Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

1 March 2017 *

(State aid — Maritime cabotage — Aid awarded by France to Société nationale martime Corse Méditerranée (SNCM) and Compagnie méridionale de navigation — Service of general economic interest — Compensation for an additional service, on top of the basic service, covering peak periods during the tourist season — Decision declaring aid incompatible with the internal market — Concept of State aid — Advantage — *Altmark* judgment — Determination of the amount of aid)

In Case T-454/13,

**Société nationale maritime Corse Méditerranée (SNCM)**, established in Marseilles (France), represented initially by A. Winckler, F.-C. Laprévote, J.-P. Mignard and S. Mabile, subsequently by A. Winckler and F.-C. Laprévote, and lastly by F.-C. Laprévote and C. Froitzheim, lawyers,

applicant,

v

**European Commission**, represented by M. Afonso and B. Stromsky, acting as Agents,

defendant,

supported by

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

intervener,

APPLICATION pursuant to Article 263 TFEU for annulment of Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of Société Nationale Maritime Corse-Méditerranée [and the Compagnie méridionale de navigation] (OJ 2013 L 220, p. 20).

THE GENERAL COURT (Sixth Chamber),

composed of S. Frimodt Nielsen, President, A.M. Collins (Rapporteur) and V. Valančius, Judges,

Registrar: G. Predonzani, Administrator,

having regard to the written part of the procedure and further to the hearing on 14 June 2016,

gives the following

* Language of the case: French.

## Judgment

### Background to the dispute

#### *Principle actors*

1 The applicant, Société nationale maritime Corse Méditerranée (SNCM), is a French shipping company which provides regular transport links to and from the ports of Marseilles (France) and Nice (France), linking them inter alia to the ports of Ajaccio, Bastia, Calvi, Île-Rousse, Porto-Vecchio and Propriano on the island of Corsica (France).

2 At the time relevant to the present case, SNCM operated a fleet of 10 vessels, including 6 ferries, namely the *Danielle Casanova*, the *Napoléon Bonaparte*, the *Corse*, the *Méditerranée*, the *Île de Beauté* and the *Excelsior*, and 4 passenger-cargo vessels transporting both passengers and cargo, namely the *Jean Nicoli* (which replaced the *Monte Cinto* in 2009 for the provision of the services in question), the *Pascal Paoli*, the *Paglia Orba* and the *Monte d'Oro*.

3 By judgment dated 28 November 2014, the Tribunal de commerce de Marseille (Marseilles Commercial Court, France) initiated a judicial reorganisation procedure in respect of SNCM. By judgment dated 20 November 2015, that court accepted one of the offers submitted to it for the takeover of SNCM. Consequently, it ordered that the judicial reorganisation procedure be converted into a compulsory liquidation of SNCM and fixed the date of transferal to the buyer at 45 days after that judgment was handed down.

4 The Compagnie méridionale de navigation ('CMN') is a French shipping company operating services to inter alia the ports of Bastia, Ajaccio and Propriano from Marseilles.

5 In order to provide the services in question, CMN used three passenger-cargo vessels, namely the *Kalliste*, the *Girolata* and the *Scandola* (subsequently replaced by the *Piana*).

6 Corsica Ferries France SAS ('Corsica Ferries') is a French shipping company which provides regular maritime transport links between, inter alia, mainland France and Corsica, namely the Nice-Ajaccio, Nice-Île-Rousse, Nice-Bastia, Nice-Calvi, Toulon-Ajaccio, Toulon-Bastia and Toulon-Île-Rousse.

7 The Corsican Regional Authority ('CRA') is a legal entity governed by French public law, comprising three entities, namely the Corsican Assembly, the Corsican Executive Council and the Economic, Social and Cultural Council of Corsica.

8 The Corsican Transport Board ('CTB') is a French industrial and commercial public company, set up by the CRA and responsible for the implementation of the air and maritime transport policy of Corsica. The tasks of the CTB include the management of the budget allocated by the CRA to ensure territorial continuity and the allocation of funds between air transport and maritime transport. As such, it concludes agreements with the transport companies, who are the public service concession holders, determining inter alia fare schedules, terms of performance and quality of service. The purpose of the principle of territorial continuity is to compensate for Corsica's position as an island, ensure that the services to and from the island are on terms that resemble as closely as possible entirely mainland connections and implement, in respect of the maritime links between mainland France and Corsica, fares comparable to those for mainland transport.

***Maritime transport services between mainland France and Corsica and public service delegation agreements***

9 At the time relevant to the present case, the maritime transport service between mainland France and Corsica was provided by three shipping companies: SNCM, CMN and Corsica Ferries. A fourth company, Moby Lines, provided connections between Toulon and Corsica from April 2010 to February 2011.

10 Passenger traffic between the mainland and Corsica is highly seasonal, with the bulk of this traffic occurring during the summer months. During the 2000s, the main trend in the transport markets between Corsica and the French mainland was the development of the offer of crossings from Toulon, now the main port offering services to Corsica in terms of traffic. This trend towards increased traffic out of Toulon has been consistent with an increase in Corsica Ferries' market share.

11 On 31 March 1976, SNCM and CMN, on the one hand, and the French Republic, on the other, signed a 25-year framework concession agreement for the operation of a public service maritime link to Corsica departing from mainland France.

12 When that public service concession ended on 31 December 2001, the Corsican authorities reviewed the operation of the island's ferry services.

13 Thus, beginning on 1 January 2002, only routes departing from Marseilles operated under a public service delegation agreement, under which the concession holders received financial compensation. That agreement was entered into between SNCM and CMN, on the one hand, and the CRA and CTB, on the other, for a period of five years.

14 For the other routes departing from Nice and Toulon, a social assistance scheme was put in place by the Corsican authorities in parallel to the agreement referred to in paragraph 13 above for the benefit of the residents of the island as well as certain identified social categories. Thus, under a social assistance agreement, for each passenger eligible for a reduced fare, assistance would be paid that was pre-financed by those transport companies agreeing to observe public service obligations ('PSOs'), with the individual assistance being reimbursed to them subsequently. The categories concerned accounted for almost two-thirds of the total traffic (Corsican residents, persons under 25 or over 60, students under 27 years of age, families and persons with disabilities or invalids). That assistance scheme was approved by the European Commission by Decision of 2 July 2002 (State aid N 781/2001 — Individual social assistance scheme for shipping services to Corsica). By Decision of 23 April 2007 (State aid N 13/2007 — Extension of the individual social assistance scheme for shipping services to Corsica N 781/2001), the Commission approved the renewal of the assistance scheme until 31 December 2013. The maritime links between the ports of Nice and Toulon and ports on Corsica are operated mainly by Corsica Ferries.

15 By resolution of 24 March 2006, the Corsican Assembly voted in principle to renew a public service delegation ('PSD') for maritime services to the ports of Ajaccio, Bastia, Calvi, Île-Rousse, Porto-Vecchio and Propriano from the port of Marseilles as from 1 January 2007. By the same resolution, it gave the President of the CTB a mandate to launch the associated tendering procedure on behalf of the CRA, carry out a technical examination of applications and assist the CRA in awarding the PSD.

16 A notice of call for tenders was published in the *Official Journal of the European Union* on 27 May 2006 and in the newspaper *Les Échos* on 9 June 2006. Four bids were submitted on 4 August 2006, the deadline for the submission of tenders: one from SNCM, one from Corsica Ferries, one from CMN and one from a temporary group formed by Corsica Ferries and CMN.

17 By decision of 15 December 2006, the Conseil d'État (Council of State, France) annulled the procedure to award the PSD.

18 By resolution of 22 December 2006, the Corsican Assembly decided to repeat in its entirety the procedure for the award of the PSD, extend the then-current PSD until 30 April 2007 and set 1 May 2007 as the implementation date of the new PSD.

19 A fresh notice of call for tenders was published in the *Official Journal of the European Union* on 30 December 2006, in *Les Échos* on 4 January 2007 and in the weekly magazine *Le Journal de la Marine Marchande* on 5 January 2007. On 9 February 2007, two bids were submitted: a joint bid by SNCM and CMN constituted as a temporary group ('the SNCM-CMN group') covering all routes, in the form of both an overall bid and route-by-route bids, and a bid by Corsica Ferries covering the Marseilles-Ajaccio, Marseilles-Porto-Vecchio and Marseilles-Propriano routes, in the form both of an overall bid for those three routes and route-by-route bids.

20 By order of 27 April 2007, the judge hearing the application brought by Corsica Ferries for interim measures of the tribunal administratif de Bastia (Administrative Court of Bastia, France) annulled the negotiation phase of the PSD procurement procedure and the decision of the President of the Executive Council of Corsica and the President of the CTB accepting the bid from the SNCM-CMN group and proposing that the Corsican Assembly award the PSD to that group, holding that it was for the CRA and the CTB to resume discussions with the bidding undertakings.

21 By resolution of 27 April 2007, the Corsican Assembly extended the duration of the then-current delegation by two months and set 1 July 2007 as the implementation date of the new PSD.

22 Following a new stage of negotiations with the SNCM-CMN group and Corsica Ferries, the CTB proposed rejecting the latter's bid on the grounds that it was not able to set a firm and final date as from when it would be able to operate the PSD and could not comply with the maximum age requirement for vessels set out in the specific regulations of the call for tenders.

23 By resolution of 7 June 2007, the Corsican Assembly awarded the SNCM-CMN group the PSD for the ferry service between the port of Marseilles and the Corsican ports between 1 July 2007 and 31 December 2013.

24 Article 1 of that resolution is worded as follows:

'[The Corsican Assembly] approves the report of the President of the [Corsican] Executive Board, in which it is stated, first, that the SNCM-CMN group's bid meets the requirements and criteria of the specific regulations of the call for tenders and the tender specifications for each of the five routes and, second, that Corsica Ferries is not able to set a firm and final date on which it would be able to operate the next [PSD] and, in this respect, the conditions which it sets out, relating to matters falling outside the [PSD]'s content, cannot be taken into consideration.'

25 By decision of the same day, the President of the Executive Council of Corsica was authorised to sign the public service delegation contract relating to that maritime service ('the PSDC').

26 The PSDC was concluded on 7 June 2007 for the period from 1 July 2007 to 31 December 2013.

27 By judgment of 24 January 2008, the tribunal administratif de Bastia (Administrative Court of Bastia) dismissed an application by Corsica Ferries for annulment of the resolution and the decision referred to in paragraphs 23 and 25 above. By judgment of 7 November 2011, the Cour administrative d'appel de Marseille (Marseilles Administrative Court of Appeal, France) set aside that judgment and annulled that resolution and the decision. By decision of 13 July 2012, the Conseil d'État (Council of State), on appeal by SNCM and CMN, set aside the judgment of the Cour administrative d'appel de Marseille

(Marseilles Administrative Court of Appeal) and referred the case back to that court. By judgment of 6 April 2016, the Cour administrative d'appel de Marseille (Marseilles Administrative Court of Appeal) set aside the judgment of the tribunal administratif de Bastia (Administrative Court of Bastia) of 24 January 2008 and annulled that resolution and the decision.

28 Article 1 of that PSDC defines the purpose of the public service delegation contract as the provision of scheduled maritime transport services on all lines of the PSD between the port of Marseilles and the ports of Bastia, Ajaccio, Porto-Vecchio, Propriano and Balagne (Calvi and Île-Rousse).

29 The tender specifications contained in Annex 1 to the PSDC define the nature of those services. It provides in particular for:

— a permanent 'passenger and freight' service to be provided throughout the year on all the routes concerned ('the basic service') and

— an additional 'passenger' service to be provided during peak periods on the Marseilles-Ajaccio, Marseilles-Bastia and Marseilles-Propriano routes ('the additional service').

30 Article 2 of the PSDC sets out inter alia the reference financial compensation amounts to which concession holders commit for the duration of the PSD.

31 Article 3 of the PSDC states that the PSD does not confer exclusive use of the ferry routes in question, but allows other companies to operate regular services, although subject to certain obligations and without entitlement to financial compensation. Article 3 also states that the requests for financial compensation from concession holders were determined according to the social assistance scheme.

32 Article 5 of the PSDC, entitled 'Conditions for the payment of financial compensation', provides in the third subparagraph of paragraph 2 that the final financial compensation for each concession holder for each year is limited to the operating deficit resulting from its obligations stemming from the tender specifications, allowing for a reasonable return on the nautical capital employed in proportion to the days when it was actually used for crossings made in performance of those obligations. The percentage of 15% of its conventional value is considered as a reasonable return on the nautical capital employed. The conventional value is specified in Annex 3 to the PSDC.

33 Article 7 of the PSDC, entitled 'Safeguard clause', states in paragraph 1 that in the event of a substantial change in the technical, regulatory or economic conditions for the operation of the delegated services or to take account of external events having a significant impact on the financial commitments of the concession holder(s), the parties are to meet, at the initiative of the party raising the issue, to take steps to re-establish the initial financial equilibrium of the PSDC 'with priority given to the maximum fares and the adaptation of the services'.

34 Article 7(2) of the PSDC recalls that the amounts of the annual reference financial compensation have been determined on the basis of the gross passenger and cargo revenue forecasts contained in the bids submitted by each concession holder. The same provision allows for the possibility in certain situations of adjusting the financial compensation upwards or downwards each year for each category of revenue and for each concession holder. This provision also stipulates that this adjustment mechanism is to apply only until the date of application of the adaptation clause provided for in Article 8 of the PSDC.

35 Article 8 of the PSDC, entitled 'Adaptation clause', reads as follows:

'In view of the duration of the [PSDC], a progress report shall be drawn up during the third year, the purpose of which is to analyse, on the basis of an *inter partes* procedure and joint expert opinion, the financial equilibrium of the [PSDC] and, after consultation between the parties, adopt any measures

necessary to correct services and adjust fares so as to ensure that the [CRA] is in control of its financial contribution, in particular, by reducing the compensation, and to preserve the general scheme of the [PSDC].'

36 Under that adaptation clause, the PSDC was amended by a supplementary contract at the end of 2009.

***Procedure before the Commission and the contested decision***

37 By letters of 27 September, 30 November and 20 December 2007, the Commission received a complaint from Corsica Ferries concerning unlawful State aid incompatible with the internal market, from which SNCM and CMN benefited as a result of the PSDC.

38 By letters dated 20 May 2010, 16 July 2010, 22 March 2011, 22 June 2011, 15 December 2011 and 10 January 2012, Corsica Ferries provided additional information to the Commission in support of its complaint.

39 By letters dated 13 March 2008, 12 November 2008, 13 October 2011 and 14 December 2011 the Commission requested information from the French authorities. The latter responded to those requests by letters dated 3 June 2008, 14 January 2009, 7 December 2011 and 20 January 2012 respectively.

40 By letter dated 27 June 2012, the Commission notified the French Republic of its decision to open the formal investigation procedure under Article 108(2) TFEU into potential aid granted to SNCM and CMN contained in the PSDC (OJ 2012 C 301, p. 1).

41 The French authorities submitted their observations on that decision and replied to the questions contained therein by letters dated 13 July and 7 September 2012. Corsica Ferries, SNCM and CMN also submitted observations on that decision, which were communicated to the French authorities, who in turn provided comments on those observations by letters dated 14 November 2012 and 3 January, 16 January and 12 February 2013.

42 Upon completion of that procedure, on 2 May 2013, the Commission adopted Decision 2013/435/EU on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France to [SNCM and CMN] (OJ 2013 L 220, p. 20) ('the contested decision').

43 The contested decision was notified to the French Republic on 3 May 2013 and communicated to SNCM by email from the Commission on 14 June 2013.

44 In the contested decision, in order to determine whether the compensation granted to SNCM and CMN within the framework of the PSDC constituted State aid and, in particular, conferred a selective advantage, the Commission examined whether the cumulative criteria laid down by the Court of Justice in the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), were satisfied in this case ('the *Altmark* criteria'). More specifically, it analysed the first and fourth of those criteria (see paragraphs 87 and 90 below).

45 As regards the first *Altmark* criterion, in the first place, the Commission defined the 'analytical framework' to be used in its assessment (recitals 132 to 136 of the contested decision). In particular, it considered that, in order to be acceptable under the State aid rules, the scope of the public service remit had to comply with Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7) ('the Maritime Cabotage Regulation'), as interpreted by the case-law and, in particular, by the Court of Justice in its judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107). It concluded that 'the scope of the public service remit as defined by a

public service contract [had to be] necessary and proportionate to a real public service need, as demonstrated by the lack of regular transport services under normal market conditions' (recital 136 of the contested decision).

