reflected in the Commission's decision-making practice and the Court's case-law.

63 In its decision-making practice, the Commission requires in that regard that all parties, solicited or unsolicited, who may be interested by the acquisition in question be given the opportunity to submit a bid and be provided with identical informational opportunities and timeline terms. Moreover, in the judgments of 29 April 2004, *Germany* v *Commission* (C−277/00, EU:C:2004:238, paragraph 95), and of 19 October 2005, *CDA Datenträger Albrechts* v *Commission* (T−324/00, EU:T:2005:364, paragraph 73), it was held that the fact that a sale has not taken place immediately, but has been preceded by unsuccessful attempts with another company, was an indicator that the procedure was not sufficiently open and transparent.

64 The applicant further considers that it is possible to accept that the principles of openness and transparency in public procurement may be applicable by analogy to procedures involving transfers of assets. It is apparent from Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), and from Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), that EU law allows for awarding such a contract to an economic operator without prior advertising or competition following an unsuccessful first tendering procedure, including when the operator did not participate in that first procedure, without that constituting an infringement of the principles of openness and transparency. Those principles should a fortiori be deemed to have been observed where the assets have been transferred to the last interested party, the only one to have made a firm offer, when it has participated in the process in its entirety, initially as part of a consortium from which the other party withdrew in the course of the procedure.

65 The Commission takes the view that the second ground of appeal is inadmissible or, in the alternative, unfounded.

Findings of the Court

66 First of all, without it being necessary to rule on a potential analogy between the tendering procedure relevant to the present case and the principles that are applicable in public procurement, set out in paragraph 64 of the present judgment, it should be noted that the applicant's argument concerning that potential analogy is based on the fact that, at the end of the tendering procedure, no bid or no appropriate bid had been submitted. That kind of argument can be successful only if it challenges the General Court's findings of fact in paragraph 170 of the judgment under appeal, to the effect that '[t]he "last interested person" in the transparent and open tendering procedure in this case was candidate 4. … As observed by the Commission in its written pleadings, following candidate 5's withdrawal, recourse should have been had to candidate 4, who had been part of the process since the beginning and had also indicated its interest at the end of the second round'. That argument, which asks the Court of Justice to substitute its analysis for the one carried out by the General Court as part of its sovereign assessment of the facts and evidence, is therefore inadmissible and must be rejected.

67 Next, the practice followed by the Commission in its decisions or its guidelines, even if that practice were to support the applicant's argument cannot, in any event, bind the Court in its interpretation of the EU rules (see, to that effect, judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission*, C−357/14 P, EU:C:2015:642, paragraph 68).

68 In any event, as correctly observed by the General Court in paragraph 183 of the judgment under appeal, according the Court's case-law, the question whether a tendering procedure has been open and transparent is determined on the basis of a body of indicia specific to the circumstances of each case (see, to that effect, judgment of 29 April 2004, *Germany* v *Commission*, C−277/00, EU:C:2004:238, paragraph 95).

69 Accordingly, in the light of the facts of the present case, and having held in paragraphs 170 and 171 of the judgment under appeal, that the successful bid did not originate from a candidate who had participated autonomously in the tendering procedure from the beginning of that procedure, the General Court was correct in holding, in paragraph 174 of that judgment, that the requirement of an open and transparent procedure had not been observed.

70 Consequently, the second ground of appeal must be rejected as in part inadmissible and in part unfounded.

The third ground of appeal

Arguments of the parties

71 By the third ground of appeal, the applicant submits that the General Court made an error of law and distorted the facts in paragraphs 165 to 167 and 170 of the judgment under appeal, in holding that the firm offer from Sernam's management team could be not be considered to be the outcome of an open and transparent tendering procedure on the ground that that offer was much less attractive for the vendor than the non-binding offers put forward by candidates 4 and 5 in the second round of the tendering procedure.

72 That analysis is based on a distortion of the facts of the case. The General Court failed to take account of the fact that the amount of recapitalisation proposed by those two candidates necessarily supposed that on the date the operation was carried out, there would still be the amount stated in the 2004 balance sheet, being EUR 49.2 million, in Sernam's cash holdings. The offer put forward by Sernam's management team on 30 June 2005, which referred to EUR 59 million in recapitalisation, took account of the sharp deterioration in Sernam's cash situation between 31 December 2004 and 30 June 2005.

73 The Commission considers that third ground of appeal is ineffective or, in the alternative, unfounded.

Findings of the Court

74 The applicant's criticism of the General Court's assessment of the offers put forward by Sernam's management team and candidates 4 and 5 is aimed at calling into question one of the factors that led the General Court to hold, in paragraph 174 of the judgment under appeal, that the management team's offer was not the result of an open and transparent tendering procedure.

75 As is apparent from the analysis in paragraphs 68 and 69 of the present judgment in relation to the second ground of appeal, in the light of the facts of the present case, the fact that Sernam's management team had not participated autonomously in the tendering procedure from the beginning suffices to establish that that procedure was not open and transparent, as required under Article 3(2) of the Sernam 2 Decision.

