JUDGMENT OF THE GENERAL COURT

(Third Chamber, Extended Composition)

21 May 2010 *

In Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04,

French Republic, represented initially by G. de Bergues, R. Abraham and S. Ramet, subsequently by E. Belliard, G. de Bergues and S. Ramet, and finally by E. Belliard, G. de Bergues, A.-L. Vendrolini and J.-C. Niollet, acting as Agents,

applicant in Case T-425/04,

France Télécom SA, established in Paris (France), represented initially by A. Gosset-Grainville and S. Hautbourg, and subsequently by S. Hautbourg, lawyers,

applicant in Case T-444/04,

* Language of the case: French.

Bouygues SA, established in Paris,

Bouygues Télécom SA, established in Boulogne-Billancourt (France),

represented by J. Vogel, F. Sureau, D. Théophile and J. Blouet Gaillard, lawyers,

applicants in Case T-450/04,

Association française des opérateurs de réseaux et services de télécommunications (AFORS Télécom), established in Paris, represented by O. Fréget, F. Herrenschmidt, M. Struys and L. Eskenazi, lawyers,

applicant in Case T-456/04,

v

European Commission, represented initially by C. Giolito and J. Buendía Sierra, and subsequently by C. Giolito and D. Grespan, acting as Agents,

defendant,

supported by

French Republic, represented, in Case T-450/04, by E. Belliard, G. de Bergues, A.-L. Vendrolini and J.-C. Niollet, and, in Case T-456/04, by G. de Bergues, acting as Agents,

intervener in Cases T-450/04 and T-456/04,

by

Bouygues SA, established in Paris,

and

Bouygues Télécom SA, established in Boulogne-Billancourt,

represented by J. Vogel, F. Sureau, D. Théophile and J. Blouet Gaillard, lawyers,

interveners in Case T-444/04,

and by

France Télécom SA, established in Paris, represented initially by A. Gosset-Grainville and S. Hautbourg, and subsequently by S. Hautbourg, lawyers,

intervener in Cases T-450/04 and T-456/04,

APPLICATIONS for annulment of Commission Decision 2006/621/EC of 2 August 2004 on the State aid implemented by France for France Télécom (OJ 2006 L 257, p. 11),

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of J. Azizi (Rapporteur), President, E. Cremona, I. Labucka, S. Frimodt Nielsen and K. O'Higgins, Judges,

Registrar: E. Coulon,

having regard to the written procedure and further to the hearing on 21 April 2009,

gives the following

Judgment

Background to the dispute

I — *France Télécom's financial situation during the period from 2001 to 2004*

1 Until 1990, the activities engaged in by France Télécom SA ('FT') came under a directorate of the French Ministry of Posts and Telecommunications. FT was formed

in 1991 as a public law corporation and since 31 December 1996 has had the status of a public limited company. Since October 1997, FT has been listed on the stock exchange. At the time of the adoption of the decision at issue in these proceedings, FT was a group active in the supply of telecommunications networks and services, mainly in France, in particular in the fixed telephony sector and also, through its subsidiaries, Orange, Wanadoo and Equant, in the mobile telephony, internet, data transmission and other information services sectors. In 2002, the French State's participation in FT's capital was 56.45%.

2 On 31 December 2001, FT posted a net debt of EUR 63.5 billion and a loss of EUR 8.3 billion in its published accounts for 2001.

3 As at 30 June 2002, FT's net debt reached EUR 69.69 billion, including EUR 48.9 billion of bond debt falling due for repayment during the period from 2003 to 2005. That bond debt mainly stemmed from the acquisitions made by FT from 1999 onwards aimed at developing its activity in the mobile telephony sector, such as the takeover of the British operator Orange and the acquisition of part of the capital of the German operator Mobilcom.

4 In the light of FT's financial situation, the French Minister for Economic Affairs, Finance and Industry ('the Minister for Economic Affairs'), in an interview published in the daily newspaper *Les Echos* on 12 July 2002 ('the declaration of 12 July 2002'), said that:

'We are the majority shareholder, with 55% of the capital … The State shareholder will behave like a prudent investor and would take appropriate steps if [FT] were to

face any difficulties … I repeat, if [FT] were to face any financing problems, which is not the case today, the [French] State would take whatever decisions were necessary to overcome them. You are reviving the rumour of a capital increase … No, certainly not! I am simply saying that we shall take appropriate measures when the time comes. If it is necessary …'

5 According to the half-yearly accounts published on 12 September 2002, FT's turnover showed an increase of 10% compared with the same period in 2001, earnings before amortisation ('EBITDA') amounting to EUR 6.87 billion, that is, an increase of 13.3% in historical data and 9.8% in pro forma data, and earnings of EUR 3.18 billion, up 15% in pro forma data. Earnings after interest (EUR 1.75 billion) but before taxes, minority shareholdings and interests, exclusive of extraordinary items, were EUR 718 million against EUR 271 million as at 30 June 2001. The operating free cash flow amounted to EUR 3.6 billion, up 15% on the first six months of 2001. At the same time, FT confirmed that its consolidated own funds became negative as at 30 June 2002 to the amount of EUR 440 million.