46 In the second place, the Commission considered that the basic service and the additional service had to be analysed separately (recitals 137 to 144 of the contested decision). It noted that the tender specifications annexed to the PSDC made a clear distinction between the two types of service. It also considered that it would be legitimate to consider that the additional service may be justified by the real public service need met by the basic service only if it could be determined that its operation was essential to the basic service, 'on the grounds of a set of technical and economic considerations' (recital 139 of the contested decision). Yet in the present case no technical complementarity has been established between the two types of service, since they are subject to different obligations, particularly with regard to timetables and frequency, and since the basic service is provided by passenger-cargo vessels while the additional service is provided by ferries. In addition, SNCM's cost accounts show a consistent operating deficit for the additional service, so that the French authorities' argument that the inclusion of that service within the scope of the PSD was justified by a financial equalisation with the basic service cannot be upheld.

47 In the third place, the Commission analysed the basic service in the light of the first *Altmark* criterion (recitals 145 to 150 of the contested decision). In that regard, it found first of all that the provision of a minimum territorial continuity service between Marseilles and the five Corsican ports concerned met a clearly defined public service need (recital 145 of the contested decision). Second, as regards the shortage of private initiative, it observed that the other operators on the market had themselves recognised that they had been unable to provide the basic service (recital 146 of the contested decision). Furthermore, it considered that grouping of routes within a single service was not, in itself, contrary to the Maritime Cabotage Regulation. Instead, in the case at hand, grouping together those five routes made it possible to pool shipping resources to improve the quality of the service in question and reduce costs (recital 148 of the contested decision). Lastly, it pointed out that the PSDC and the annexes thereto set clear standards of continuity, regularity, capacity and pricing that concession holders had to fulfil to ensure the basic service (recital 149 of the contested decision). It concluded therefrom that the inclusion of the basic service within the scope of the PSDC was necessary and proportionate to the real public service need (recital 150 of the contested decision).

48 In the fourth place, the Commission analysed the additional service provided by SNCM alone, using two ferries, in the light of the first *Altmark* criterion (recitals 151 to 167 of the contested decision). It considered that its inclusion within the scope of the public service remit did not correspond to a real public service need and that the French Republic had therefore committed a manifest error of assessment by classifying it as a service of general economic interest ('SGEI') (recital 167 of the contested decision).

49 In that connection, the Commission began by making the case that there was a high degree of substitutability in terms of passenger demand between the additional service from Marseilles and the passenger transport services from Toulon to Bastia and Ajaccio at the time of conclusion of the PSDC (recitals 154 to 160 of the contested decision). In that regard, it observed inter alia that the evolution of traffic on routes between mainland France and Corsica during the period 2002-2009 showed a clear trend of rapidly developing competition for the services offered by the two concession holders. The distribution of traffic between the ports served showed very strong growth in traffic departing from Toulon and a concomitant decrease in traffic departing from Marseilles. Thus the overall growth in traffic was absorbed mainly by the service providers operating out of Toulon, to the detriment of the concession holders operating out of Marseilles. It also referred to the short distance between Marseilles and Toulon, the fact that the journey time by road between the two cities was considerably less than the journey time at sea and the fact that vessels departing from Toulon could reach Corsica in less time than those departing from Marseilles.

50 The Commission further found that the French authorities had provided no evidence of a shortage of private initiative for the additional service (recital 161 of the contested decision). It noted inter alia that for the ports of Bastia and Ajaccio, which represented 90% of the capacity required by the additional service, the combination of capacities offered by the basic service of the PSD from Marseilles and the private initiative service available provided by Corsica Ferries from Toulon was sufficient to meet the real demand observed, both for the spring-autumn period and for the summer period, for each of the two ports for each year between 2004 and 2006 (recital 162 of the contested decision). The Commission accordingly considered that bringing the additional service within the scope of the PSD was neither necessary nor proportionate to meeting demand for transport observed for the Marseilles-Bastia and Marseilles-Ajaccio lines. As regards the Marseilles-Propriano line, the Commission considered that the small proportion of traffic represented by that line did not mean that a shortage of private initiative on that one line invalidated the conclusion concerning the additional service as a whole (recital 164 of the contested decision). It also noted that the service provided by Corsica Ferries did meet the standards of PSOs applicable to all connections between the French mainland and Corsica, and showed no qualitative difference with the service provided as part of the additional service (recital 165 of the contested decision).

51 The Commission concluded therefrom that the first *Altmark* criterion was not fulfilled as regards the compensation awarded in respect of the additional service (recital 167 of the contested decision).

52 Regarding the fourth *Altmark* criterion, the Commission considered that it was not fulfilled for either of the two types of service at issue (recital 183 of the contested decision).

53 In the first place, the Commission concluded, on the basis of a number of factors, that the terms of the call for tenders had failed to enable a candidate to be selected who was capable of providing the services in question at the least cost to the community (recitals 169 to 178 of the contested decision).

54 In arriving at that conclusion the Commission based itself, in essence, on the following factors:

— the PSD was awarded following a negotiated procedure after publication of a notice of call for tenders, which procedure confers broad discretion on the contracting authority and may restrict the participation of the operators concerned;

— the only bid competing with that of the two concession holders, namely that of Corsica Ferries, was not assessed on the basis of its own merits (award criteria) but on the basis of a single selection criterion, namely the tenderer's ability to commence operations on 1 July 2007;

— the procedure thus did not allow the CTB to compare several bids in order to select the most economically advantageous one;

— the fact that two bids were actually submitted was not sufficient to guarantee effective competition, inasmuch as the competing bid from Corsica Ferries, which gave 12 November 2007 as a start date for operations, was not able to provide a credible alternative;

— the multiple sets of legal proceedings brought in the present case is not evidence in favour of the effectiveness of competition in the procurement procedure for the PSDC;

— the SNCM-CMN group had a significant competitive advantage as the incumbent operator that already had vessels adapted to the requirements of the PSDC's tender specifications;

— the very short time set between the date of awarding the PSD (ultimately awarded on 7 June 2007) and the date of commencement of services (1 July 2007) was likely to constitute a significant barrier to entry for new entrants;

— combined with the technical requirements related to the specific conditions of the ports involved, the condition concerning the age of the fleet and the unit capacities required by the PSDC's tender specifications, this very short time frame was likely to limit participation in the call for tenders;

— the existence of numerous clauses providing for meetings associated with the freedom given to the CTB to decide upon exemptions to rules may also have helped to dissuade tenderers from taking part in the call for tenders by raising doubts about some technical and economic parameters that were critical to the preparation of a bid.

55 In the second place, the Commission noted that the French authorities had failed to provide any information capable of demonstrating that the compensation had been calculated by reference to a medium-sized, well-run and adequately equipped undertaking (recitals 179 and 180 of the contested decision). It added that the compensation had not been defined by reference to a base cost established in advance or by comparison with the cost structure of other comparable shipping companies, but by reference to forecast revenue and fuel costs, which referred only to a portion of the income and expenses of the service (recital 180 of the contested decision). Moreover, the forecast compensation of the PSD was significantly higher than that forecast for the period 2002-2006 for similar obligations, or in fact slightly less demanding ones in terms of available capacity (recital 181 of the contested decision). Lastly, it considered that a comparison with the costs incurred by a well-run undertaking was all the more necessary, since there were certain elements to suggest that SNCM itself, which was emerging from a period of intense restructuring at that time, did not meet such requirements (recital 182 of the contested decision).

56 In the light of all those considerations, the Commission concluded that there was a selective economic advantage granted to the concession holders (recital 184 of the contested decision).

57 Having found that the compensation in question might distort competition and affect trade between Member States, the Commission concluded that it constituted State aid and was unlawful because it had been granted without prior notification (recitals 185 to 187 and Article 1 of the contested decision).

58 In recitals 188 to 212 of the contested decision, the Commission assessed the compatibility of that State aid with the internal market.

59 In the first place the Commission pointed out that, in accordance with paragraph 11 of its Communication — European Union framework for State aid in the form of public service compensation (2011) (OJ 2012 C 8, p. 15) ('the SGEI Framework'), State aid falling outside the scope of Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) TFEU to State aid in the form of public-service compensation granted to certain undertakings entrusted with the operation of [SGEI] (OJ 2012 L 7, p. 3) could be declared compatible with Article 106(2) TFEU if it was necessary for the operation of the SGEI concerned and did not affect the development of trade to such an extent as to be contrary to the interests of the European Union, which balance could be struck only if the conditions set out in Sections 2.2 to 2.10 of the SGEI Framework were met (recital 190 of the contested decision).

60 In the second place, the Commission observed that the basic service constituted an SGEI, but the additional service did not, so that the compensation paid for the latter service could not be declared compatible with Article 106(2) TFEU (recitals 192 and 193 of the contested decision).

61 In the third place, the Commission considered that the other conditions laid down in the SGEI Framework were met for the basic service (recitals 194 to 212 of the contested decision).

62 The Commission concluded therefrom that the compensation paid to SNCM and CMN for the basic service was State aid that was unlawful but nevertheless compatible with the internal market (recital 213, Article 1 and Article 2(2) of the contested decision), whereas the aid paid to SNCM alone for the additional service was State aid that was unlawful and incompatible with the internal market (recital 214, Article 1 and Article 2(1) of the contested decision).

63 Consequently, the Commission ordered the immediate cessation of payments of compensation for the additional service and the recovery from the recipient of any aid already paid for that purpose, it being understood that the sums to be recovered were interest-bearing as from the date on which they were made available to the recipient until their actual recovery (recitals 215 to 218 and 220 and Article 3 of the contested decision). The Commission specified that recovery was to be immediate and effective and that the French authorities were to ensure that the contested decision was implemented within four months of the date of its notification (recital 219 and Article 4 of the contested decision), that is to say, by 3 September 2013. Furthermore, the French authorities were required to inform the Commission of the following within two months of notification of the contested decision: the total amount (principal and interest) to be recovered from the recipient; a detailed description of the measures already adopted and planned for the purpose of complying with the contested decision; and the documents proving that the recipient had been ordered to repay the aid (Article 5 of the contested decision).

## Procedure and forms of order sought

64 By application lodged at the Registry of the General Court on 26 August 2013, SNCM brought the present action.

65 The contested decision was also the subject of an action for annulment by the French Republic, lodged at the Court Registry on 12 July 2013 and registered as Case T-366/13.

66 By document lodged at the Court Registry on 11 December 2013, Corsica Ferries sought leave to intervene in the present proceedings in support of the Commission.

67 By documents lodged at the Court Registry on 9 January and 10 February 2014, SNCM requested confidential treatment, with regard to Corsica Ferries, if it were granted leave to intervene, in respect of certain information in the application and the reply, respectively. It attached to those requests a non-confidential version of those pleadings.

68 By order of 21 February 2014, the President of the Sixth Chamber of the General Court granted Corsica Ferries leave to intervene. The decision on the merits of the requests for confidentiality was reserved.

69 By document lodged at the Court Registry on 6 March 2014, Corsica Ferries raised objections to the requests for confidential treatment in respect of a large part of the information covered by those requests.

70 By order of 3 October 2014, *SNCM* v *Commission* (T-454/13, EU:T:2014:898), the President of the Sixth Chamber of the General Court allowed in part the requests for confidential treatment.

71 Corsica Ferries lodged its statement in intervention at the Court Registry on 9 January 2015. SNCM submitted its observations on that statement by document lodged at the Court Registry on 9 March 2015. By letter of the same date, the Commission stated that it had no observations to make on that statement.

72 Acting upon a proposal of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral part of the procedure.

73 By way of measures of organisation of procedure as provided for in Article 89 of its Rules of Procedure, the Court invited the Commission to answer certain questions in writing, which it did within the prescribed period.

74 By document lodged at the Court Registry on 6 June 2016, SNCM requested confidential treatment of certain parts of the Commission's reply to those questions in respect of Corsica Ferries. Corsica Ferries received only a non-confidential version of that response and raised no objection to the applications for confidential treatment made with regard to it.

75 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 14 June 2016.

76 SNCM claims that the Court should:

— principally, annul the contested decision;

— in the alternative, partially annul the contested decision in so far as it provides that the amount of the aid must include the items referred to in recital 218;

— order the Commission to pay the costs.

77 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order SNCM to pay the costs.

78 Corsica Ferries contends that the Court should:

— dismiss the main action;

— order SNCM to pay the costs.

**Law**

79 In support of the action, SNCM puts forward a series of arguments which can be grouped into five pleas in law, namely:

— a first plea, alleging that the Commission erred in finding that the additional service did not constitute an SGEI;

— a second plea, alleging that the Commission erred in finding that the PSDC did not satisfy the fourth *Altmark* criterion;

— a third plea, alleging that the Commission erred in calculating the amount of aid to be recovered;

— a fourth plea, alleging infringement of the principle of protection of legitimate expectations;

— a fifth plea, alleging infringement of the principle of equal treatment.

***Preliminary observations***

80 It is appropriate to begin by highlighting certain principles from the case-law relating to inter alia the classification of State aid as a compensation for public service, in the light of which principles the present action must be examined.

81 Under Article 107(1) TFEU, save as otherwise provided for 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.

82 It is settled case-law that classification as State aid for the purposes of Article 107(1) TFEU requires that all the conditions set out are fulfilled. Accordingly, first, there must be an intervention by the State or through State resources; second, that intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient; fourth, it must distort or threaten to distort competition (see judgment of 8 May 2013, *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 74 and the case-law cited).

83 The first two pleas in the present action concern predominantly the third of those conditions, namely that the measure at issue must be viewed as having conferred an advantage on its recipient.

84 In that regard, it must be recalled that, according to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid (see judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited).

85 However, a State measure regarded as compensation for the services provided by the recipient undertakings in order to discharge PSOs, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, is not caught by Article 107(1) TFEU (judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdebur*g, C-280/00, EU:C:2003:415, paragraph 87, and of 8 May 2013, *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 84).

86 However, for such compensation to escape classification as State aid in a particular case, four cumulative conditions must be satisfied (judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraphs 87 and 88).

87 First, the recipient undertaking must actually have PSOs to discharge, and those obligations must be clearly defined (judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 89). The concept of PSOs within the meaning of this first criterion accords with that of SGEI referred to in Article 106(2) TFEU (see, to that effect, judgment of 12 February 2008, *BUPA and Others* v *Commission*, T-289/03, EU:T:2008:29, paragraph 162).

88 Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 90).

89 Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of PSOs, taking into account the relevant receipts and a reasonable profit for discharging those obligations (judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 92).

90 Fourth, where the undertaking which is to discharge PSOs, in a specific case, is not chosen pursuant to a public procurement procedure making it possible to select the candidate capable of providing the services in question at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 93).

91 In the contested decision the Commission considered that the first *Altmark* criterion was not fulfilled as regards the additional service and that the fourth of those criteria was not fulfilled as regards either of the two types of service in question.

***The first plea: the Commission erred in finding that the additional service did not constitute an SGEI***

92 By its first plea, which is subdivided into four parts, SNCM submits that the Commission erred in finding that the additional service did not constitute an SGEI.

93 It should be noted as a preliminary point that, according to settled case-law, given that the Member State enjoys wide discretion in defining an SGEI mission and the conditions for its implementation and also that the scope of the review that the Commission may carry out in that regard is limited to manifest error (see paragraph 111 below), the Court's review of the Commission's assessment in the matter may not go beyond those same parameters; accordingly, its review must be restricted to ascertaining whether the Commission properly found or rejected the existence of a manifest error by the Member State (see, to that effect, judgment of 16 September 2013, *Iliad and Others* v *Commission*, T-325/10, not published, EU:T:2013:472, paragraph 121 and the case-law cited).

***The first part: the Commission erred in law by carrying out a detailed examination of the need for the service in the light of a real public service need***

94 In the first part of the first plea, SNCM disputes the validity of the test used by the Commission in the contested decision to verify compliance with the first *Altmark* criterion (see paragraph 45 above). It submits that the Commission erred in law in carrying out in the present case a detailed review of the classification as an SGEI and of the need for the additional service in the light of a real public service need.

95 This first part may be divided into four subsidiary parts. The Court should examine, first, the first subsidiary part, then the second and fourth subsidiary parts and, lastly, the third subsidiary part.

*– The first subsidiary part: the Commission disregarded its previous decision-making practice and the case-law*

96 SNCM submits that the PSDC, the primary objective of which was the implementation of the principle of territorial continuity, as a whole fulfilled a clear public service need. In finding that it did not in the contested decision, the Commission departed from its previous decision-making practice on previous PSDs for ferry services to and from Corsica which gave rise to the judgments of 19 May 1993, *Corbeau* (C-320/91, EU:C:1993:198), and of 11 September 2012, *Corsica Ferries France* v *Commission* (T-565/08, EU:T:2012:415). In the reply, SNCM adds that the Commission may not adopt a diametrically opposite position to what it hitherto held on the same subject matter without a proper statement of reasons.