76 Therefore, the third ground of appeal must be rejected as ineffective.

The fourth ground of appeal

Arguments of the parties

77 By the fourth ground of appeal, the applicant criticises the General Court for having held, in paragraph 153 of the judgment under appeal, that the Commission did not confuse the subject matter of the sale and its price in finding that a net amount of EUR 57 million net had been injected into the assets through the successive recapitalisations of Sernam and then Sernam Xpress, thereby infringing Article 3(2) of the Sernam 2 Decision.

78 In the first place, in stating 'suffice it to observe that the Commission did not confuse the subject matter of the sale and its price' in a peremptory manner in paragraph 153 of the judgment under appeal, the General Court vitiated that judgment by providing an inadequate statement of reasons.

79 In the second place, in refusing to accept, in paragraph 153 of the judgment under appeal, that the EUR 57 million recapitalisation represented the negative price 'paid' for Sernam's assets en bloc, the General Court also vitiated the judgment under appeal with a contradictory statement of reasons since, in paragraphs 103 and 107 of the judgment under appeal, it acknowledged that State aid law is not concerned with the legal forms that transactions may take, but rather focuses on their economic reality and that it is possible to proceed with a sale at a negative price through prior recapitalisation by the vendor.

80 In the third place, the General Court made a number of errors of law. First, its assessment, in paragraph 153 of the judgment under appeal, by which it held that the amount of EUR 57 million net had been added to the assets of those two companies through the successive recapitalisations of Sernam and then Sernam Xpress, is incorrect. In the applicant's submission, the EUR 57 million recapitalisation is not an addition to the assets transferred, but corresponds to the negative price paid for the acquisition of Sernam's assets en bloc.

81 Second, the applicant criticises the General Court for having made a second error of law in holding, in paragraphs 154 and 158 of the judgment under appeal, that the negative price results from the fact that the obligation to sell only Sernam's assets without the liabilities had not been observed and that, had the applicant complied with that obligation, the sale price would have been positive or nil. In the applicant's submission, since the sale of the assets en bloc entails the continuation of Sernam's activity, the structurally loss-making nature of the activity transferred and the automatic transfer of the employment contracts, as provided for under French law, necessarily entail a negative valuation of the activity. Thus, the negative price results not from the addition of certain liabilities, but from the transfer of a structurally loss-making entity.

82 The Commission submits that the fourth ground of appeal is in part inadmissible and in part unfounded.

Findings of the Court

83 Regarding, in the first place, the criticism of the failure to provide a statement of reasons of the judgment under appeal, it should be observed that, in paragraph 152 of that judgment, the General Court held that, in recital 117 of the Sernam 3 Decision, the Commission had found that, through the recapitalisations of Sernam SA and Sernam Xpress, EUR 57 million net was added to Sernam's assets, which addition was not authorised by Article 3(2) of the Sernam 2 Decision.

84 In the light of the case-law referred to in paragraph 34 of the present judgment, it follows that the General Court set out with all the required clarity the reasons why the Commission had not confused the subject matter and price of the sale.

85 In the second place, it cannot be argued that paragraph 153 of the judgment under appeal contradicts paragraphs 103 and 107 of that same judgment. Those paragraphs include the analysis of the concept of 'sale' by which the General Court considered, in examining the second part of the fourth plea in law put forward at first instance, that a sale may be completed at a negative price, inter alia through prior recapitalisation by the vendor.

86 That question may be distinguished from that of whether, in the present case, the Commission could find, as it did in recital 117 of the Sernam 3 Decision, that an addition of assets had been made contrary to Article 3(2) of the Sernam 2 Decision, a question on which the General Court ruled in dealing with the fourth part of the fourth plea in law put forward before it and which was addressed in paragraph 153 of the judgment under appeal.

87 In the third place, regarding the applicant's criticism of the General Court for having made the errors of law referred to in paragraphs 80 and 81 of the present judgment, it is clear, first of all, that in paragraph 153 of the judgment under appeal the General Court merely observed that a net amount of EUR 57 million was added to the assets through a recapitalisation of Sernam, a fact which is not disputed by the parties.

88 Second, as is apparent from paragraphs 54 to 58 of the present judgment, the General Court was correct in holding that the inclusion of the liabilities in the sale of Sernam's assets en bloc did not comply with the obligation imposed by the Sernam 2 Decision. The inference it drew therefrom in paragraphs 154 and 158 of the judgment under appeal, having found that the negative price paid for Sernam's assets would have been positive or nil if only the assets had been sold, is a factual assessment. As the applicant has not alleged any distortion of the facts, its argument must be rejected as inadmissible.

89 In the light of the foregoing, the fourth ground of appeal must be rejected as in part unfounded and in part inadmissible.

The fifth ground of appeal

Arguments of the parties

90 By the fifth ground of appeal, the applicant criticises the General Court for having distorted Article 4 of the Sernam 2 Decision in paragraph 278 of the judgment under appeal, and for having held, incorrectly, in paragraph 279 of that judgment that since Sernam continued to exist economically within Sernam Xpress and then Financière Sernam, the inclusion of the EUR 41 million aid recovery debt in the liabilities of the liquidation account of Sernam infringed that provision.