97 The Commission contests the arguments put forward by SNCM.

98 First of all, the Court does not accept SNCM's claim that the Commission acted in an 'obviously contradictory' manner in that it had already found in earlier decisions on previous PSDs that provision of additional passenger capacity during peak periods met a public service need. It follows from settled case-law that the concept of State aid is an objective concept, the sole test being whether a State measure confers an advantage on one or more particular undertakings. The Commission's decision-making practice in the area cannot, therefore, be a decisive factor (see judgment of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, EU:T:2009:50, paragraph 145 and the case-law cited). The same approach must also be taken with the question of assessing the compatibility of aid with the internal market (judgments of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 21, and of 15 June 2005, *Regione autonoma della Sardegna* v *Commission*, T-171/02, EU:T:2005:219, paragraph 177).

99 In any event, the mere fact that the contested decision differs from the Commission's earlier decisions on the matter does not mean that it is inconsistent with those previous decisions. As rightly pointed out by the Commission, the assessment of whether there is a real public service need may evolve over time in the light of the development of market forces. It should also be noted that, already in Decision 2002/149/EC of 30 October 2001 on the State aid awarded by France to [SNCM] (OJ 2002 L 50, p. 66), relied on several times by SNCM in its written pleadings, the Commission observed that, 'as far as services from the French mainland ports are concerned, the market [had] evolved significantly in recent years, to the extent that the need for [PSO] for all the lines throughout the whole year [had] been questioned' (recital 78) and that 'the Commission's conclusion regarding the real need for a public service resulting from the service system provided for by the framework agreement signed between the State and SNCM in 1976 and, within the framework of this agreement, by the five-year agreements concluded between the [CTB] and SNCM in 1991 and 1996, [could not] be extrapolated beyond the deadline of 31 December 2001, the date on which the framework agreement expires' (recital 80).

100 Next, for the same reasons as set out in paragraph 99 above, SNCM cannot successfully rely on the judgment of 11 September 2012, *Corsica Ferries France* v *Commission*, T-565/08, EU:T:2012:415), in support of its assertion. The two passages of that judgment referred to by SNCM in fact relate to the PSD for the period 1996-2001.

101 Nor can SNCM rely on the judgment of 19 May 1993, *Corbeau* (C-320/91, EU:C:1993:198), and thus the requirement to avoid the practice of 'skimming', that is to say, the practice by which the competitors of the public service concession holder concentrate on the profitable activities of the PSD and leave the unprofitable activities to the public service concession holder, thereby not allowing it to offset losses incurred in unprofitable sectors against profits made in more profitable sectors. As will be explained in more detail in paragraph 155 below, the material in the case file shows that both the basic service and the additional service had a large operating deficit, which precluded any possibility of financial equalisation between them (see, inter alia, recitals 47 and 143 of the contested decision).

102 Lastly, the complaint that the Commission failed to fulfil its obligation to provide a statement of reasons must be dismissed as completely unfounded. Not only can it not be criticised for adopting a 'diametrically opposed' approach in the present case as compared to its earlier decisions in this area (see paragraph 99 above), it is clear that, in the contested decision, it states clearly and precisely why it considers that the existence of a real public service need has not been established for the additional service. Thus, after defining the 'analytical framework' it was to use to determine whether the first *Altmark* criterion was satisfied in the present case (recitals 132 to 136 of the contested decision), the Commission set out, inter alia by refuting the arguments relied on by the French Republic, SNCM and CMN, the reasons why it considered that the basic service and the additional service constituted two distinct types of service and had to be examined separately (recitals 137 to 144 of the contested decision) before analysing the second of those services in the light of that criterion (recitals 151 to 167 of the contested decision). With regard to the latter point, the Commission found that the inclusion of the additional service within the scope of the public service remit did not meet a real

public service need after having found in essence, on the basis of a set of factors, first, that there was a high degree of substitutability for that service out of Marseilles, from the point of view of passenger demand, that could be met by passenger services from Toulon to Bastia and Ajaccio at the time the PSDC was concluded (recitals 154 to 160 of the contested decision) and, second, that no evidence had been provided of a shortage of private initiative for the additional service (recitals 161 to 166 of the contested decision).

103 It follows from the foregoing that this first subsidiary part must be rejected as unfounded.

*– The second and fourth subsidiary parts: the Commission disregarded the Member States' wide discretion and the scope of the judgment of 20 February 2001, Analir and Others (C-205/99, EU:C:2001:107) and of the Maritime Cabotage Regulation*

104 First, SNCM submits that in the present case the Commission exceeded the wide discretion enjoyed by the Member States in defining what SGEIs are. Far from limiting itself to merely ascertaining whether there had been a manifest error of assessment, it carried out a particularly detailed examination of the definition of the SGEI in question and of the need for the service. SNCM further argues that the Commission cannot rely on the judgment of 16 September 2013, *Colt Télécommunications France* v *Commission* (T-79/10, not published, EU:T:2013:463) given that, in the case giving rise to that judgment, there were guidelines expressly providing for the need to prove market failure, in that case the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (OJ 2009 C 235, p. 7).

105 Second, SNCM submits that the Commission disregarded the scope of the judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107) and of the Maritime Cabotage Regulation. It affirms that neither that judgment nor the regulation pertains to State aid control; in fact, they confirm the validity of the PSDC. It adds that they relate to obligations which may be imposed in connection with public services and are capable of providing justification for a prior authorisation scheme or a public service contract, not to the range of the services that may be covered by compensation as contemplated in *Altmark* or the amount of such compensation. It observes in particular that, contrary to the situation which gave rise to the judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107), the provision of ferry services between mainland France and Corsica is not subject to a requirement of prior authorisation being obtained. It further disputes that the scope of the public service remit as defined by a public service contract must be necessary and proportionate to a real public service need, as demonstrated by there being insufficient regular transport services under normal market conditions. Lastly, it challenges the Commission's finding in recital 135 of the contested decision that 'the compensation of specific obligations under a public service contract, subsidising a range of services, clearly constitutes an obstacle to the free movement of services'. Neither the purpose nor the effect of the public service compensation in the present case is to hamper the freedom to provide services and none of the judgments referred to by the Commission in footnote 63 of the contested decision establish otherwise.

106 At the hearing, in response to a question from the Court seeking clarification as to which criteria should serve as the basis for determining the merits and scope of the SGEI, SNCM stated that it was sufficient for the Member State to 'identify a general interest in the very broad sense which may relate to what [was] generally in the public interest'. It added that it considered that the criteria of necessity and proportionality, at the very least as set out in the Maritime Cabotage Regulation and the judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107) should not have been relied on in this exercise as they were derived from concepts associated with the freedom to provide services.

107 The Commission, supported by Corsica Ferries, disputes SNCM's arguments.

108 First, referring to paragraph 154 of the judgment of 16 September 2013, *Colt Télécommunications France* v *Commission* (T-79/10, not published, EU:T:2013:463), the Commission and Corsica Ferries contend that, irrespective of the sector concerned, the determination of the existence of a market failure is a prerequisite for the classification of an activity as an SGEI and that, consequently, the requirement that there be an insufficiency or shortage of private initiative is inherent in the first *Altmark* criterion and presupposes careful examination.

109 The Commission and Corsica Ferries further argue that the Member States' discretion in defining SGEIs is limited by the Maritime Cabotage Regulation, as interpreted by the Court of Justice in, inter alia, the judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107). By implication, the service in question must meet a real public service need due to the insufficiency of regular transport services in a situation of free competition and the scope of the SGEI must be necessary and proportionate to that need. At the hearing, the Commission stated that it considered that proving the existence of a real public service need was more a burdensome requirement than demonstrating the existence of a market failure as contemplated in the judgment of 16 September 2013, *Colt Télécommunications France* v *Commission* (T-79/10, not published, EU:T:2013:463).

110 Second, the Commission and Corsica Ferries consider that SNCM is wrong to dispute the existence of a link between the Maritime Cabotage Regulation and State aid control. It would also be clearly inaccurate to claim that that regulation concerns only situations where the provision of services is subject to a requirement of prior authorisation. The judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107) does not concern solely the question whether it is possible to make a maritime transport activity subject to a requirement of prior authorisation; it also contains very clear reasoning on how the provisions of the Maritime Cabotage Regulation should be interpreted in the light of its objective of ensuring freedom to provide maritime cabotage services and allowing infringements of that freedom only where they are justified by a real public service need and are necessary and proportionate to the fulfilment thereof. It is also obvious that subsidising a supply of services by entering into a public service contract with a particular operator covered by that regulation may result in an obstacle to the freedom to provide services.

111 It must be remembered that, according to consistent case-law, Member States have wide discretion to define what they regard as an SGEI and, consequently, the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error (see judgments of 15 June 2005, *Olsen* v *Commission*, T-17/02, EU:T:2005:218, paragraph 216 and the case-law cited, and of 22 October 2008, *TV2/Danmark and Others* v *Commission*, T-309/04, T-317/04, T-329/04 and T-336/04, EU:T:2008:457, paragraph 101 and the case-law cited).

112 However, the Member State's power to define SGEIs is not unlimited and may not be exercised arbitrarily for the sole purpose of allowing a particular sector to circumvent the application of the competition rules (judgment of 12 February 2008, *BUPA and Others* v *Commission*, T-289/03, EU:T:2008:29, paragraph 168).

113 In particular, where there are specific rules of EU law governing the definition of the content and scope of the SGEI, they are binding on the Member States' discretion, as provided for in paragraph 46 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ 2012 C 8, p. 4) ('the SGEI Communication'). As rightly pointed out by the Commission, those rules are generally aimed at the harmonisation of legislation in order to remove obstacles to freedom of movement and freedom to provide services; the fact that they are adopted on the basis of provisions of the Treaty different from those concerning State aid control and have as their primary purpose the achievement of the internal market does not in any way diminish their relevance under the first *Altmark* criterion.

114 In the present case, as the Commission and Corsica Ferries correctly stated, there were such rules, in this case the provisions of the Maritime Cabotage Regulation. In that regard, Article 1 thereof enshrines the principle of freedom to provide maritime cabotage services in the European Union. In the same vein, the third recital thereof states that it seeks to abolish the restrictions on the freedom to provide services.

115 Article 4 of the Maritime Cabotage Regulation provides for possible exceptions to that guiding principle, in the form of the possibility for Member States to conclude public service contracts with shipping companies involved in regular services to, from and between islands or to impose PSOs on them as a condition for the provision of cabotage services. In that respect, it should be noted that — as acknowledged by SNCM — the PSDC unquestionably constitutes such a public service contract, which is defined by Article 2(3) of that regulation as a contract concluded between the competent authorities of a Member State and a Union shipowner in order to provide the public with adequate transport services. Article 4(2) of that regulation further stipulates that, in imposing PSOs, Member States are to abide by requirements relating to ports to be served, regularity, continuity, frequency, capacity to provide the service, rates charged and crew and that, where applicable, any compensation for PSOs must be available to all Union shipowners.

116 Accordingly, the Commission's submission that in the present case the French authorities' discretion was limited by the provisions of the Maritime Cabotage Regulation must be upheld.

117 Furthermore, it is right to state that the contested decision also took account of the interpretation given to those provisions by the Court of Justice in the judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107). In the case giving rise to that judgment, the Court of Justice was, inter alia, called upon to interpret Articles 1 and 4 of the Maritime Cabotage Regulation and to specify the conditions under which the supply of maritime cabotage services could be subject to a requirement of prior administrative authorisation.

118 In interpreting the relevant provisions of the Maritime Cabotage Regulation, the Court of Justice has stated inter alia the following:

> '34. The application of a prior administrative authorisation scheme as a means of imposing [PSOs] presupposes that the competent national authorities have first been able to determine, for specific routes, that the regular transport services would be inadequate if their provision were left to market forces alone. In other words, it must be possible to demonstrate that there is a real public service need.
>
> 35. Second, for a prior administrative authorisation scheme to be justified, it must also be demonstrated that such a scheme is necessary in order to be able to impose [PSOs] and that it is proportionate to the aim pursued, inasmuch as the same objective could not be attained by measures less restrictive of the freedom to provide services, inter alia a system of declarations *ex post facto* …
>
> 36. It is possible that prior administrative authorisation is a sufficient and appropriate means of enabling the content of the [PSOs] to be imposed on an individual shipowner to be specified, taking account of his particular circumstances, or of enabling a prior check to be made on his ability to fulfil such obligations.
>
> 37. However, such a scheme cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings …'

119 Although what was at issue in the case giving rise to the judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107) was a system of prior administrative authorisation and not, as in the present case, a PSD accompanied by the granting of compensation, the reasoning developed by the Court of Justice in that judgment, which is based on an interpretation of the Maritime Cabotage Regulation in accordance with its fundamental objective, which is to ensure the freedom to provide maritime cabotage services and, consequently, to accept restrictions of that freedom only under very strict conditions, is fully transposable to the present case.

120 In that regard, it must be borne in mind that it is settled case-law that Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (in addition to the judgments cited in footnote 63 of the contested decision, see judgment of 7 October 2010, *dos Santos Palhota and Others*, C-515/08, EU:C:2010:589, paragraph 29 and the case-law cited; judgment of 19 December 2012, *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 38; see, also, judgment of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 44 and the case-law cited). It cannot be disputed that the granting of financial compensation to a particular service provider, that is, the public service concession holder, is liable to impede or render less advantageous the provision of those same services by operators not benefiting from the same compensation. The amount of the compensation allows its recipient to enjoy a decisive advantage over its competitors and, consequently, to dissuade them from offering the services concerned.

121 In the present case, the PSD was all the more likely to impede the freedom to provide maritime cabotage services, as is clear from the findings made by the Commission at paragraph 44 of its decision to open the formal investigation procedure, since the second paragraph of Article 3 of the PSDC imposed particularly restrictive conditions on potential new entrants on the routes departing from Marseilles for Corsica. That provision reads as follows:

‘Competition may be exercised in the following manner: for each of these routes, any company may, without financial compensation, provide a regular service, all year round, with at least two round trips per week, under such conditions that it will not be able to adversely affect the economic conditions of the public service operator and that consequently the choice of departure and arrival days will be determined by the [CTB] after agreement of the Corsican Assembly. This condition will be the subject of a firm commitment. In the event of non-compliance with all or part of this commitment, a penalty of EUR 2 million will be applied to the company, the payment of which will be assured by a bank guarantee of an equivalent amount. This bank guarantee will have to be provided by a bank established in the European Union, with a long-term rating of “Standard and Poors A+” (or equivalent).’

122 In that context, SNCM’s observation that the existence of the PSD did not prevent Corsica Ferries from entering the market and rapidly acquiring a ‘dominant position’ on it must be rejected. It cannot be ruled out that, in the absence of the PSD, Corsica Ferries’ entry into the market and the development of its activities on the market would have been even faster or that other operators would have also entered the market.

123 Moreover, contrary to what SNCM claims, the fact that the PSD was awarded in the context of a call for tenders in which Corsica Ferries participated does not mean that the interference with the freedom to provide services resulting from the payment of financial compensation to the sole public service concession holder has been eliminated. The extent of that interference may be lessened when a PSD is awarded following a truly open, transparent and non-discriminatory tendering procedure, but the fact remains that it persists throughout the period of provision of the public service in question.

124 In view of the foregoing and, in particular, the Court of Justice's interpretation of the Maritime Cabotage Regulation in the judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107) (see paragraph 118 above), it must be concluded that, in the contested decision, in order to verify compliance with the first *Altmark* criterion, the Commission was correct in finding that 'the scope of the public service remit as defined by a public service contract [had to be] necessary and proportionate to a real public service need, as demonstrated by the lack of regular transport services under normal market conditions' (recital 136 of the contested decision).

125 In those circumstances, there is no need to rule further on the parties' considerations concerning the relevance to the present case of the judgment of 16 September 2013, *Colt Télécommunications France* v *Commission* (T-79/10, not published, EU:T:2013:463). It should be noted, however, that in a case such as the present one, the national authorities cannot dispense with the requirement to demonstrate the existence of a shortage of private initiative. It is clear from paragraph 34 of the judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107) that the demonstration of the existence of a real public service need is linked to the existence of such a shortage of private initiative. In other words, it is on the basis of a finding of shortage of private initiative that the real public service need is determined.

126 It follows from all the foregoing considerations that the second and fourth subsidiary parts of the first part of the first plea must be rejected as unfounded.