91 In the first place, the applicant criticises the General Court for having held in paragraph 278 of the judgment under appeal that 'the allusion made in Article 4 of the Sernam 2 Decision to the continued existence of Sernam could only be alluding to the continuation in Sernam's economic activity', whereas that provision stated only that 'the Sernam company [would], if it [continued] to exist, be responsible for paying back the aid of [EUR] 41 million'.

92 As that provision is completely unambiguous, it should be interpreted literally. Thus, the reference to existence of 'Sernam' should be understood as referring to the existence of the legal person consisting of

Sernam. Article 4 of the Sernam 2 Decision merely distinguished between whether or not the legal person 'Sernam' continues to exist, without taking into account, explicitly or implicitly, the question of the interruption of its economic activity.

93 The applicant, referring to paragraph 77 of the judgment of 20 September 2001, *Banks* (C−390/98, EU:C:2001:456), and to paragraph 80 of the judgment of 29 April 2004, *Germany* v *Commission* (C−277/00, EU:C:2004:238), submits that such an interpretation is consistent with the Court's settled case-law, in the case of a sale of the assets of a company that has benefited from State aid to a third party at market price, the benefit of the aid is incorporated in the market price, so that the vendor retains the actual benefit of the aid.

94 In giving Article 4 of the Sernam 2 Decision a meaning and scope that it does not have, given its completely unambiguous wording, the General Court distorted that provision and made an error of law.

95 In the second place, on the basis of paragraph 135 of the judgment of 13 September 2010, *Greece and Others* v *Commission* (T−415/05, T−416/05 and T−423/05, EU:T:2010:386), and paragraph 155 of the judgment of 28 March 2012, *Ryanair* v *Commission* (T−123/09, EU:T:2012:164), the applicant observes that the determination of whether there is economic continuity between a company that has benefited from State aid and the party acquiring its assets, thereby entailing a transfer of the competitive advantage associated with the benefit of that aid to the party acquiring those assets, takes the following elements into consideration: the subject matter of the transfer, the transfer price, the identity of the shareholders or owners of the acquiring undertaking and of the original undertaking, the moment at which the transfer was carried out and, lastly, the economic logic of the transaction. The use of those criteria by the General Court in its determination of whether there was economic continuity between Sernam and the party acquiring its assets is vitiated by a number of errors of law.

96 First of all, as regards the identity of the shareholders, the General Court held, incorrectly, in paragraph 242 of the judgment under appeal that it was a question of assessing the economic continuity between Sernam and Sernam Xpress. Since French law does not allow, inter alia, a negative price to be stipulated in a contract of sale, the conditions laid down in Article 3(2) of the Sernam 2 Decision made it impossible to sell Sernam's assets en bloc directly to Financière Sernam. The method chosen, a type of contribution-transfer preceded by a recapitalisation, ensured that the economic reality of the operation remained a transfer of Sernam's assets en bloc to Financière Sernam in a manner permitted by national law.

97 In focusing its analysis on the relationship between Sernam and Sernam Xpress, the General Court artificially broke down a single operation, thereby infringing the principle by which State aid law is not concerned with the legal forms that transactions may take, but rather focuses on their economic reality. The General Court also made a contradictory statement of reasons in the light of the principle, referred to in paragraph 107 of the judgment under appeal, to the effect that a sale may be effected at a negative price.

98 Next, as regards the transfer price, the applicant criticises the General Court for having refused, in paragraph 255 of the judgment under appeal, to take into consideration the market price paid for Sernam's assets, when that criterion is, inter alia on the basis of the judgments of 29 April 2004, *Germany* v *Commission* (C−277/00, EU:C:2004:238, paragraphs 86), and of 19 October 2005, *CDA Datenträger Albrechts* v *Commission* (T−324/00, EU:T:2005:364, paragraphs 97 to 99) one of the leading criteria for finding an absence of economic continuity.

99 Moreover, as regards the subject matter of the transfer, the General Court held, incorrectly, in paragraph 240 of the judgment under appeal, that that criterion was met on the ground that the undertaking in its entirety had been transferred, contrary to Article 3(2) of the Sernam 2 Decision. Only the operating liabilities, and not all liabilities, were added to the assets, which rendered the General Court's analysis meaningless.

100 The applicant further criticises the General Court's assessment in paragraph 246 of the judgment under appeal, relating to the time of the transfer, where it held that the moment of implementation of a decision to

recover unlawful aid is as opportune for circumventing the recovery obligation as the phase involving the formal investigation procedure. In the present case, no circumvention may be alleged, since the Commission itself provided for the possibility of a transfer of assets en bloc and those assets were sold at market price.