– *The third subsidiary part: the Commission misapplied the rules governing the burden of proof*

127 SNCM submits that the Commission misapplied the rules on the burden of proof in its analysis of the first *Altmark* criterion. In that regard, first, it maintains that the Commission systematically imposed on the French Republic the burden of demonstrating the public service need and the shortage of private initiative. Second, citing two of the Commission's findings in recitals 165 and 166 of the contested decision, it submits that, conversely, the Commission itself has exempted itself from any burden of proof in respect of several essential aspects of its analysis of that criterion.

128 In the reply, SNCM adds that the 'three-stage … test' invoked by the Commission (see paragraph 130 below) is unprecedented, is not referred to in the decision to open the formal investigation procedure or in the contested decision, and is not grounded on any previously established legal basis. Moreover, this test would be particularly difficult, if not impossible, to satisfy.

129 The Commission, supported by Corsica Ferries, disputes that it misapplied the rules on the burden of proof.

130 First, the Commission submits that it is for the Member State concerned to justify the restriction of the freedom to provide services and to establish the need for and proportionality thereof. More specifically, in the present case, in order to establish the existence of a real public service need justifying the award of a PSD, the French authorities should have demonstrated the following: first, that there was user demand; second, that that demand was not capable of being satisfied by the market operators in the absence of an obligation imposed by the public authorities to that end; and, third, that simply having recourse to PSOs was insufficient to remedy that shortage. It states that it is not thereby setting out an entirely new test but merely summarising the lacunae in the French authorities' and SNCM's approach with regard to the existence of a real public service need. It adds that making out proof of these three aspects is neither novel nor particularly difficult to do.

131 Second, the Commission rejects SNCM's claim that certain of its assessments in recitals 165 and 166 of the contested decision are not based on any evidence.

132 The Court considers that the Commission cannot be criticised for having infringed the rules on the burden of proof in its analysis of the first *Altmark* criterion.

133 First, it is clear from the considerations set out in the examination of the second and fourth subsidiary parts of the first part of the first plea (see paragraphs 111 to 126 above) that, for a maritime cabotage service to be classifiable as an SGEI, it must meet a real public service need, demonstrated by the insufficient regular transport services in a situation of free competition, and that the scope of the SGEI is necessary and proportionate to that need. It is unquestionably the responsibility of the Member State concerned, and not the Commission, to make out proof of this by adducing sufficiently convincing evidence. It should be noted in that regard that, contrary SNCM's assertions at the hearing (see paragraph 106 above), the Member State cannot merely rely on the existence of a 'general interest in the broadest sense'. The absence of any evidence provided by the Member State establishing that the abovementioned criteria have been met or disregarded is liable to constitute a manifest error of assessment which the Commission is required to take into consideration.

134 As regards the three-stage test set out by the Commission to prove the existence of a real public service need (see paragraph 130 above), it should be noted that, contrary to what SNCM claims, it does not in any way constitute an additional requirement of proof not provided for in the contested decision. This test is merely an alternative presentation of the test used by the Commission in the contested decision in order to verify compliance with the first *Altmark* criterion (see paragraph 45 above), the merits of which were upheld during the examination of the second and fourth subsidiary parts of the first part of the first plea (see paragraphs 111 to 126 above). Thus, first of all, if there is no demand from users for all or part of the services falling within the scope of the public service remit, as defined by the national authorities, that public service or its scope clearly cannot be considered necessary and proportionate in relation to a real public service need. Next, nor can there be such a need if the user demand is already capable of being met by the market operators in the absence of an obligation laid down by the public authorities to that end. In other words, as has already been pointed out in paragraph 125 above, in the absence of a shortage of private initiative, there can be no real public service need. Lastly, if there is a user demand and if that demand is not capable of being met by the interplay of market forces alone, the national authorities should still give preference to the approach which is least harmful to the essential freedoms for the proper functioning of the internal market. As rightly pointed out by the Commission in its reply to one of the written questions put by the Court, in the case of the maritime cabotage sector, the imposition of PSOs applicable to all carriers wishing to offer their services on a given route and which do not necessarily give rise to financial compensation (see Article 4(2) of the Maritime Cabotage Regulation) entails less burdensome restrictions on the freedom to provide services than the granting of financial compensation to a particular carrier or to a limited number of carriers in the context of a PSD.

135 It must be added that the test thus criticised by SNCM is not particularly difficult to satisfy, since public service needs can be easily assessed through, inter alia, market research, public consultations or calls for projects, none of which were done in this case by the French authorities before approving the principle of renewal of a PSD for ferry services to and from Corsica.

136 Second, SNCM is wrong to claim that the Commission's two findings set out in recitals 165 and 166 of the contested decision are not based on any evidence. Those findings in fact are the result of the Commission's examination of the material in the file.

137 Thus, as regards the first finding criticised in recital 165 of the contested decision, it is noteworthy that the sentence on which it is based begins by finding that 'the service provided by Corsica Ferries did meet the standards of [PSOs] applicable to all connections between the French mainland and Corsica' and that that finding cannot be called into question. Hence, companies which, like Corsica Ferries, offered maritime transport services on, inter alia, the Toulon-Corsica route were subject to PSOs in terms of regularity, continuity, frequency of crossings, capacity to provide the service, rates charged and crewing of vessels, within the framework of the social assistance scheme as described in

paragraph 14 above. Those companies were required to provide any justification for their ability to provide service, be in good standing with regard to tax and social obligations, communicate their operating programme to the CTB beforehand and ensure at least two round trips per week throughout the year between Toulon and Corsica. The crews of their vessels were subject to the rules laid down by French law. In addition, maximum social fares were set for each of the categories concerned.

138 The Commission could legitimately rely on a comparison between the requirements relating to those PSOs with the obligations laid down in the PSDC's tender specifications for the additional service, which were less onerous than those applicable to the basic service (see recital 141 of the contested decision and paragraph 151 below), the assessment criticised by SNCM that the service provided by Corsica Ferries 'showed no qualitative difference with the service provided as part of the additional service'.

139 As regards the second finding criticised in recital 166 of the contested decision, it follows from an overall reading of that recital that what the Commission means thereby, in essence, is that the services provided by Corsica Ferries out of Toulon are satisfactory and offer terms (price, objective quality characteristics, continuity and access to the service) that are compatible with the general interest. That assessment appears to be based not only on the developments referred to in paragraph 137 above but also, and more generally, to take account of the fact — as quite rightly observed by the Commission — that the conditions relating to the PSOs applicable to maritime routes between mainland France and Corsica have been defined by the CTB pursuant to the Maritime Cabotage Regulation. Those PSOs must therefore be viewed as being obligations to ensure that maritime cabotage services are provided under conditions that are compatible with the general interest which a Union shipowner, if he were considering his own commercial interest, would not assume or would not assume to the same extent (see, in this connection, Article 2(4) of the Maritime Cabotage Regulation and paragraphs 47 and 48 of the SGEI Communication). Accordingly, it could legitimately be considered that any provision of maritime cabotage service falling within those PSOs was being made in accordance with the public interest in terms of the qualitative parameters governed by the PSOs and listed in Article 4(2) of the Maritime Cabotage Regulation, including those set out in recital 166 of the contested decision.

140 It must be concluded from all of the foregoing that the third subsidiary part of the first part of the first plea and, consequently, that first part in its entirety must be rejected as unfounded.

***The second part: the Commission committed an error of law, an error of fact and a manifest error of assessment in treating the additional capacity to be provided during peak periods in the same way as an additional service and evaluating that service separately from the basic service under the first Altmark criterion***

141 In the second part of the first plea, SNCM submits that the Commission committed an error of law, an error of fact and a manifest error of assessment in treating the additional capacity to be provided during peak periods in the same way as an additional service and evaluating that service separately from the basic service under the first *Altmark* criterion.

142 The second part is subdivided into three subsidiary parts, the last one being invoked in the alternative.

*– The first subsidiary part: the PSDC does not make a distinction between the basic service and the additional service*

143 SNCM submits that the PSDC does not distinguish between the basic service and the additional service, contrary to what is stated in recital 137 of the contested decision, which is the basis of the Commission's entire reasoning. The content of this supposed additional service is not defined in

specific and fully identifiable provisions of the tender specifications. By providing additional minimum capacities for certain periods of the year, the parties to the PSDC had no intention of creating two services that could be supplied independently of one another. The fact that the new PSD for the period 2014-2023 would no longer cover the additional service but would be limited to the basic service is not relevant, since that exclusion was due to budgetary reasons. Moreover, the inclusion within the scope of the public service remit of services relating to peak periods in order to avoid any risk of skimming is the only solution compatible with the case-law arising from the judgment of 19 May 1993, *Corbeau* (C-320/91, EU:C:1993:198). Lastly, the public service compensation provided for by the PSDC is paid each year and calculated on a flat-rate basis for all the services provided by the concession holders.

144 The Commission, supported by Corsica Ferries, disputes the arguments put forward by SNCM.

145 It is clear that the Commission was correct in stating, in recital 137 of the contested decision, that the distinction between the transport services to be provided throughout the year as part of the basic service and the additional capacities to be provided during peak periods — the additional service — was clearly reflected in the PSDC's tender specifications.

146 In the first place, it should be noted in that regard that the additional service, which concerns only three out of the five routes covered by the PSD, is the subject of specific provisions in the PSDC's tender specifications, namely point I(a)(2) (Marseilles-Bastia route), point I(b)(2) (Marseilles-Ajaccio route) and point I(d)(1.4) (Marseilles-Propriano route).

147 SNCM's claim that in that context the PSDC does not 'at any time refer' to the term 'additional service' as such is therefore irrelevant. In any event, this claim is unfounded since, on page 1 of the tender specifications annexed to the PSDC, it is specified that the services concerned 'comprise, on each route, a permanent passenger and freight service and, on certain routes, an additional passenger service for peak traffic'. It should also be noted that, as rightly pointed out by Corsica Ferries, SNCM itself explicitly distinguishes between permanent and additional services in some of the PSD implementation reports it is required to draw up each year.

148 In the second place, contrary to SNCM's claim, the Commission's finding that the basic service and the additional service constitute two distinct types of service is not based in its 'entirety' on the criticised statement in recital 137 of the contested decision which, in footnote 64, refers to the specific provisions cited in paragraph 146 above. That finding is also based on a number of other factors, set out in the following paragraphs.

149 First, it must be remembered that the basic service concerns maritime transport of passengers and freight, while the additional service concerns only passenger transport.

150 Second, for the basic service, the PSDC tender specifications specify daily, journey-by-journey minimum capacities for each of the routes concerned, whereas for the additional service it specifies only overall journey-by-journey minimum capacities for each of the routes concerned.

151 Third, the two types of service are subject to certain distinct obligations, in particular in terms of timetables and frequency of crossings, with those applicable to the basic service being more restrictive than those applicable to the additional service. Thus, whilst the PSDC's tender specifications provide for strict departure and arrival times for the basic service, it does not impose any particular schedule for the additional service. Similarly, while the tender specifications stipulate that under the basic service passengers must be transported in each direction on a daily basis (but only three times a week in the case of the Marseilles-Propriano route) throughout the year, it places no restrictions on the frequency of crossings under the additional service. Although those same tender specifications provide that under the additional service travel days and schedules must be the subject of an 'explicit and prior' memorandum of understanding with the CTB, this is principally down to the contractual nature of the

PSDC, and SNCM nevertheless retains greater flexibility than with the basic service. Moreover, under the basic service, journeys must be made without a stopover whereas there is no such requirement for the additional service.

152 Fourth, as is apparent from Annex 2 to the PSDC and will be explained in more detail in paragraphs 160 and 161 below, the basic service is carried out by passenger-cargo vessels, which can carry both passengers and freight, while the additional service uses ferries, which carry only passengers (and their vehicles).

153 Fifth, it is also apparent from Annex 2 to the PSDC that the operation of the additional service was to be the sole responsibility of SNCM. Provision is made therein for the *Danielle Casanova* and *Napoléon Bonaparte* vessels to be used to 'ensure the additional capacity of the passenger service of the Ajaccio, Bastia and Propriano routes'. Those two vessels are part of the SNCM fleet and not the CMN fleet. Thus, in practice, only SNCM has provided the additional service.

154 In the third place, SNCM's claim, to the effect that no argument can be made based on the fact that the new PSD for the period 2014-2023 no longer covers the additional service but is limited to the basic service since that exclusion is in essence due to budgetary reasons, must be rejected as ineffective. This argument, based on the new PSD, is one that was relied on by Corsica Ferries during the administrative procedure but was not incorporated as such by the Commission in the contested decision as the basis for its reasoning. In any event, the fact that the new PSD no longer covers the additional service in fact shows that the latter service is not indispensable to the proper performance of the basic service either for technical reasons or due to economic considerations, and that those two types of service are separable.

155 In the fourth place, SNCM is wrong to rely on the case-law arising from the judgment of 19 May 1993, *Corbeau* (C-320/91, EU:C:1993:198). As has already been pointed out in paragraph 101 above, it is apparent from the case file that both the basic service and the additional service had a large operating deficit, which ruled out any possibility of financial equalisation between them. This is shown more specifically by SNCM's cost accounting, annexed to the observations of 5 November 2012 submitted by it in the administrative procedure, which show that for each year of the period 2007-2011 and in the case of both ferries and passenger-cargo vessels, the direct costs (maritime, crew and supply costs) were higher than the net revenues.

156 In the fifth place, while it is true that, as argued by SNCM and as also stated in recital 47 of the contested decision, the compensation owing to SNCM was set out in aggregate in Article 2 of the PSDC, it is nevertheless clear from the cost accounting referred to in paragraph 155 above that in practice they were apportioned between the basic service, carried out by passenger-cargo vessels, and the additional service, carried out by ferries. In any event, the fact that that article provides for an overall compensation amount for both types of service does not indicate whether or not they are separable.

157 It follows that the first subsidiary part of the second part of the first plea must be rejected as unfounded.

*– The second subsidiary part: the Commission erred in equating the basic service with the services offered by cargo vessels and the additional service with the services offered by the ferries*

158 SNCM argues that the Commission erred in equating the basic service with the services offered by the cargo vessels and the additional service with the services offered by the ferries. It submits that the PSDC's tender specifications do not require the use of different vessels for each of those types of service. On the contrary, in practice, part of the additional service is provided using cargo vessels,

whilst ferries can be used to provide the basic service, especially during the off-peak periods during the cargo vessels' technical stops. SNCM refers to tables annexed to the application in support of its assertions.

159 The Commission and Corsica Ferries reject SNCM's claims.

160 It is clear that, as noted above in paragraph 152 and as is apparent from Annex 2 to the PSDC, the basic service is performed using passenger-cargo vessels whereas the additional service is carried out using ferries. As rightly pointed out by Corsica Ferries, this finding is further confirmed by SNCM's implementation reports for the PSD. Thus, for example, the implementation report for 2010 shows that the basic service is provided through 'passenger-cargo vessels' and that it is the 'car ferries *Napoléon Bonaparte* and *Danielle Casanova* [which] provided additional passenger capacity during the peak periods on the ports of Bastia, Ajaccio and Propriano', giving a total of 251 932 passengers transported, 'being 47% of the traffic of SNCM's PSD'.

161 SNCM's claim that, in fact, passenger-cargo vessels were used for the additional service whilst ferries were used for the basic service has not been demonstrated to the requisite legal standard. More specifically, the tables provided by SNCM to try to corroborate that claim are inconclusive. First of all, one of those tables, entitled 'Additional service provided by cargo vessels', contains errors in calculation. Next and more importantly, as rightly observed by the Commission, the tables contain an artificial allocation of the overcapacity (in number of seats on board) of the various vessels which is irrelevant to the manner in which the two types of service were provided in practice. For the Marseilles-Bastia and Marseilles-Ajaccio routes, the table entitled 'Additional service provided by cargo vessels' shows, for the second half of 2007 and each of the years in the period 2008-2013, the difference between the capacities offered by the concession holders' cargo vessels for those routes under the basic service (table entitled 'Permanent service provided by cargo vessels') and the capacities required by the PSDC's tender specifications for those services and routes (table entitled 'Tender specifications — permanent service'). In other words, that table represents merely a simple inventory of the overcapacity of the vessels providing the basic service in relation to the requirements of the tender specifications, overcapacities that SNCM arbitrarily allocates to an alleged provision of the additional service using cargo vessels. Similarly, the table entitled 'Additional service provided by ferries' arbitrarily fixes the capacity offered by SNCM ferries within the framework of the additional service as resulting from the difference between the capacities required by the PSDC's tender specifications for that service (table entitled 'Tender specifications — additional service') and the overcapacity included in the table entitled 'Additional service provided by cargo vessels'. Yet it is clear from the case file that the capacity offered by those ferries was considerably higher than those referred to in the table entitled 'Additional service provided by ferries', so that, save in exceptional circumstances, there was no need to have recourse to cargo vessels to provide the additional service. As for the table entitled 'Permanent service provided by ferries', it merely asserts, without any justification, that each year the ferries have contributed a certain number of places on the Marseilles-Ajaccio and Marseilles-Bastia routes to the basic service (in particular 13 000 places for the second half of 2007 and 26 000 places in 2008). Lastly, it should be noted that the fact that there may have been isolated cases in which a vessel usually assigned to the basic service has been assigned to the additional service and vice versa is not in itself sufficient to call into question the finding in principle that the cargo vessels were assigned to the basic service and the ferries to the additional service.

162 It follows from the foregoing that the second subsidiary part of the second part of the first plea must be rejected as unfounded.

*– The third subsidiary part, put forward in the alternative: the additional service is justified by the real public service need which is met by the basic service*

163 SNCM argues, in the alternative, that the additional service is justified by the real public service need which is met by the basic service. In its submission, even if there is an additional service which is distinguishable from the basic service, *quod non*, those two types of service cannot be assessed independently of each other for the purpose of analysing the first *Altmark* criterion.

164 In support of this third subsidiary part, SNCM puts forward two sets of arguments. By the first, it seeks to establish, in essence, that an overall analysis of the basic service and the additional service was required on the basis of certain considerations other than technical and economic considerations. By the second, it seeks to demonstrate that there is a technical and economic complementarity between those two types of service.

165 The Commission, supported by Corsica Ferries, contends that the third subsidiary part should be rejected.

166 As regards the first set of arguments, it is clear that none of them provides grounds for concluding that the Commission erred in law by failing to conduct an overall analysis of the additional service and the basic service in the present case.

167 In the first place, it must be pointed out that SNCM is incorrect to call into question the Commission's assessment, set out in recital 139 of the contested decision, according to which 'it would only be legitimate to consider that the additional service may be justified by the real public service need met by the basic service if it can be determined … that its operation is essential to the basic service, on the grounds of a set of technical and economic considerations'. If the additional service, which is clearly a separate service from the basic service (see paragraphs 145 to 154 above), were to be included within the scope of the public service remit without being justified by the existence of technical complementarities between the two types of service or by considerations of economic efficiency, the requirements of necessity and proportionality would obviously not be satisfied (as regards those requirements, see paragraph 124 above).

168 In the second place, SNCM is also incorrect in claiming that there is no difference in nature between the basic service and the additional service. It is apparent from the evidence set out in paragraphs 145 to 154 above that these two types of service in fact display significant differences.

169 In the third place, even if SNCM's argument as set out in paragraph 168 above must also be understood as being based on the fact that the two types of service share a common objective of guaranteeing territorial continuity, it cannot be upheld.

170 First of all, as a general proposition, just because both types of service share the same objective does not mean they automatically must be regarded as constituting in reality only one and the same type of service.

171 Furthermore, the fact that the basic service and the additional service are allegedly both aimed at ensuring territorial continuity does not necessarily imply that they must be examined together as forming an inseparable whole, particularly as regards the question of the existence of a real public service need.

172 As rightly pointed out by the Commission, an objective of territorial continuity may very well be achieved through both market forces and public services. It must be borne in mind in that regard, first, that although the Member State enjoys wide discretion in this area, it can only establish an SGEI in so far as it satisfies a real public service need and, second, that if the demand is already met by market forces, such a need cannot exist (see paragraphs 111 to 124 above). Thus, in order to be able

to establish an SGEI in the maritime cabotage sector, it is not sufficient for the Member State to invoke the pursuit of an objective of territorial continuity. It is also necessary that that objective is not already being met simply through the interplay of market forces. If that interplay makes it possible to achieve a part of that objective, the creation of such an SGEI is justified only in so far as it makes up for the corresponding market shortcoming.

173 In the present case, as will be explained below in connection with the examination of the third part of the first plea, the Commission found correctly that the territorial continuity between Corsica and the French mainland was already ensured through the basic service supplemented by market forces, subject to PSOs. Consequently, apart from the fact that the additional service clearly did not meet a real public service need, it was not even indispensable for the achievement of the hypothetical objective of territorial continuity which had been assigned to it by the French authorities.

174 In the fourth place, SNCM claims, unsuccessfully, that the Commission's approach renders the proper operation of the public service impossible in practice in that it amounts to reserving only unprofitable activities for public service, thereby precluding any financial equalisation mechanism and dissuading any prudent and informed economic operator from providing a public service. As pointed out in paragraphs 101 and 155 above, both the basic service and the additional service had a large and recurring operating deficit, which precluded any possibility of financial equalisation between them.

175 In the fifth place, SNCM states that the need for an overall analysis of the basic service and the additional service can also be inferred from paragraph 6 of the Conseil d'État (Council of State) decision of 13 July 2012 and from the Commission's earlier decision-making practice relating to previous PSDs for maritime services to Corsica.

176 SNCM cannot rely on the passage it cites from paragraph 6 of the Conseil d'État (Council of State) decision of 13 July 2012. Neither the Commission nor the Courts of the European Union is bound by the interpretation of the Conseil d'État (Council of State) of the provisions of the Maritime Cabotage Regulation. In the present case, SNCM is even less entitled to rely on that passage given that, on the date on which the Conseil d'État (Council of State) gave its decision, the formal investigation procedure leading to the adoption of the contested decision had already been opened by the Commission.

177 Nor can SNCM rely on the Commission's earlier decision-making practice relating to the previous PSDs for maritime services to Corsica, for the reasons already set out in paragraphs 98 and 99 above.

178 As regards the second set of arguments, it must first be noted that the Commission was correct in pointing out in recital 141 of the contested decision that no technical complementarity between the basic service and the additional service had been demonstrated.

179 It must be borne in mind in that regard that, apart from the fact that those services are subject to different obligations, in particular in terms of timetables and frequency of crossings (see paragraph 151 above), they are also provided using vessels of different types and having different purposes (see paragraphs 152, 160 and 161 above). The basic service is provided using passenger-cargo vessels which can be used for the transport of goods and passengers, whilst the additional service is provided using ferries, which can be used for the transport of passengers and their vehicles only. The technical differences between these two types of vessel prevent not only, inter alia, those used for providing the additional service from being used to provide the basic service but also economies of scale from being realised, notably for maintenance and repair of shipping resources. In addition, crews must be certified differently depending on the type of vessel and are therefore not interchangeable.

180 Those findings are not called into question by SNCM's claim that the two types of service have 'many common technical characteristics, inter alia in terms of quality of service' and that there are significant synergies between them since they share the same port infrastructure, the same network of agencies and the same telephone and telecommunications resources for booking tickets, as well as the same dock staff and can use the same procedures for certification, hygiene control and food security. As rightly pointed out by the Commission, the synergies thus invoked are of only a relatively marginal nature, since the main sources of costs for the services concerned relate to the shipping resources and the crews, and the sharing of common administrative and commercial structures cannot constitute a valid complementarity for the purposes of resolving the issues in the present case, since it could in any event apply to all SNCM activities.

181 Nor can SNCM's claim that ferries are intended to replace passenger-cargo vessels during their technical stops be upheld. In addition to the fact that ferries cannot be used for freight transport, it is clear from the tables in Section B 'Presentation of the standard years' in Annex 2 to the PSDC that during technical stops of passenger-cargo vessels the crossings concerned should always be made by other passenger-cargo vessels as listed in those tables and not by ferries.

182 In the second place, it is clear that none of the arguments relied on by SNCM leads to the conclusion that the inclusion of the additional service within the scope of the public service remit was justified by considerations of economic efficiency.

183 It should be borne in mind that, as established in paragraphs 101, 155 and 174 above, the additional service had an operating deficit.

184 SNCM's argument that, through the revenues it generated from operating maritime transport links to and from Corsica during the highest-earning periods, the additional service contributed fundamentally to the overall economic equilibrium of the basic service and the PSD and to the financing of territorial continuity, cannot be upheld.

185 In that regard, first of all, it is incorrect of SNCM to criticise the Commission for having failed to examine whether '[the additional service], in covering at least its specific variable costs, could have helped to cover part of the fixed costs shared with the [basic] service'. SNCM's cost accounting, produced by SNCM during the administrative procedure, show that, for each year for the period 2007-2011, the net revenue generated by the ferries was lower than the direct costs of that service (including maritime costs and costs of crew and supplies) (see paragraph 155 above).

186 Next, in support of that argument SNCM reiterates, unsuccessfully, its claim that ferries could also be used to provide the basic service. For the reasons already set out in paragraphs 152, 160, 161 and 181 above, that claim must be rejected.

187 Lastly, SNCM's argument that the contribution of the revenue generated by the additional service to the total remuneration of that company is quite significant, since the periods during which that service is offered are those which are the most profitable, must be rejected as ineffective. Even if that were true, the fact remains that that revenue was not sufficient to offset the direct costs of supplying that service (see paragraphs 101, 155, 174 and 185 above).

188 It must be concluded from all of the foregoing that the third subsidiary part of the second part of the first plea must be rejected as unfounded, as must accordingly the second part in its entirety.

***The third part, relied on in the alternative: the additional service, viewed in isolation, fulfils the first Altmark criterion***

189 Under the third part of the first plea in law, put forward in the alternative, SNCM submits that the additional service, viewed in isolation, fulfils the first *Altmark* criterion and that the Commission therefore committed a manifest error of assessment in considering that the inclusion of that service within the scope of the public service remit did not correspond to a real public service need.

190 This third part may be divided into four subsidiary parts.

*– The first subsidiary part: the Commission erred in assessing the substitutability of passenger transport services departing from Marseilles with those departing from Toulon*

191 SNCM submits that the Commission's finding in recital 160 of the contested decision that 'the additional service was broadly substitutable, in terms of demand, by passenger services from Toulon to Bastia and Ajaccio when the [PSDC] was awarded' is based on manifestly incorrect reasoning.

192 The Commission, supported by Corsica Ferries, disputes the arguments put forward by SNCM.

193 In support of its argument, SNCM begins by asserting that the Commission's reasoning rests on a biased and contradictory analysis of passenger traffic statistics.

194 The Court finds that none of the criticisms put forward by SNCM in support of this claim are well founded.

195 Thus, first, SNCM is wrong to criticise the Commission for analysing, in recitals 154 and 155 of the contested decision, the evolution of passenger traffic between the French mainland and Corsica between 2002 and 2009, a period which includes two years subsequent to the award of the PSD. The inclusion of those two years, in addition to the years 2002 to 2007, makes it possible to observe the main trends in the evolution of passenger traffic over an extended period and to conclude that it had not changed after the PSD was awarded. Moreover, SNCM does not even claim that the evolution of passenger traffic after 2007 showed significant differences as compared to previous years.

196 Second, SNCM's observation that, during the period 2002-2009, passenger traffic departing from Marseilles remained more or less stable whilst traffic departing from Toulon increased significantly in no way contradicts the Commission's conclusion as to the existence of demand-side substitutability of maritime passenger transport services offered on the Marseilles-Corsica route with those offered on the Toulon-Corsica route.

197 It is apparent from the case file that, as stated in recital 154 of the contested decision, overall traffic for maritime passenger transport between the French mainland and Corsica increased significantly during the period 2002-2009 (+ 3 1.6%), and that that increase was to a very large extent absorbed by operators departing from Toulon (+150%), and not by those departing from Marseilles (- 1.7%). SNCM's observation that the increase in traffic departing from Toulon was accompanied by quasi-stability in traffic departing from Marseilles fails to take account of the growth in overall traffic and the evolution of the operators' market shares. It is indisputable that, in that context in which there was a general increase in traffic between Corsica and the French mainland, the market share of providers operating out of Toulon increased considerably whilst that of providers operating out of Marseilles decreased. It is not decisive in that regard that, in absolute numbers of passengers, the Marseilles-Corsica route was virtually stagnant, since in terms of market share proportions it suffered a sharp drop. It could be readily inferred therefrom that there was a shift in maritime transport

passenger traffic from the Marseilles-Corsica route towards the Toulon-Corsica route and therefore demand substitutability for the services offered on the first route with those offered on the second route.

198 Nor does SNCM contest the developments referred to in recital 157 of the contested decision, which reads as follows:

'In fact, the development of traffic between the French mainland and Corsica to the benefit of crossings from Toulon is even more pronounced for the additional service. Between 2002 and 2005, actual traffic on the additional service declined by 208 213 passengers on the Marseilles — Corsica route, while traffic increased by 324 466 passengers on the Toulon — Corsica route over the same period. The decrease in the proportion of traffic carried by the additional service to the benefit of other market operators in the context of an overall increase in traffic since 2002 indicates a high degree of substitutability between these two services.'

199 Third, it is incorrect of SNCM to argue that the Commission's analysis in recital 154 of the contested decision contradicts recital 155 thereof, in which it stated that that trend did not seem to be due to an effect of absorption of demand from Italy, since maritime passenger traffic between Corsica and Italy remained stable during the relevant period. In recital 155, the Commission in no way stated that traffic between Corsica and Italy remained stable. It refuted an argument put forward by the French authorities to the effect that the routes between Corsica and Italy had absorbed part of the traffic from the Marseilles-Corsica routes, stating, instead, that the share of maritime passenger traffic to or from all Corsican ports represented by routes to Italy had decreased overall during the period concerned. It should be noted in that regard that, according to data published by the Regional Transport Observatory of Corsica, although between 2002 and 2009 traffic between Corsica and Italy increased by 4.6%, overall traffic between Corsica and the various mainland ports had grown by more than 21%. Thus, the share of Corsican traffic travelling on routes to and from Italy declined from 39.1% in 2002 to 33.8% in 2009.

200 Fourth, it is incorrect of SNCM to criticise the Commission for taking into account, as part of its analysis of the substitutability of services, the shift of traffic from the Marseilles-Corsica route to the Toulon-Corsica route during the years 2004 and 2005, on the grounds that those years had been marked by major strikes which had greatly disrupted traffic from Marseilles.

201 First of all, it must be borne in mind that the Commission's analysis of recitals 154 to 160 of the contested decision is not limited to the years 2004 and 2005 but covers a period extending from 2002 to 2009. Second, the social unrest referred to by SNCM took place in September 2004, September 2005 and October 2005, and not throughout 2004 and 2005, as it claims. Lastly, as rightly pointed out by the Commission, referring to paragraph 38 of its Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), the experience of a strike can be used to delimit a market.

202 In the second place, it must be held that SNCM is wrong to characterise the Commission's analysis of the substitutability of the services as 'particularly rough' in that it takes account only of evolution of volumes without verifying whether the services offered by Corsica Ferries were substitutable for its own services in terms of timetables, fare caps, quality of service and destinations served.

203 The Commission's analysis is based on a careful examination of consumer behaviour as well as rational factors and factual findings stemming inter alia from public data relating to the supply and demand of maritime transport services. Thus, as rightly pointed out by the Commission, when a passenger chooses to travel to Corsica from Toulon rather than from Marseilles, he necessarily takes into account all the parameters relied on by SNCM. It can be legitimately assumed that if there had been a genuine qualitative difference between the services provided by that company departing from Marseilles and those provided by Corsica Ferries from Toulon, this would have slowed down the

significant shifts in traffic discussed in paragraphs 197 and 198 above. Moreover, as has already been stated in paragraphs 137 and 139 above, the services provided by Corsica Ferries had to meet a series of requirements in terms of regularity, continuity, frequency of crossings, capacity to provide the service, rates charged and crewing of vessels and operate in conditions compatible with the general interest.

204 In that context, moreover, in recital 158 of the contested decision, the Commission also takes account, 'in a more qualitative way', of the short distance between Marseilles and Toulon for the purposes of its analysis of the substitutability of services. It is clear in that regard that it was right to consider that the short distance — about 50 km as the crow flies and 65 km by road — and the fact that the traveling time by road between those two cities is only 45 minutes, which is considerably shorter than the crossing time from the French mainland to Corsica, constituted relevant indicia of substitutability from the point of view of demand for maritime transport services for passengers departing from Marseilles and those departing from Toulon. Added to this is the fact that the port of Toulon is closer to Corsica than Marseilles, so that vessels operating out of Toulon are able to make the crossing in less time than those operating out of Marseilles. In view of those factors, it is unlikely that an additional 45 minutes of driving will discourage people residing or working in Marseilles from using the Toulon-Corsica route. Nor is the relevance of those various findings contested by SNCM.