101 Lastly, as regards the economic logic of the operation, the applicant submits that the General Court concluded, incorrectly, that there was infringement of the purpose of Article 3(2) of the Sernam 2 Decision inasmuch as Sernam's activity was not interrupted. Yet it was precisely that provision that made the transfer of Sernam's activity possible by allowing for a transfer of Sernam's assets en bloc.

102 The Commission considers that the arguments put forward in support of the fifth ground of appeal are ineffective or, in the alternative, unfounded.

Findings of the Court

103 In criticising, in the first place, the meaning attached by the General Court to the continued existence of Sernam in paragraph 278 of the judgment under appeal, despite claiming that there has been a distortion of Article 4 of the Sernam 2 Decision, the applicant is, in reality, challenging the General Court's interpretation of that provision.

104 In must be remembered in that regard that, according to settled case-law, the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded (see, inter alia, judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission*, C−357/14 P, EU:C:2015:642, paragraph 111 and the case-law cited). Restoring the situation prior to the payment of aid which was unlawful or incompatible with the internal market is a necessary requirement for preserving the effectiveness of the provisions of the Treaties concerning State aid (judgment of 20 September 2001, *Banks*, C−390/98, EU:C:2001:456, paragraph 75).

105 In that light, it should be recalled that, according to Article 107(1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market (see, inter alia, judgment of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity*, C−164/15 P and C−165/15 P, EU:C:2016:990, paragraph 39).

106 As observed by the General Court in paragraph 277 of the judgment under appeal, the illegal aid must be recovered from the company which carries on the economic activity of the undertaking which initially benefited from the advantage associated with the grant of State aid and which, therefore, retains the actual benefit thereof (see, to that effect, judgment of 24 January 2013, *Commission* v *Spain*, C−529/09, EU:C:2013:31, paragraph 109 and the case-law cited).

107 Therefore, the General Court was correct in holding, in paragraph 278 of the judgment under appeal, that Sernam's continued existence, referred to in Article 4 of the Sernam 2 Decision, 'could only be alluding to the continuation in Sernam's economic activity'.

108 As regards, in the second place, alleged errors of law in the analysis of the economic continuity, it must be remembered that such continuity between companies who are parties to a transfer of assets is assessed in the light of the subject matter of the transfer (assets and liabilities, maintenance of the workforce, bundled assets), the transfer price, the identity of the shareholders or owners of the acquiring undertaking and the original undertaking, the moment when the transfer takes place (after the commencement of the investigation, opening of the procedure or the final decision) and also the economic logic of the operation (see, inter alia, judgment of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission*, C−328/99 and C−399/00, EU:C:2003:252, paragraph 78).

109 Firstly, as regards the subject matter of the transfer, in paragraph 240 of the judgment under appeal the General Court merely referred to the findings in paragraphs 134 to 137 of that judgment, the subject matter of the transaction was not solely a sale of Sernam's assets, but rather the transfer of it in its entirety, including its assets and liabilities. It is clear that the applicant is not challenging those findings in the present appeal.

110 Secondly, as is apparent from the analysis in paragraphs 66 to 69 of the present judgment, the General Court was justified in finding that the offer from Sernam's management team was not the result of an open and transparent tendering procedure. It was thus correct in holding, in paragraph 255 of the judgment under appeal, that for that reason the negative price paid in the present case was not a market price.

111 In substantiating that determination, moreover, the General Court looked to other factors, which the applicant has not disputed, inter alia by observing, in paragraphs 256 and 260 of the judgment under appeal, that the alleged market price had been perceived as operating aid and that the expert reports provided did not show that the transfer price was a market price. Consequently, the applicant cannot criticise the General Court for having refused to take the market price criterion into consideration.

112 Thirdly, as regards the error of law alleged by the applicant regarding the application of the criterion of the identity of the shareholders, although the greatest weight should be given to the economic reality of the State aid, the legal form it takes may also turn out to be relevant for assessing that economic reality. In particular, the question of the transfer of the aid is assessed differently, depending on whether it forms part of a sale of shares or of a sale of all or part of the assets (see, to that effect, judgment of 29 April 2004, *Germany* v *Commission*, C−277/00, EU:C:2004:238, paragraphs 78 and 84).

113 The General Court was accordingly correct, in paragraph 242 of the judgment under appeal, in agreeing with the Commission when it took into account the links between Sernam and Sernam Xpress before going on to find that Sernam Xpress was the debtor of the obligation to repay the illegal aid, an obligation ultimately passed on to Financière Sernam by reason of its merger with Sernam Xpress.

114 Moreover, for the same reasons as set out in paragraphs 85 and 86 of the present judgment, the applicant cannot argue that, in its analysis of the criterion relating to the identity of the shareholders, the General Court contradicted its own finding in paragraph 107 of the judgment under appeal about the general possibility of selling at negative prices.

115 Furthermore, regarding the time of transfer, it is clear that, in paragraph 246 of the judgment under appeal, the General Court merely noted that '[t]he moment of implementation of a decision involving the possibility of a sale of assets en bloc of the aid recipient, and also the obligation to recover unlawful and incompatible aid, seems at least as opportune for circumventing the recovery obligation as the phase involving the formal investigation procedure', which is not an error of law.