205 Although as SNCM rightly points out, the port of Propriano, which was one of the three Corsican ports covered by the additional service, was not served by vessels departing from Toulon, it was served by the vessels of the SNCM-CMN group departing from Marseilles as part of the basic service (see point I(d)(1.3) of the PSDC's tender specifications). There were even plans to increase minimum capacity for the Marseilles-Propriano route and for that service for the period from 1 May to 30 September (see point I(d)(1.3)(i) of the PSDC's tender specifications). As rightly pointed out by the Commission, there is no indication that the basic service, which was thus reinforced for five months over the spring-summer period, was not sufficient on its own to meet user demand on that route, even in peak periods. It must therefore be considered that the services provided on that route as part of the additional service did not meet a real public service need and that the question of substitutability of the ports of Marseilles and Toulon for the service of Propriano did not even arise.

206 Furthermore, and in any event, as pointed out by the Commission in recital 164 and footnote 98 of the contested decision, traffic on the Marseilles-Propriano route accounted for only a small proportion (about 10%) of all the activity covered by the additional service. Such a low proportion did not warrant there being a public service having the scope of an additional service which was not limited to that route. As stated in that recital 'the small proportion of traffic represented by [that] line … would not lead to the assumption that a shortage of private initiative on this one line invalidates the conclusion concerning the additional service as a whole'.

207 Lastly, it should be noted that, for a finding of substitutability in the present case, it was not necessary for the requirements applicable to services departing from Marseilles and to those departing from Toulon to be strictly identical.

208 It follows from all the foregoing considerations that the Commission was correct in considering that the maritime transport services provided on the Marseilles-Corsica route as part of the additional service and those provided on the Toulon-Corsica route were mutually substitutable in terms of passenger service demand.

*– The second subsidiary part: the Commission erred in its assessment of the shortage of private initiative*

209 Under this second subsidiary part, SNCM submits that the Commission's analysis of the shortage of private initiative in recitals 161 to 166 of the contested decision contains an inadequate statement of reasons and is manifestly incorrect.

210 That analysis is summarised as follows in recital 162 of the contested decision:

'… the Commission compared the actual passenger traffic to each of the ports of the additional service with the offering of transport provided by Corsica Ferries from Toulon, and by the basic service of the [PSD]. It is apparent from this that, for the ports of Bastia and Ajaccio, which represent 90% of the capacity required by the additional service, the combination of capacities offered by the basic service of the [PSD], from Marseilles, and the private initiative service available from 2004 to 2006 from Toulon was sufficient to meet the real demand observed, both for the spring-autumn period and for the summer period, for each of the two ports for each year between 2004 and 2006.'

211 The Commission and Corsica Ferries dispute SNCM's claims.

212 In support of its argument, SNCM begins by complaining that the Commission did not supply any details or figures on the comparative supply and demand calculation set out in recital 162 of the contested decision.

213 That plea must be rejected as unfounded. As confirmed by the Commission in response to a written question from the Court, the data it used for the purpose of the contested analysis are public data from the Regional Transport Observatory of Corsica which were sent to it by Corsica Ferries during the administrative procedure and were not contested by the French authorities at the time of that procedure. SNCM, which is particularly well placed to know the state of supply and demand for maritime transport between the French mainland and Corsica and the capacity data provided for by the PSDC, cannot seriously claim, as it does in its pleadings, that it is impossible for it to understand the Commission's reasoning and to ascertain whether or not the figures used by the Commission are correct. As regards the methodology used by the Commission for its analysis, it is clear from recital 162 of the contested decision that it is merely a comparison, for each year from 2004 to 2006 distinguishing the 'spring-autumn' period and 'summer' period and for each of the three Corsican ports covered by the additional service, of the combination of the capacities offered by Corsica Ferries from Toulon and those offered by its fellow concession holders as part of the basic service departing from Marseilles with the real observed demand (actual passenger traffic). Focusing on the ports of Bastia and Ajaccio, which represented 90% of the capacity required by the additional service, the Commission found that that combination was sufficient to satisfy the real demand observed, based on the fact that the difference between the first and the second was systematically positive. Consequently, the Commission has provided a statement of reasons for its analysis of the shortage of private initiative to the requisite legal standard.

214 Second, SNCM submits that the comparative analysis of actual passenger traffic with the combination of the transport supply provided by Corsica Ferries as part of the basic service is manifestly incorrect inasmuch as it does not take account of the characteristics of the market, more specifically the large imbalance in demand within the peak period itself. Even at the height of summer, there are peaks in traffic, especially on weekends, which cannot be fully covered using that combination.

215 It is clear that SNCM has not proven to the requisite legal standard the allegedly considerable imbalance in the demand that it claims is present. Instead it merely refers to a passage in Commission 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), which refers to a market study carried out, according to it, by the Commission. In fact, as is apparent from recital 50 of that decision, that market study was not commissioned by the Commission at all, but rather was submitted by the French authorities. It was, moreover, based on the data available up to 2001. Market conditions underwent significant change between 2001 and 2007. Lastly, it should be noted that Decision 2004/166 was annulled by the General Court by its judgment of 15 June 2005, *Corsica Ferries France* v *Commission* (T-349/03, EU:T:2005:221).

216 Third, SNCM submits that, in order to examine the question of shortage of private initiative, the Commission could not simply carry out a quantitative analysis of the supply provided by Corsica Ferries. It should have reasoned not only in terms of capacity but also in terms of fares, continuity and regularity and shown that Corsica Ferries offered its services on terms similar to those provided by SNCM as part of the additional service. In that context, SNCM observes that the Commission has never demonstrated that the services provided by Corsica Ferries met the qualitative requirements laid down in the tender specifications.

217 Those complaints made against the Commission cannot be upheld.

218 It is true that, as is clear from the case file and is, moreover, common ground between the parties, the PSDC obligations applicable to the additional service and the PSOs to which the transport services are subject from Toulon are not strictly identical. However, as rightly pointed out by the Commission in recital 165 of the contested decision, it has not been demonstrated that there is a significant qualitative difference between the maritime transport services departing from Marseilles under the additional service and the maritime transport services departing from Toulon such as to dissuade users of the former from availing themselves of the latter.

219 It should first of all be borne in mind in that regard that the obligations laid down in the PSDC's tender specifications are less stringent for the additional service than for the basic service (see paragraph 151 above). Next, reference must be had to the considerations set out in paragraphs 202 to 204 above, from which it is apparent that, in addition to the fact that the services provided by Corsica Ferries had to meet a set of requirements in terms of regularity, continuity, frequency of crossings, capacity to provide the service, rates charged and crewing of vessels and operate in conditions compatible with the general interest, it has not been established that there was a real qualitative difference between those services and those provided by SNCM out of Marseilles. Lastly, as regards more specifically the quality of service obligations provided for in the PSDC's tender specifications for the additional service, relied on by SNCM, suffice it to note that SNCM has not adduced any evidence establishing any particular need whatsoever of travellers that was not met by the maritime transport services as provided by the shipping companies operating out of Toulon. The additional service was, moreover, accompanied by only a few obligations in terms of the quality of the service offered, which were not fundamentally different from those applicable to the transport services provided by the competing shipping companies, in particular by Corsica Ferries.

220 It follows from the foregoing that the Commission was correct in finding that no evidence of a shortage of private initiative concerning the additional service had been adduced in the present case.

*– The third subsidiary part: the Commission omitted, incorrectly, to analyse the impact of the abolition of the additional service on the supply actually observed*

221 SNCM criticises the Commission for having failed to analyse the impact of the abolition of the additional service on the supply actually observed, which led the Commission to overestimate the private initiative capable of substituting for that service. First of all, there is nothing in the contested decision to indicate that there is perfect substitutability between Corsica Ferries' services departing from Toulon and SNCM's services departing from Marseilles. Next, there is nothing to show that, quite apart from any public service contract, Corsica Ferries' bid would have been in a position to guarantee continuity and regularity of service equivalent to the additional service. Lastly, in the event of the cancellation of the compensation paid, SNCM's very presence in the market would be called into question, which would place Corsica Ferries in a quasi-monopolistic situation, thereby prompting it to increase its fares significantly whilst reducing the quality of its services.

222 The Commission disputes SNCM's claims.

223 This third subsidiary part cannot be upheld. The three premisses forming the basis for SNCM's complaint directed at the Commission are incorrect.

224 In the first place, it cannot reasonably be required of the Commission to show that there is perfect substitutability between the transport services departing from Toulon and those departing from Marseilles. In recital 160 of the contested decision, it was right to take account of the fact that those services were 'broadly substitutable'.

225 In the second place, it is clear that the Commission's analysis in the contested decision establishes to the requisite legal standard that, in the absence of a PSD for the additional service, Corsica Ferries' bid offering services out of Toulon, combined with the SNCM-CMN group's bid as part of the basic service, was able to guarantee territorial continuity throughout the year, including during peak periods; or, to put it another way, passenger demand would always have been met (see the examination of the first and second subsidiary parts of this third part above).

226 SNCM's claims to the effect that, in the absence of a PSD for the additional service, Corsica Ferries could, either gradually or suddenly, reassign its fleet to destinations other than Corsica, is but mere speculation and cannot therefore be upheld.

227 In the third place, SNCM's claims about the impact of the abolition of compensation paid in respect of the additional service on its position and that of Corsica Ferries is also pure speculation and must therefore be rejected.

*– The fourth subsidiary part: SNCM's competitors operating out of Toulon cannot be considered to be operating under normal market conditions*

228 SNCM argues that, contrary to what is stated in recital 166 of the contested decision, its competitors operating out of Toulon cannot be considered to be operating under normal market conditions. The service departing from Toulon is subsidised by State aid in the form of the social assistance scheme and thus carries with it PSOs.

229 The Commission and Corsica Ferries contend that this subsidiary part should be rejected.

230 The Commission, in observing in the last sentence of recital 166 of the contested decision that 'SNCM's competitors for passenger transport operating out of Toulon could be considered to be operating under normal market conditions', was not referring to a situation where there was no public intervention in the market. As is readily apparent from the first part of that sentence 'in the light of the presence of public service obligations and the social assistance scheme on all the lines operating between the French mainland and Corsica', the Commission intended merely to indicate that all the shipping companies offering passenger services between, inter alia, the port of Toulon and the ports of Corsica were covered by the social assistance scheme described in paragraph 14 above and, therefore, were subject to the requirements imposed by the PSOs provided for under that scheme, so that they should be regarded as carrying on their activities on the market under equivalent conditions. In other words, 'normal market conditions' were those which included that scheme and the associated PSOs.

231 Therefore, the fourth subsidiary part of the third part and the third part as a whole must be rejected as unfounded.

***The fourth part of the plea, put forward in the alternative: the Commission failed to demonstrate that the services provided as part of the additional service did not constitute a normal commercial transaction***

232 In the further alternative, should the additional service be held not to constitute an SGEI, SNCM criticises the Commission for having failed to demonstrate that the French authorities, by entering into a contract with SNCM for that service, had not acted like a private investor in normal market conditions and that the purchase of the services provided as part of the additional service could not therefore be classified as a normal commercial transaction.

233 As observed correctly by the Commission and Corsica Ferries, it is clear that the criterion of a private investor operating in a market economy is not applicable in a situation such as the one in the present case. Where a public authority presents itself as the organising and delegating authority of the public service, the applicability of that criterion is necessarily ruled out, since by definition it is acting as a public authority. Moreover, contrary to the view expressed by SNCM, nor can the French authorities' conduct in the present case be equated with their procuring maritime transport services in exchange for the payment of a price. What is in fact at issue in this case is an agreement whereby a public authority entrusts economic operators with the management of a public service in return for financial compensation being paid to them. In such a situation, it is the four *Altmark* criteria which apply for the purpose of determining whether such compensation constitutes State aid and, in particular, confers a selective advantage.

234 Consequently, the fourth part of the first plea cannot be upheld.

235 It follows that the first plea must be rejected as unfounded in its entirety. It must therefore be concluded that the Commission was correct in holding that the inclusion of the additional service within the scope of the public service remit did not meet a real public service need and that the French Republic had, therefore, committed a manifest error of assessment in classifying the additional service as an SGEI.

***The second plea: the Commission erred in finding that the PSDC did not fulfil the fourth Altmark criterion***

236 By its second plea, SNCM claims that the Commission erred in finding that the fourth *Altmark* criterion was not met in respect of either the basic service or the additional service. It submits that the procurement procedure for the PSDC ensured effective competition between operators and hence the choice of the most economically advantageous bid for the community.

237 The Commission and Corsica Ferries dispute SNCM's arguments.

238 It must be remembered that the fourth *Altmark* criterion sets out two alternative scenarios. Under the first scenario, the undertaking which is to discharge PSOs must be chosen pursuant to a public procurement procedure allowing for the selection of the tenderer capable of providing the services in question at the least cost to the community. Under the second scenario, the level of compensation must have been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

239 In the contested decision, the Commission took the view that neither of those two scenarios had been made out in the present case (see recitals 169 to 178 and 179 to 183 of the contested decision). In the present action, SNCM challenges only the Commission's findings on the first of those scenarios.

240 It is clear from a set of consistent indicia that the tendering procedure conducted in the present case clearly did not result in effective and open competition sufficient to make it possible to select the candidate capable of providing the maritime transport services at the least cost to the community.

241 First, it must be pointed out that the PSDC was awarded to the SNCM-CMN group following a negotiated procedure with publication, after the Conseil d'État (Council of State) had, on 15 December 2006, annulled in its entirety a first procurement procedure involving the PSD. As is clear from recital 170 of the contested decision and paragraph 66 of the SGEI Communication, a negotiated procedure with prior publication confers broad discretion on the contracting authority and may restrict the participation of interested operators. Such a procedure can therefore be deemed sufficient to satisfy the fourth *Altmark* criterion only in exceptional cases. Additionally, paragraph 68 of the same communication states that there may be circumstances in which a procurement procedure cannot allow for the least cost to the community because it does not give rise to a sufficiently open and genuine competition.

242 In the second place, it is noteworthy that only two bids were submitted following the publication of the notice of call for tenders: the joint bid from SNCM and CMN, on the one hand, and Corsica Ferries' bid, on the other. In theory, several other shipping companies could have submitted bids under the call for tenders, including at least three companies providing scheduled maritime transport services between the mainland and Corsica: Saremar (Italy-Corsica), Lauro (Italy-Corsica) and Moby (Italy-Corsica but also, for a period of time, mainland France-Corsica).

243 In the third place, and by extension of what is stated in paragraph 242 above, it must be held that, as is apparent from recitals 174 to 177 of the contested decision, a series of factors have indisputably discouraged or even prevented potential candidates from participating in the call for tenders.

244 First, it must be borne in mind that, as stated in recital 175 of the contested decision and as is apparent from paragraphs 60 and 106 of Decision 06-MC-03 of the Conseil de la concurrence (Competition Council, France) of 11 December 2006 on the request for interim measures in the maritime transport sector between Corsica and the mainland, the SNCM-CMN group had an important competitive advantage because of its position as an incumbent operator on the Marseilles-Corsica route using vessels which were already adapted to the requirements of the PSDC's tender specifications.

245 Second, the short time periods imposed under the PSDC award procedure necessarily had an exclusionary effect. It should be noted in that regard that the fresh notice of call for tenders and the final tender specifications were published on 30 December 2006 for implementation of the PSD from 1 May 2007 onwards, which was only four months later; the latter date was subsequently extended to 1 July 2007 by resolution of the Corsican Assembly on 27 April 2007. As a result, the period between the date of award of the PSD — which award finally took place on 7 June 2007 — and the implementation date of the PSD could only be extremely brief and was, in the event, only 23 days. Such short time periods clearly did not allow operators who were not already present on the Marseilles-Corsica route to deploy their vessels from other routes or to acquire other vessels meeting the requirements of the tender specifications. Those operators would not have taken the very high economic risk to adapt their fleet in advance in the absence of any favourable indication as to the possibility of winning the contract.

246 It is true that, despite the obstacles created by those very short time periods, Corsica Ferries was able to submit a bid in the call for tenders in question. However, it should be noted that it was unable to propose a date prior to 12 November 2007 for the start of PSD operations precisely because its fleet had to remain mobilised in Nice and Toulon until then, as the tickets for the tourist season had been put up for sale the previous January.

247 Third, it is clear that certain technical constraints have also limited the number of candidates who are likely to submit a bid in the call for tenders, including the fact that the vessels had to meet specific technical requirements in order to be able to manoeuvre in some of the Corsican ports. For example, as stated in footnote 107 of the contested decision, in 2007 the port of Bastia did not allow the manoeuvring of vessels over 180 metres long. This constraint, coupled with the requirement of a high minimum number of linear meters in the PSDC's tender specifications for freight transport, implied the construction of almost tailor-made vessels similar to some of SNCM's vessels, such as the *Paglia Orba* and the *Pascal Paoli*. However, as noted in footnote 109 of the contested decision, the cost of vessels likely to meet the conditions of those tender specifications was particularly high. In addition to those elements, it was stipulated that vessels intended for public service could not be more than 20 years old, with the possibility of a derogation for 2007 and 2008, which benefited SNCM directly whilst having the effect of excluding five vessels from the Corsica Ferries fleet available for the operation of the PSD, as explained very convincingly by the Commission in its reply to one of the Court's written questions.

248 Moreover, in paragraph 56 of its Decision 06-MC-03 of 11 December 2006 (see paragraph 244 above), cited in footnote 106 of the contested decision, the Competition Council concluded that, 'although in theory, several companies had the necessary vessels and could have responded to the call for tenders, a certain number of particularities of the tender regulations, the periods allowed to respond to that call for tenders as well as a number of constraints of a technical or commercial nature, in practice reduced the number of bidders to the three companies already active in servicing Corsica from the ports of Marseilles, Toulon and Nice' (see also paragraphs 120 to 133 of Decision 09-D-10 of the Competition Council of 27 February 2009 on practices in the maritime transport sector between Corsica and the mainland).

249 In the fourth place, as was correctly stated in recital 172 of the contested decision, Corsica Ferries' bid, which was therefore the only offer competing with that of the SNCM-CMN group, was rejected on the basis of selection criteria, and not award criteria, that is to say, without even comparing the merits of the offers in order to retain the one which was economically the most advantageous. Thus, it is clear from the resolution of the Corsican Assembly of 7 June 2007 that Corsica Ferries' bid was rejected on the grounds that it was not in a position to 'fix firmly and definitively the date on which it would be able to operate the [PSD]'. More precisely, as stated above in paragraph 246, Corsica Ferries was unable to propose a date prior to 12 November 2007 for the implementation of the PSD, whereas the start of the PSD had already been set for 1 July 2007. Moreover, the report of the President of the Corsican Executive Council on maritime service between Marseilles and Corsica, on the basis of which that resolution was adopted, shows that some of the vessels of Corsica Ferries exceeded the maximum age requirement for vessels laid down in the specific regulations of the call for tenders, as they had been commissioned before 1 January 1987 (see also footnote 20 of the contested decision).

250 Accordingly, SNCM's contention to the effect that Corsica Ferries' bid was rejected on the ground that it was not the most economically advantageous cannot be upheld. Furthermore, the reasons for the rejection are not among the award criteria set out in the specific regulations of the call for tenders, which, under the heading 'Selection criterion', provides inter alia:

'For the award of the contracts, the [CRA] will decide on the basis of the overall financial commitment that it will take on and the factors relating to quality of service and economic development for the island provided by the bidding undertakings, in particular, the share of the services and activities envisaged in the island market, within the limits of the capacities and types of production.'

251 In the fifth place, the Commission's finding in recital 177 of the contested decision must be upheld: 'the existence of numerous clauses providing for meetings associated with the freedom given to the [CTB] to decide upon exemptions to rules may also have helped to dissuade tenderers from taking part in the procedure by raising doubts about some technical and economic parameters that were critical to the preparation of a bid'.

252 Thus, first, Article 2 of the PSDC provides that the obligations set out in the tender specifications may be amended during a transitional period ending on 31 December 2008. The obligations referred to therein, which may be relaxed at the discretion of the CTB, cover essential aspects of the PSD, since they relate to minimum capacities (see point I(a)(1.3), point I(b)(1.3), point I(c)(1.3), point I(d)(1.3) and point I(e)(1.3) of the tender specifications), the quality of service and the date of commissioning of the vessels (see introduction to point III of the tender specifications). Admittedly, the derogations were only for a period of 18 months, but they were no less significant, since such a period was sufficient to allow for the reorganisation of a fleet of vessels, if necessary.

253 Secondly, the PSDC's tender specifications stipulate that 'with the agreement of the CTB, inter alia in order to enable fulfilment of the regulatory obligations to maintain/repair/reclassify the vessels, a reduced level of service may be allowed in respect of the abovementioned capacities, inter alia for passengers (up to a limit of 30% reduction), which may be put in place during the period from 1 October to 31 March, outside school holidays and at any time of year in the case of an unforeseen event' (see point I(a)(1.4), point I(b)(1.4), point I(c)(1.4), point I(d)(1.4) and point I(e)(1.4) of the tender specifications). It should be noted that a reduction in service was possible 'inter alia' to comply with the regulatory obligations to maintain/repair/reclassify the vessels and not 'solely' for that reason, as SNCM claims. Moreover, as rightly pointed out by the Commission, the discretion that provision conferred on the CTB was very broad, as it left open both the reasons for which the reductions could be made and their scope ('inter alia for passengers') and their magnitude (a maximum of 30%) during all the off-peak periods, that is to say, those during which the operation of the various maritime lines was, by definition, most loss-making and, therefore, during which a reduction in services was the most profitable for the concession holders.

254 Thirdly, given their scope, the safeguard clause and the adaptation clause provided for in Article 7 and Article 8 respectively of the PSDC could also give rise to doubts about certain technical and economic parameters (see paragraphs 33 to 35 above).

255 None of the other arguments put forward by SNCM casts any doubt on the foregoing considerations.

256 Thus, in the first place, it is incorrect of SNCM to claim that, in paragraph 59 of its judgment of 11 September 2012, *Corsica Ferries France* v *Commission* (T-565/08, EU:T:2012:415), the Court concluded that the PSD for the period 2007-2013 had been obtained by the SNCM-CMN group 'in accordance with the new Community rules, and following a European call for tenders'. To begin with, the case giving rise to that judgment did not concern the PSD for the period 2007-2013, but an SGEI relating to the period 1991-2001. Moreover, in paragraph 59 of that judgment, the Court merely found that SNCM and CMN had together obtained the PSD after 2001 in accordance with the new Union rules and following a European call for tenders. It did not examine the lawfulness of those calls for tenders — which were not, moreover, the subject of the dispute — nor, a fortiori, whether they were liable to fulfil the fourth *Altmark* criterion.

257 In the second place, SNCM cannot successfully rely on the fact that the CRA was never presented with an application from potential candidates who had withdrawn from participating in the consultation due to constraints imposed by the tender specifications or the award timetable of the PSD. Even if that were true, it is not in itself capable of influencing the Commission's reasoning and findings set out in the contested decision relating to the failure to comply with the fourth *Altmark* criterion.

258 In the third place, nor can SNCM argue that both the Conseil d'État (Council of State), in a decision of 5 June 2007 and in its decision of 13 July 2012 referred to in paragraph 27 above, and the Competition Council, in its Decision 07-D-13 of 6 April 2007 relating to new requests for interim measures in the field of maritime transport between Corsica and the mainland, allegedly considered the procedure followed by the CRA for awarding the PSDC to be perfectly legal.

259 First of all, decision of the Conseil d'État (Council of State) of 5 June 2007 was a decision made following an appeal on a point of law brought by Corsica Ferries against the order of the judge hearing the application for interim measures of the tribunal administratif de Bastia (Administrative Court of Bastia) of 27 April 2007, referred to in paragraph 20 above, who had only partially allowed its application for annulment of the entire procedure organised by the CRA and the CTB for the renewal of the PSD for the maritime service to Corsica from the port of Marseilles. In addition to the fact that the jurisdiction of the judge hearing the application for interim measures will by its very nature be limited, it should also be noted that, as regards the merits of the order under appeal, in its decision the Conseil d'État (Council of State) restricted itself in essence to holding that the judge hearing the application for interim measures in the tribunal administratif de Bastia (Administrative Court of Bastia) had in no way distorted the facts or evidence in the file. Moreover, that decision relates only to that part of Corsica Ferries' forms of order sought that had been dismissed by that judge who, on grounds of infringement of the principle of equality as between candidates, had annulled the negotiation phase of the procedure and consequently the decision to accept the SNCM-CMN group's bid and propose that the Corsican Assembly allocate the PSD to that group.

260 Next, contrary to what SNCM claims, it cannot be inferred from the decision of the Conseil d'État (Council of State) of 13 July 2012 that it upheld the lawfulness of the procedure followed by the CRA for the award of the PSDC. In the second part of its decision, which concerns State aid law and, more specifically, compliance with the obligation laid down in Article 108(3) TFEU to give prior notification, the Conseil d'État (Council of State) focused solely on determining whether the safeguard clause in Article 7(1) of the PSDC, viewed in isolation, could constitute State aid. Furthermore, following the decision of the Conseil d'État (Council of State) of 13 July 2012 setting aside the judgment of the Cour administrative d'appel de Marseille (Marseilles Administrative Court of Appeal) of 7 November 2011 and referring the case back to it, that court, by judgment of 6 April 2016, set aside the judgment of the tribunal administratif de Bastia (Administrative Court of Bastia) of 24 January 2008 and annulled the resolution and decision referred to in paragraphs 23 and 25 above, precisely after having found that the fourth *Altmark* criterion was not met.

261 Lastly, it must be remembered that the decision of the Competition Council of 6 April 2007 related to requests for interim measures and could not therefore have prejudged the outcome as to the merits of the dispute in question. Nor can any inferences be drawn from that decision as regards compliance with the fourth *Altmark* criterion. The questions before the Competition Council in fact related to the possible anticompetitive nature of the formation of the SNCM-CMN temporary group and the allegedly excessive amount of the subsidy requested by that group in the bid it submitted following the publication of the fresh call for tenders. Lastly, it should be noted that, in paragraph 46 of its decision, the Competition Council itself states that the decision to choose 1 May 2007 as the implementation date of the PSD (which date was subsequently deferred to 1 July 2007) had an exclusionary effect.

262 It follows from all the foregoing considerations that the Commission did not err in finding that the fourth *Altmark* criterion was not fulfilled in respect of the basic service and the additional service. The second plea must therefore be rejected as unfounded.

***The third plea, relied on in the alternative: the Commission erred in calculating the amount of aid to be recovered***

263 SNCM's third plea is directed against recital 218 of the contested decision, which reads as follows:

'To determine the amount of aid to be recovered, without interest, the Commission considers that SNCM's cost accounting provides an adequate basis for allocating compensation between the basic service and the additional service. On this basis, the amount of aid to be recovered shall include the following:

(a) the amount of compensation actually paid from 2007 to 2011 under the additional service, amounting to EUR 172 744 million …;

(b) the monthly payments made for 2012 under the additional service, currently estimated at EUR 38 million and the remainder of the compensation, due for payment after the final report on service implementation was sent, if already paid;

(c) monthly payments made for 2013 under the additional service up to the date of this Decision, currently estimated at EUR 9.5 million, it being recalled that France must cancel all payments subsequent to that date.'

264 By this plea, which is subdivided into three parts, SNCM claims that, even if the additional service could be distinguished from the basic service and the compensation paid in respect of the additional service did not satisfy the *Altmark* criteria, the Commission committed a manifest error of assessment and infringed Article 106(2) and Article 107 TFEU, as well as the principles of proportionality and prohibition of unjust enrichment by fixing the amount of aid to be recovered at the full amount of that compensation.

265 The Commission and Corsica Ferries consider that each part of the third plea must be rejected as unfounded.

***The first part: in determining the amount of the aid to be recovered, the Commission erred in failing to take account of the costs incurred in providing the additional service***

266 SNCM criticises the Commission for having failed to take account, in determining the amount of the aid which had to be repaid, of the costs it incurred in providing the additional service, which were considerable and were not covered by the amount of compensation paid for that service or by revenues generated from passenger fares. In so doing, the Commission infringed Article 106(2) and Article 107 TFEU and the principles of proportionality and prohibition of unjust enrichment whilst also committing a manifest error of assessment.

267 It must be remembered that, as already pointed out in paragraph 233 above, and as rightly pointed out by the Commission, the present case does not concern a situation in which the State acquires a specific good or service in exchange for the payment of a price. What is at issue in this case is an agreement whereby a public authority entrusts economic operators with the management of a public service in return for financial compensation being paid to them. In such a situation, the case-law arising from the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), applies. Thus, if the compensation does not meet all four *Altmark* criteria, it will be held to confer an advantage on its recipients and, provided that the other conditions required for a finding of State aid incompatible with the internal market are fulfilled, it must be repaid in full by those recipients.

268 In the present case, since, as was found in the examination of the first and second pleas in law, the first and fourth *Altmark* criteria were not fulfilled as regards the compensation paid to SNCM for the additional service, as a whole it constituted an advantage for that company. Since the other conditions for establishing that the compensation had to be classified as State aid incompatible with the internal market are met, it must be held that the Commission's ordering the recovery of the full amount of the aid did not disregard Article 106(2) and Article 107 TFEU or the principles of proportionality and prohibition of unjust enrichment. It must be borne in mind in that regard that recovery of unlawful State aid is the logical consequence of a finding that it is unlawful. Consequently, such a recovery of State aid unlawfully granted, for the purpose of re-establishing the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aid (judgment of 21 March 1990, *Belgium* v *Commission*, C-142/87, EU:C:1990:125, paragraph 66).

269 In particular, the obligation to reimburse that amount to the French authorities cannot be regarded as entailing unjust enrichment for those authorities, since they are merely recovering an amount that should not have been paid to SNCM.

270 As regards SNCM's claim in the reply, to the effect that the recovery of the amount fixed by the Commission means its 'death sentence' and its liquidation, suffice it to recall that it is settled case-law that the fact that the undertaking concerned is in difficulty or insolvent does not affect the obligation of recovery (judgment of 11 December 2012, *Commission* v *Spain*, C-610/10, EU:C:2012:781, paragraph 71).

271 Lastly, SNCM's claim that the additional service has recorded 'chronic under-compensation' has not been established to the requisite legal standard. On the contrary, the explanations given by the Commission in reply to a written question from the Court and at the hearing tend to confirm that that service, in fact, benefited from overcompensation.

272 In the light of the foregoing, the first part of the third plea in law must be rejected as unfounded.

***The second part: in determining the amount of aid to be recovered, the Commission erred in failing to take account of the under-compensation for the basic service***

273 SNCM submits that, in its assessment of the amount of aid to be repaid, the Commission ought to have taken account of the 'chronic and massive' under-compensation for the basic service, which came under the same PSD as the additional service, in the period from 2007 to 2011. The Commission thus erred in law and in the assessment of the amount of the advantage granted to SNCM whilst also infringing the principles of proportionality and prohibition of unjust enrichment.

274 That complaint cannot be upheld.

275 As rightly pointed out by the Commission, it cannot be accepted that compensation paid in return for the performance of a particular service and constituting State aid has been artificially allocated as compensation for a public service, even if those two services were provided for by one and the same agreement. Public service compensation granted to an undertaking entrusted with the operation of an SGEI must be established in the light of the costs incurred for providing that SGEI alone.

276 Moreover and in any event, it is incorrect to claim that the basic service has been the subject of 'chronic and massive' under-compensation. It follows from the calculations made by the Commission on the basis of the return on assets (ROA) financial indicator — which measures in percentage the ratio between earnings and total assets — and SNCM's cost accounting referred to in paragraph 155 above, which calculations were set out explicitly by the Commission in its reply to one of the Court's written questions at the hearing, that that service was neither overcompensated nor under-compensated (see also the table set out in recital 207 of the contested decision).

***The third part: the Commission committed a manifest error of assessment in determining the share of the annual compensation attributable to the additional service***

277 SNCM submits that, even if the amount of the benefit to be repaid tallies with the full compensation allocated for the additional service, *quod non*, the Commission committed a manifest error of assessment in determining that amount. It submits that the Commission made an arbitrary and erroneous choice on the basis of its cost accounting and, more precisely, the breakdown of the income statement by type of vessel (the aggregate income statement for passenger-cargo vessels being equated with the income statement for the basic service and the one for the ferries with the income statement for the additional service) in order to determine the share of the annual compensation attributable to the additional service. It proposes two other methods which could have been used by the Commission to that end.

278 It should be noted that this part is based entirely on the premiss that the Commission could not equate the basic service with the services provided by the cargo vessels and the additional service with the services provided by the ferries. However, as has already been demonstrated in paragraphs 158 to 162 above, that premiss is incorrect. The conclusion is, therefore, that the method used by the Commission to determine the amount of the advantage derived from the compensation for the additional service, which is based on SNCM's own cost accounting (which draws a clear distinction between passenger vessels/ferries, on the one hand, and cargo vessels, on the other), was particularly suitable, unlike the two alternative methods proposed by SNCM, which are not acceptable as they lead to confusion between the basic service and the additional service and the means used to provide those services.