116 Regarding the applicant's argument that no circumvention can be alleged as the possibility of a transfer of Sernam's assets en bloc was provided for by the Sernam 2 Decision, suffice it to bear in mind that it is apparent, inter alia, from paragraphs 54 to 58 and 109 to 111 of the present judgment that that transfer was not limited to only Sernam's assets and that it was not carried out at market price. Consequently, the requirements provided for in Article 3(2) of the Sernam 2 Decision were not complied with.

117 Lastly, the argument by which the applicant criticises the General Court for having found, in its assessment of the economic logic of the transfer operation, that since Sernam's economic activity was not interrupted the purpose of Article 3(2) of the Sernam 2 Decision was not observed, cannot be upheld. It must be remembered, as is apparent from paragraphs 30 to 33 of the present judgment, that the purpose of Article 3(2) of the Sernam 2 Decision was precisely just such an interruption.

118 Consequently, the arguments by which the applicant takes the view that the General Court made errors of law regarding the analysis of the economic continuity between Sernam and the party acquiring its assets en bloc are unfounded.

119 In the light of the foregoing, the fifth ground of appeal must be rejected as unfounded.

The sixth ground of appeal

The first part of the sixth ground of appeal

– *Arguments of the parties*

120 By the first part of the sixth ground of appeal, the applicant complains that the General Court took account of only one of the grounds put forward by the Commission for not applying the private investor test to the transfer of Sernam's assets en bloc and for having stated, in paragraph 312 of the judgment under appeal, after having established that that criterion was inapplicable because such a transfer, allowed by Article 3(2) of the Sernam 2 Decision, was equivalent to the compensatory measures provided for in Article 3(1) of the Sernam 2 Decision, that 'it [was] no longer necessary to examine the other arguments … relied on by the Commission to justify the non-applicability of the private investor test in the context "of recovery" of the State aid'. In so doing, the General Court vitiated its judgment with an incomplete set of reasons in failing to consider the complaints put forward to it by the applicant in its action at first instance, directed at the inapplicability of the private investor test due to the alleged recovery situation.

121 The applicant further submits that the two grounds relied on by the Commission for rejecting the private investor test are contradictory. The Commission cannot justify the non-application of that criterion both on the basis of a recovery situation, implying that the aid in question is incompatible with the internal market, and on the existence of a compensatory measure, implying that the aid is compatible with that same market. The General Court thus failed to rule on the contradictory statement of reasons that vitiated the statement of reasons of the Sernam 3 Decision.

122 The Commission considers that the first part of the sixth ground of appeal must be rejected.

– *Findings of the Court*

123 It is appropriate, at the outset, to dismiss the argument by which the applicant criticises the General Court for having failed to sanction the contradictory statement of reasons on which the Sernam 3 Decision was based. Such a line of argument, which was put forward by the applicant only at the reply stage, was not raised before the General Court. The General Court cannot be criticised for having failed to examine an argument that was not put forward to it.

124 As regards the applicant's argument alleging a failure to provide an answer, it is worth noting that, in paragraphs 286 and 287 of the judgment under appeal, the General Court summarised the reasons put forward by the Commission for not applying the private investor test. As the General Court observed, the Commission bases itself on two grounds in recitals 154 and 155 of the Sernam 3 Decision, being, in the first place, the ground that that criterion is not applicable in an aid recovery situation and, in the second place, the ground that the sale of Sernam's assets en bloc allowed under Article 3(2) of the Sernam 2 Decision forms part of a compensation situation that precludes the principle of the informed private investor from being taken into account.

125 In paragraphs 288 to 311 of the judgment under appeal, the General Court examined the applicability of the private investor test to the compensatory measures and concluded that that criterion could not be applied, having observed, in paragraph 309 of that judgment, that 'the compensatory logic of the sale of Sernam's assets en bloc, referred to in recital 155 of the [Sernam 3] decision, differed from the logic of a private operator seeking to maximise its profits or, as in this case, minimise its losses'.

126 Therefore, it is clear that the argument alleging that the Commission potentially made an error of law in finding that the private investor test was also inapplicable due to the recovery situation of which the sale of Sernam's assets en bloc was a part was, in any event, ineffective. Consequently, the General Court could,

without vitiating the reasons of the judgment under appeal by a failure to answer, conclude in paragraph 312 of that judgment that it was no longer necessary to examine such an argument.

127 In the light of the foregoing, the first part of the sixth ground of appeal must be held to be unfounded.

The second part of the sixth ground of appeal

– *Arguments of the parties*

128 By the second part of the sixth ground of appeal, the applicant submits that, in upholding the approach taken by the Commission in recital 155 of the Sernam 3 Decision, by which it found that since the sale of Sernam's assets en bloc was a compensatory measure, the principle of the informed private investor was inapplicable, the General Court distorted the Sernam 2 Decision. The applicant puts forward four arguments in support of that second part.

129 Firstly, the General Court distorted the clear wording of Article 3(2) of the Sernam 2 Decision. The obligation referred to therein to effect a transfer of Sernam's assets en bloc at market price and following a transparent and open tendering procedure corresponds precisely to the application of the informed private investor test. That conclusion is also apparent from the Commission Notice on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1). In not applying the informed private investor test to the transfer of Sernam's assets en bloc, the General Court distorted the facts of the dispute and the content of the Sernam 2 Decision by substituting its own statement of reasons for those contained in that decision.

130 Secondly, the General Court distorted the Sernam 2 Decision in finding, in paragraph 301 of the judgment under appeal, that '[s]ince the condition relating to the sale of the assets en bloc excluded the liabilities, the possibility of obtaining a negative price in the present case was by definition precluded'. As the applicant also argued in support of the third part of the first ground of appeal and as set out in paragraphs 47 to 52 of the present judgment, in finding that the transfer of Sernam's assets en bloc had to exclude all liabilities, the General Court distorted Article 3(2) of the Sernam 2 Decision, just as it did by adding a condition not imposed by the Sernam 2 Decision in having found that the price for transferring Sernam's assets en bloc could not be negative. The terms of Article 3(2) of the Sernam 2 Decision refer only to a requirement of market price which, according to the case-law, may be negative, as is apparent from the judgments of 28 January 2003, *Germany* v *Commission* (C−334/99, EU:C:2003:55, paragraph 133), and of 13 May 2015, *Niki Luftfahrt* v *Commission* (T−511/09, EU:T:2015:284, paragraph 139).

131 Thirdly, the applicant criticises the General Court for having given a contradictory statement of reasons in finding, in paragraph 301 of the judgment under appeal, that 'the possibility of obtaining a negative price in the present case was by definition precluded'. Such a finding runs counter to the statement in paragraph 100 of that judgment, to the effect that, under Article 3(2) of the Sernam 2 Decision, 'the only price-related requirement was that it be a market price'.

132 Fourthly, the applicant takes the view that the positive or negative value of the market price had no bearing on the achievement of the purpose pursued as stated in Article 3(2) of the Sernam 2 Decision. Under recital 217 of that decision, that purpose consists of Sernam ceding its market shares to an independent acquiring party and no longer operating in its previous legal form, without a positive price being necessary. In the applicant's submission, those kinds of objectives were attained at the time of the transfer of Sernam's assets at a market price, albeit negative, following a transparent and open tendering procedure. Consequently, the General Court also distorted the Sernam 2 Decision in having found that the transfer of Sernam's assets en bloc at a negative price was, by definition, precluded.

133 It is, moreover, apparent from paragraph 80 of the Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1) that compensatory measures to limit distortions of competition 'should therefore normally take the form of divestments on a going concern basis of viable stand-alone businesses that, if operated by a suitable

purchaser, can compete effectively in the long term'. The purpose of Article 3(2) of the Sernam 2 Decision echoes that logic perfectly by ensuring that Sernam's market shares are ceded to the party acquiring its assets and allowing that party to compete effectively in the long term. In that regard, the value of the market price is of no import.

134 The Commission contends that the second part of the sixth ground of appeal must be rejected.

– *Findings of the Court*

135 It is appropriate, at the outset, to observe that although the applicant alleges that there has been a distortion of Article 3(2) of the Sernam 2 Decision, in reality it is seeking to criticise the General Court's interpretation of that provision, which led it not to apply the informed private investor test.

136 Firstly, the applicant is incorrect in maintaining that the obligation to sell at market price following an open and transparent tendering procedure corresponds to the application of the informed private investor test.

137 It should be borne in mind in that regard that the question of the applicability of that test must be distinguished from the question of its application (see, inter alia, judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep*, C−224/12 P, EU:C:2014:213, paragraphs 29 and 33).

138 As rightly observed by the General Court in paragraph 292 of the judgment under appeal, 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 belonging to it (see, inter alia, judgments of 5 June 2012, *Commission* v *EDF*, C−124/10 P, EU:C:2012:318, paragraph 81, and of 3 April 2014, *Commission* v *Netherlands and ING Groep*, C−224/12 P, EU:C:2014:213, paragraph 31).

139 As the intervention of the public entity in its capacity as shareholder has been established, and therefore the applicability of the private investor as well, the private investor test is applied, next, in order to determine whether, because of its effects, the economic advantage granted, in whatever form, through State resources to a public undertaking distorts or threatens to distort competition and affects trade between Member States (judgment of 5 June 2012, *Commission* v *EDF*, C−124/10 P, EU:C:2012:318, paragraph 89).

140 As regards the application of the private investor test, according to the Court's settled case-law, the market price is the highest price which a private investor acting under normal competitive conditions is ready to pay for a company in the situation it is in and, where a public authority proceeds to sell an undertaking belonging to it by way of an open, transparent and unconditional tender procedure, it can be presumed that the market price corresponds to the highest offer (see, inter alia, judgments of 24 October 2013, *Land Burgenland and Others* v *Commission*, C−214/12 P, C−215/12 P and C−223/12 P, EU:C:2013:682, paragraphs 92 and 94, and of 16 July 2015, *BVVG*, C−39/14, EU:C:2015:470, paragraph 32).