279 It follows from the foregoing that the third part of the third plea and the third plea in its entirety must be rejected as unfounded.

***The fourth plea: infringement of the principle of protection of legitimate expectations***

280 Under the fourth plea, SNCM calls forth four allegedly exceptional circumstances capable of giving rise to a legitimate expectation on its part that the aid in question was lawful and therefore precluded the Commission from ordering the recovery thereof.

281 The Commission and Corsica Ferries dispute SNCM's arguments.

282 It should be remembered as a preliminary point that, according to settled case-law, any individual in regard to whom an EU institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectations (judgment of 11 March 1987, *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)* v *EEC*, 265/85, ECR, EU:C:1987:121, paragraph 44). This presupposes that three cumulative conditions have been satisfied. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Union authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules (see judgment of 30 June 2005, *Branco* v *Commission*, T-347/03, EU:T:2005:265, paragraph 102 and the case-law cited; judgments of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 77; and of 30 June 2009, *CPEM* v *Commission*, T-444/07, EU:T:2009:227, paragraph 126).

283 It is also settled case-law that undertakings receiving aid cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in the FEU Treaty. A diligent economic operator should normally be able to determine whether that procedure has been followed (see judgment of 20 March 1997, *Alcan Deutschland*, C-24/95, EU:C:1997:163, paragraph 25 and the case-law cited). In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 108(3) TFEU, the

recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (see judgment of 27 September 2012, *Fedecom* v *Commission*, T-243/09, not published, EU:T:2012:497, paragraph 93 and the case-law cited).

284 It is clear that none of the four allegedly exceptional circumstances relied on by SNCM could have given rise to a legitimate expectation on its part that the aid in question was lawful.

285 In the first place, SNCM cannot successfully draw an argument from the fact that the Commission, in its earlier decisions relating to the previous PSDs for maritime services to Corsica (Decision 2002/149 and 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)), did not conclude that a separate analysis of the basic service and the additional service was necessary.

286 The fact that the Commission was able to come to the conclusion that an SGEI for maritime services to Corsica satisfied a real public service need during an earlier period provides no indication, let alone any guarantee, that such a need would still exist for the period 2007-2013. As stated in paragraph 99 above, the assessment of the existence of such a need may change over time in the light of the development of market forces. The decisions referred to in paragraph 285 above were, moreover, adopted by the Commission in 2001 and 2008 taking into account a factual context different from that which led to the adoption of the contested decision, inter alia in terms of the evolution of market shares. That view is further confirmed by the passages in recitals 78 and 80 of Decision 2002/149 referred to in paragraph 99 above and by paragraph 70 of the judgment of 11 September 2012, *Corsica Ferries France* v *Commission* (T-565/08, EU:T:2012:415), a judgment relied on in fact by SNCM in support of this claim, from which it emerges that, in view of the particularly rapid development of competition on the market concerned, the analyses of the existence of a real public service need in a given period cannot provide any conclusive evidence casting doubt on the Commission's assessment of that need for a different time period.

287 In the second place, SNCM cannot criticise the Commission for having applied paragraph 48 of the SGEI Communication on the ground that, on the date that the PSDC was signed, that communication had not yet been adopted.

288 Paragraph 48 of the SGEI Communication, which appears under Title 3.2 'Existence of [an SGEI]', reads as follows:

'The Commission … considers that it would not be appropriate to attach specific [PSOs] to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions …'

289 In recital 166 of the contested decision, after having reproduced the passage referred to in paragraph 288 above, the Commission states that 'in this context, [it] considers that the elements mentioned above establish that compensation for costs incurred by SNCM for the provision of the additional service also runs counter to [its] practice in this regard'.

290 SNCM's criticism directed at the Commission cannot be upheld. As is clear from paragraph 3 thereof, the sole purpose of the SGEI Communication is to clarify the key concepts underlying the application of the State aid rules to public service compensation. Thus, in order to determine whether or not the first *Altmark* criterion was met in the present case, the Commission merely applied the objective rules of the Treaty and took account of the relevant provisions of the Maritime Cabotage Regulation as interpreted by the Court of Justice in the judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107), that is to say, principles which, in substantive terms, existed at the time that the PSD was concluded.

291 In the third place, SNCM cannot successfully rely on the allegedly excessive length of the administrative procedure which led to the adoption of the contested decision as a basis for its legitimate expectation that the aid in question was lawful.

292 First of all, it is settled case-law that where, as in the present case, aid was not notified to the Commission, any apparent failure to act on its part in relation to the measure is irrelevant (judgments of 11 November 2004, *Demesa and Territorio Histórico de Álava* v *Commission*, C-183/02 P and C-187/02 P, EU:C:2004:701, paragraph 52, and of 27 September 2012, *Fedecom* v *Commission*, T-243/09, not published, EU:T:2012:497, paragraph 93). Moreover, as is clear from the findings set out in paragraphs 294 to 296 below, at no time was the Commission inactive after receiving the complaint lodged in the present case by Corsica Ferries.

293 Next, it should be remembered that on 27 June 2012 the Commission informed the French Republic of its decision to open the formal investigation procedure under Article 108(2) TFEU on potential aid granted to SNCM and CMN contained in the PSDC and that this decision was published in the *Official Journal of the European Union* on 5 October 2012. Even if it is accepted that, prior to that publication, a diligent economic operator might have been able to lay claim to a legitimate expectation that such aid would be granted, it was no longer entitled to entertain such an expectation after that publication. The initiation of the formal investigation procedure means that the Commission has serious doubts as to the compatibility of the aid in question with EU law. From that time onwards, a diligent economic operator may not therefore rely on the continuity of that aid (judgment of 21 March 2013, *Magdeburger Mühlenwerke*, C-129/12, EU:C:2013:200, paragraph 47).

294 Lastly, and in any event, it must be held that, although the length of the administrative procedure was admittedly relatively long, it cannot be regarded as unreasonable. While it is true that the principles and context underlying the contested decision are not fundamentally different from those underlying the previous Commission decisions relating to maritime service to and from Corsica, the fact nevertheless remains that the present case presented a certain complexity and required the establishment of numerous facts, which was made more difficult by the absence of prior notification from the French authorities.

295 In that context, it must be noted that, contrary to SNCM's assertions, the Commission did not wait more than six months before adopting any measure following the filing on 27 September 2007 of Corsica Ferries' complaint. SNCM fails to mention that Corsica Ferries filed supplements to that complaint on 30 November and 20 December 2007, so that in fact it was within a period of less than three months, on 13 March 2008, that the Commission took a first concrete step in the present case, by sending a request for information to the French authorities, to which the latter replied on 3 June 2008. A second request for information was sent by the Commission to the French authorities on 12 November 2008, to which they replied on 14 January 2009.

296 SNCM's claim that the Commission then remained inactive for almost three years, until 13 October 2011, when it sent a third request for information to the French authorities, is misleading. In fact, on 20 May and 16 July 2010, 22 March and 22 June 2011, the Commission received additional information from Corsica Ferries in support of its complaint, which it had to examine and deal with. The French authorities replied to that third request for information on 7 December 2011. On 15 December 2011 and 10 January 2012, Corsica Ferries provided additional information to the Commission. On 20 January 2012, the French authorities replied to a fourth request for information from the Commission, which had sent it to them on 14 December 2011.

297 The period of approximately five months which ran until 27 June 2012, the date on which the Commission notified the French Republic of the decision to open the formal investigation procedure, cannot be regarded as excessive. The same is true of the period of a little more than 10 months between 27 June 2012 and the date of adoption of the contested decision on 2 May 2013. It must be remembered in that regard that the French authorities submitted their observations on the decision to

open the formal investigation procedure on 13 July and 7 September 2012, and that Corsica Ferries, SNCM and CMN also submitted observations on that decision, which were communicated to the French authorities, who then submitted comments on those observations by letters dated 14 November 2012 and 3 January, 16 January and 12 February 2013.

298 In the fourth place, SNCM cannot successfully rely on the Conseil d'État (Council of State) decision of 13 July 2012 and, in particular, the fact that the latter confirmed the need for an overall analysis of the basic service and the additional service.

299 First of all, as is clear from the case-law referred to in paragraph 282 above, only the institutions of the Union, and not a court of a Member State, may give rise to a legitimate expectation. In that context, it should be borne in mind that, as explained in paragraph 176 above, the Commission could not have been bound by the interpretation of the Conseil d'État (Council of State) of the provisions of the Maritime Cabotage Regulation.

300 Next, when the Conseil d'État (Council of State) handed down its decision on 13 July 2012, the Commission had already decided to open the formal investigation procedure under Article 108(2) TFEU concerning the potential aid granted to SNCM and CMN contained in the PSDC. Therefore, and having regard to paragraph 293 above, as long as the Commission had not delivered its final decision, there could be no legitimate expectation that the aid in question was lawful, irrespective of whatever the Conseil d'État (Council of State) may have decided.

301 Lastly, as rightly observed by the Commission, since the end of 2006, the question of the PSD for maritime services to and from Corsica has been the subject of numerous sets of proceedings before the French courts, which have resulted in several changes in the case-law and culminated in the judgment of 6 April 2016 of the Cour administrative d'appel de Marseille (Marseilles Administrative Court of Appeal) setting aside the judgment of the tribunal administratif de Bastia (Administrative Court of Bastia) of 24 January 2008, as well as the resolution of the Corsican Assembly of 7 June 2007 and the decision of the President of the Corsican Executive Council of the same day (see paragraphs 17, 20 and 27 above).

302 In the light of the foregoing, the fourth plea must be rejected as unfounded.

### *The fifth plea: infringement of the principle of equal treatment*

303 In the fifth plea in law, SNCM claims that the contested decision, in ordering the French Republic to recover the sums paid to it under the PSDC for the additional service without providing for any other compensation options for that service, introduces unjustified, unequal treatment of it as compared to the other operators of maritime routes between Corsica and the mainland, be they CMN or competitors operating outside the framework of the PSD.

304 The Commission and Corsica Ferries contend that that fifth plea should be rejected as unfounded.

305 It must be remembered that observance of the principle of equality of treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgments of 17 October 1995, *Fishermen's Organisations and Others*, C-44/94, EU:C:1995:325, paragraph 46, and of 30 March 2006, *Spain* v *Council*, C-87/03 and C-100/03, EU:C:2006:207, paragraph 48).

306 In the present case, neither of the two situations relied on by SNCM is capable of constituting an infringement of the principle of equal treatment.

307 In the first place, SNCM is incorrect in criticising the fact that, in the contested decision, the Commission classified the compensation received by it for the provision of the additional service on the Marseilles-Propriano route (see point I(d)(1.4), of the PSDC's tender specifications) as State aid incompatible with the internal market, even though it did not classify the compensation received by CMN for the 'additional capacities that the latter [put] in place on this same route between May and September' in the same way.

308 The 'additional capacities' referred to by SNCM fall within the scope of point I(d)(1.3)(i) of the PSDC's tender specifications and therefore form an integral part of the basic service and not the additional service, as SNCM claims. This is confirmed inter alia by one of the tables in Section B, 'Presentation of the standard years' in Annex 2 to the PSDC, which shows that the reinforcement of the basic service provided for in that provision of the tender specifications was achieved in practice by the addition of one round trip per week for CMN's passenger-cargo vessels the *Kalliste* or the *Girolata*, to the round trips of its passenger-cargo vessel the *Scandola*. As stated in paragraphs 160 and 161 above, however, the basic service was provided using passenger-cargo vessels, whereas the additional service was provided using ferries.

309 Since the additional service was provided only by SNCM and only the compensation paid in respect of that service was considered by the Commission to be State aid incompatible with the internal market, no infringement of the principle of equal treatment resulted from the Commission's ordering the recovery of only that compensation and not the compensation paid to the CMN for services coming under the basic service.

310 In the second place, SNCM is incorrect in alleging unequal treatment of it as compared to the operators offering maritime transport services on the Toulon-Corsica and Nice-Corsica routes. In fact, it was not in a situation comparable to that of those operators, since it alone provided the additional service within the framework of the PSDC and was compensated for that, whilst the operators were covered by the social assistance scheme referred to in paragraph 14 above. Moreover, unlike that compensation, the assistance scheme was declared compatible with the internal market by the Commission (see paragraph 14 above).

311 In that context, SNCM is also incorrect in claiming that as a result of the contested decision it was obliged to offer certain transport capacities on the Marseilles-Corsica route without being able to claim any compensation, either under the PSDC or under the social assistance scheme, whilst shipping companies operating out of Toulon or Nice were entitled to compensation under the social assistance scheme. That situation is in fact attributable not to the Commission but to the French authorities who, as from 1 January 2002, organised the public maritime transport service between Corsica and mainland France under two parallel management modes: on the one hand, a PSD agreement for lines departing from Marseilles, giving rise to financial compensation for concession holders, and, on the other, a system of social assistance for passengers transported on lines departing from Nice and Toulon.

312 The fifth plea must therefore also be rejected as unfounded.

313 The application in its entirety must accordingly be dismissed as unfounded.

**Costs**

314 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since SNCM has been unsuccessful, it must be ordered to bear its own costs and to pay those of the Commission and Corsica Ferries, in accordance with the forms of order sought by them.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Société nationale maritime Corse Méditerranée (SNCM) to bear its own costs and to pay those incurred by the European Commission and Corsica Ferries France SAS.**

Frimodt Nielsen Collins Valančius

Delivered in open court in Luxembourg on 1 March 2017.

[Signatures]

# Table of contents

Background to the dispute ..... 2

Principle actors ..... 2

Maritime transport services between mainland France and Corsica and public service delegation agreements ..... 3

Procedure before the Commission and the contested decision ..... 6

Procedure and forms of order sought ..... 10

Law ..... 11

Preliminary observations ..... 12

The first plea: the Commission erred in finding that the additional service did not constitute an SGEI .. 13

The first part: the Commission erred in law by carrying out a detailed examination of the need for the service in the light of a real public service need ..... 13

– The first subsidiary part: the Commission disregarded its previous decision-making practice and the case-law ..... 13

– The second and fourth subsidiary parts: the Commission disregarded the Member States' wide discretion and the scope of the judgment of 20 February 2001, *Analir and Others* (C-205/99, EU:C:2001:107) and of the Maritime Cabotage Regulation ..... 15

– The third subsidiary part: the Commission misapplied the rules governing the burden of proof . 19

The second part: the Commission committed an error of law, an error of fact and a manifest error of assessment in treating the additional capacity to be provided during peak periods in the same way as an additional service and evaluating that service separately from the basic service under the first *Altmark* criterion ..... 21

– The first subsidiary part: the PSDC does not make a distinction between the basic service and the additional service ..... 21

– The second subsidiary part: the Commission erred in equating the basic service with the services offered by cargo vessels and the additional service with the services offered by the ferries ..... 23

– The third subsidiary part, put forward in the alternative: the additional service is justified by the real public service need which is met by the basic service ..... 25

The third part, relied on in the alternative: the additional service, viewed in isolation, fulfils the first *Altmark* criterion ..... 28

– The first subsidiary part: the Commission erred in assessing the substitutability of passenger transport services departing from Marseilles with those departing from Toulon ..... 28

– The second subsidiary part: the Commission erred in its assessment of the shortage of private initiative ..... 30

– The third subsidiary part: the Commission omitted, incorrectly, to analyse the impact of the abolition of the additional service on the supply actually observed ..... 32

– The fourth subsidiary part: SNCM's competitors operating out of Toulon cannot be considered to be operating under normal market conditions ..... 33

The fourth part of the plea, put forward in the alternative: the Commission failed to demonstrate that the services provided as part of the additional service did not constitute a normal commercial transaction ..... 34

The second plea: the Commission erred in finding that the PSDC did not fulfil the fourth Altmark criterion ..... 34

The third plea, relied on in the alternative: the Commission erred in calculating the amount of aid to be recovered ..... 39

The first part: in determining the amount of the aid to be recovered, the Commission erred in failing to take account of the costs incurred in providing the additional service ..... 39

The second part: in determining the amount of aid to be recovered, the Commission erred in failing to take account of the under-compensation for the basic service ..... 40

The third part: the Commission committed a manifest error of assessment in determining the share of the annual compensation attributable to the additional service ..... 41

The fourth plea: infringement of the principle of protection of legitimate expectations ..... 41

The fifth plea: infringement of the principle of equal treatment ..... 44

Costs ..... 45