141 However, and contrary to the applicant's assertions, the applicability of the informed private investor test cannot be inferred from a condition that usually forms part of its application. Therefore, a transfer at market price and through an open and transparent tendering procedure does not necessarily lead to the conclusion that that test has been applied.

142 As observed by the Advocate General in point 142 of his Opinion, to require that compensatory measures be implemented in circumstances that seek to re-establish healthy competition therefore forms part of the very essence of the compensatory mechanism, but makes no presumption whatsoever regarding the role of the State at the time of their implementation.

143 Secondly, inasmuch as the applicant disputes the General Court's conclusion in paragraph 301 of the judgment under appeal regarding the sale price of Sernam's assets en bloc, it should be observed that it was

in the light of the obligation to exclude the liabilities from that transfer that the General Court found that the possibility of obtaining a negative price was by definition excluded. Moreover, as is apparent from paragraphs 54 to 58 of the present judgment, that court was correct in finding that Article 3(2) of the Sernam 2 Decision had to be construed as requiring such an exclusion of the liabilities. Consequently, it cannot be argued that, in so doing, the General Court added a condition not provided for by the Sernam 2 Decision.

144 Thirdly, inasmuch as the applicant alleges that the General Court gave a contradictory statement of reasons in the judgment under appeal, it should be observed that it is putting forward a line of argument similar to that put forward under the fourth ground of appeal and summarised in paragraph 79 of the present judgment. It should be borne in mind in that regard that, as held in paragraph 85 of the present judgment, the statement in paragraph 100 of the judgment under appeal to the effect that, on the basis of a literal interpretation of Article 3(2) of the Sernam 2 Decision, the only price-related requirement was that it be a market price through a transparent and open procedure, relates to the analysis of the concept of 'sale' by which the General Court considered, in examining the second part of the fourth plea in law put forward at first instance, that a sale may, in principle, be completed at a negative price.

145 That consideration therefore concerns a different question from the one examined by the General Court in paragraph 301 of the judgment under appeal, which was whether in the present case a sale at a negative price was possible in relation to the sale en bloc of Sernam's assets. For those reasons, the argument alleging a contradictory statement of reasons is unfounded.

146 Fourthly, inasmuch as the applicant argues that the positive or negative transfer price has no bearing on the purpose pursued by Article 3(2) of the Sernam 2 Decision, it should be observed that, as the valuation of that price is contingent on the inclusion or exclusion of the liabilities in the transfer, that argument is being conflated with the argument put forward under the third part of the first ground of appeal, according to which adding liabilities to the sale of Sernam's assets en bloc has no bearing on that purpose. That argument must therefore be rejected on the same grounds as those stated in paragraphs 54 to 58 of the present judgment.

147 In the light of the foregoing, the second part of the sixth ground of appeal must be held to be unfounded.

Third part of the sixth ground of appeal

– *Arguments of the parties*

148 By the third part of the sixth ground of appeal, the applicant submits that, in upholding the argument to the effect that the principle of the informed private investor was inapplicable to the transfer of Sernam's assets en bloc owing to the compensatory nature of that transfer, the General Court infringed Article 107(1) TFEU.

149 In the applicant's view, the implementation of a compensatory measure falls to the beneficiary of the aid, who may be either a public or a private undertaking, and not the State in its capacity as public authority. Accordingly, there is no justification for a refusal to apply the informed private investor test when implementing a compensatory measure.

150 It is moreover apparent from the Court's case-law, including the judgments of 5 June 2012, *Commission* v *EDF* (C-124/10 P, EU:C:2012:318, paragraph 78), and of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213, paragraphs 32 to 37), that that principle is mandatory and the Commission must apply it before being able to find that there is State aid on the basis of Article 107(1) TFEU.

151 Although the Sernam 2 Decision did require a specific objective to be attained, it is obvious that the applicant, in its capacity as shareholder of Sernam, was legally bound to act in an economically rational manner in order to attain that objective, just as a private investor would, apart from granting new State aid.

152 As such, the case-law, inter alia the judgment of 11 September 2012, *Corsica Ferries France* v *Commission* (T−565/08, EU:T:2012:415, paragraphs 83 and 84), takes full account of the fact that private investors adopt the most economically rational conduct within the framework established by the constraints and limits allowed by the law. In the light of the circumstances of the present case, any solution other than the one actually implemented, including compulsory liquidation, would have been more costly. In refusing to compare the applicant's conduct with the economic rationality a private investor would have employed in the same circumstances and in finding, in paragraph 309 of the judgment under appeal, that the compensatory logic of the sale of Sernam's assets en bloc was different from the logic of a private economic operator seeking to maximise its profits or, as in the present case, minimise its losses, the General Court infringed Article 107(1) TFEU.

153 Moreover, since the question of the economic rationality of the applicant's conduct should apply to all aspects of the transfer, the General Court also made errors of law and infringed Article 107(1) TFEU in paragraphs 323 and 327 of the judgment under appeal concerning the new aid identified by the Commission, being, respectively, the inclusion of debts in the liabilities of Sernam's compulsory liquidation account and the guarantees of liabilities granted to the transferee.

154 Moreover, in holding, in paragraph 310 of the judgment under appeal, that '[t]he disputed measures are thus a direct result of the infringement of Article 3(2) of the Sernam 2 Decision and are accordingly unrelated to the application of the private investor test', the General Court made an error of law, as that finding is vitiated by the refusal to apply the private investor test, contrary to Article 107 TFEU.

155 The Commission considers that the third part of the sixth ground of appeal should be rejected.

– *Findings of the Court*

156 Inasmuch as the applicant criticises the General Court for having ruled out the application of the private investor test, first of all, it should be borne in mind that, consistently with the case-law referred to in paragraph 138 of the present judgment, the applicability of that test depends on the Member State concerned acting in its capacity as shareholder and not in its capacity as a public authority. In that regard, it is for the Commission to make an overall assessment taking into account, in addition to the evidence provided by the Member State concerned, all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C−124/10 P, EU:C:2012:318, paragraph 86; of 24 October 2013, *LandBurgenland and Others* v *Commission*, C−214/12 P, C−215/12 P and C−223/12 P, EU:C:2013:682, paragraph 60; and of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission*, C−357/14 P, EU:C:2015:642, paragraph 102).

157 Next, it should be observed that, for the purpose of determining whether there is State aid, the private investor test can be used to determine whether the measures adopted by the Member State concerned satisfied an economic rationality test, so that a private investor might also accept them (see, inter alia, judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep*, C−224/12 P, EU:C:2014:213, paragraphs 36). Thus, under that test, 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 (see, inter alia, judgment of 4 September 2014, *SNCM and France* v *Corsica Ferries France*, C−533/12 P and C−536/12 P, EU:C:2014:2142, paragraph 30 and the case-law cited).

158 In the light of the foregoing, it is clear that the private investor test presupposes that the public entity's conduct may be compared with that of an investor acting in normal market conditions.

159 As is apparent from paragraphs 30 to 32 of the present judgment and as observed by the General Court in paragraphs 305 and 306 of the judgment under appeal, the transfer of Sernam's assets en bloc, referred to in Article 3(2) of the Sernam 2 Decision, was a compensatory measure intended to prevent distortions of

competition. Therefore, the General Court was correct in holding in paragraphs 307 and 308 of the judgment under appeal that the measures provided for in Article 3(2) of the Sernam 2 Decision did not correspond to normal market conditions and that accordingly, as it observed in paragraph 309 of that judgment, 'the compensatory logic of the sale of Sernam's assets en bloc … differed from the logic of a private operator seeking to maximise its profits or, as in this case, minimise its losses', before going on to infer therefrom, in paragraph 311 of that judgment, that the Commission could not be criticised for having ruled out, on the same grounds, the private investor test in recital 155 of the Sernam 3 Decision.

160 Although that test does not disregard the obligations by which economic operators are bound (see, to that effect, judgment of 4 September 2014, *SNCM and France* v *Corsica Ferries France*, C−533/12 P and C−536/12 P, EU:C:2014:2142, paragraph 33 and the case-law cited), the obligations which are normal market conditions must not be confused with those aimed at preventing distortions of competition in that market.

161 Although, as the applicant argues, the implementation of the Sernam 2 Decision entailed that it must conduct itself in an economically rational manner, that did not necessarily mean that that implementation amounted to an infringement of Article 3(2) of that decision, as held by the General Court in paragraph 310 of the judgment under appeal. Moreover, inasmuch as the applicant argues that a private undertaking having to apply the Sernam 2 Decision would, by way of economic rationality, opt for the same conditions for the transfer of assets en bloc as those chosen in the present case, its line of argument is based on the incorrect premise that the method of transfer is compatible with the purpose and obligations imposed under Article 3(2) of the Sernam 2 Decision.

162 Moreover, as acknowledged by the applicant, the measures considered by the Commission as new State aid are not severable from the application of Article 3(2) of the Sernam 2 Decision. Therefore, those measures cannot be examined independently of the compensatory purpose of that provision, and the General Court was therefore correct in not applying the informed private investor test to those new advantages in paragraphs 323 and 327 of the judgment under appeal.

163 Having regard to the foregoing, the third part of the sixth ground of appeal must be rejected and the sixth ground of appeal must therefore be rejected in its entirety.

164 It follows that the appeal must be dismissed.

Costs

165 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 is to make a decision as to costs.

166 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.

167 Since the Commission, Mory SA and Mory Team have applied for costs to be awarded against the applicant and the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission and by Mory SA and Mory Team.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders SNCF Mobilités to bear its own costs and to pay those incurred by the European Commission and by Mory SA and Mory Team.

[Signatures]

---

* Language of the case: French.