6 On 12 September 2002, the French authorities announced publicly that they had accepted the resignation of FT's chief executive officer (CEO) ('FT's former CEO').

7 In a press release of 13 September 2002 on FT's financial situation, the French authorities stated:

'After the exceptional losses of the first six months, [FT] is faced with a serious shortage of capital. This financial situation is weakening [FT]'s potential. The [French] Government is therefore determined to exercise its responsibilities to the full …

Taking note of the new situation brought about by the considerable deterioration in the accounts, [FT's former CEO] has tendered his resignation to the [French] Government, which has accepted it. The resignation will take effect at a board meeting to be held in the next few weeks, at which a new chairman will be presented … The new chairman will in a very short space of time propose to the board a plan for improving [FT]'s accounts, enabling its debts to be reduced and its financial structure to be restored while maintaining its strategic advantages. The [French] State will help [FT] implement this plan and will contribute to a very substantial strengthening of [FT]'s capital base, according to a timetable and in a manner to be determined in the light of market conditions. In the meantime, the [French] State will, if necessary, take steps to prevent [FT] from being faced with any financing difficulties.'

8 On 2 October 2002, FT's new CEO ('FT's new CEO') was appointed. The press release announcing that appointment reads as follows:

'On a proposal from [FT]'s board of directors, the Council of Ministers has decided to appoint [FT's new CEO] … To that end, the new chairman will immediately carry out an inventory of [FT], the findings of which will be communicated to the board in the weeks ahead and which will form the basis for a financial recovery and strategic development plan enabling [FT]'s debt to be reduced while building on its strengths. Within this framework, [FT's new CEO] will enjoy the support of the State in its capacity as shareholder, determined as it is to exercise its responsibilities to the full. The [French] State will assist in implementing the recovery measures and will contribute, for its part, to the strengthening of [FT]'s own capital base in a manner to be determined in close collaboration with [FT]'s chairman and board. As already indicated, the [French] State will [in the meantime], if necessary, take steps to prevent [FT] from being faced with any financing difficulties.'

9 On 19 November 2002, the French authorities sent the Commission an 'information note' which, on the one hand, described FT's current financial situation while highlighting the fact that 'its operational performance is excellent' and, on the other, indicated their intention to participate in a recapitalisation of FT under market conditions while explaining the terms of their contribution to FT's recovery plan. In that note, the French authorities stated, inter alia, the following:

'In order to give [FT] the necessary room for manoeuvre to enter the market under the best possible conditions and at the most opportune moment, the [French] State is prepared to make an upfront prepayment towards the capital increase in the form of a shareholder loan which will be capitalised at the time of the issue of new securities. The amount of that loan will correspond to all or part of the [French] State's subscription to the future capital increase and may be up to [EUR] 9 [billion]. That loan will be temporary and its conversion into securities will be obligatory. It will also be remunerated at the market rates currently in force and the interest will be capitalised.

In order to implement its participation in [FT]'s recovery plan, the [French] State intends to use ERAP, a [French] public industrial and commercial entity, which will grant [FT] a shareholder loan and have authority to become a major [FT] shareholder once that loan is capitalised. By entering the public participation in [FT] on the assets side of its balance sheet, that public entity will have bond debts on the liabilities side of its balance sheet. That choice of ERAP reflects the [French] State's intention to identify clearly the financial outlay being granted by isolating it in a dedicated structure.'

10 At FT's board meeting of 4 December 2002, the new management of FT presented an action plan entitled 'Ambition FT 2005' ('the Ambition 2005 plan') aimed essentially at rebalancing FT's balance sheet by strengthening its capital base to the amount of EUR 15 billion.

11 The presentation of the Ambition 2005 plan was accompanied by a press release by the Minister for Economic Affairs of 4 December 2002, which reads as follows:

'[T]he Minister for Economic Affairs … confirms the [French] State's support for the action plan approved by [FT]'s board of directors on 4 December [2002]. (1) The [FT] group is a coherent industrial entity with a remarkable track record. However, [FT] is now faced with an unbalanced financial structure and a need for capital and refinancing in the medium term. This state of affairs is due to the failure of past investments, which were carried out badly at the height of the financial "bubble" and, more generally, to the market downturn. The impossibility for [FT] to finance its growth otherwise than through debt has made the situation worse. (2) The [French] State, as majority shareholder, has asked the new management to restore [FT]'s financial equilibrium while maintaining the group's integrity … (3) In the light of the action plan drawn up by management and the investment return prospects, the [French] State will participate in the EUR 15 billion strengthening of [FT]'s capital base in proportion to its share in the capital, giving an investment of EUR 9 billion. The [French] State shareholder thus intends to act like a prudent investor. It will be for [FT] to work out the detailed arrangements and precise timetable for the strengthening of its capital base. The [French] Government wants the utmost account to be taken during the operation of the situation of individual shareholders and of employees with shares in [FT]. To enable [FT] to launch a market operation at the most opportune moment, the [French] State is prepared to make an upfront prepayment towards the strengthening of the capital base in the form of a temporary shareholder loan, remunerated at market rates, placed at [FT]'s disposal. (4) The [French] State's entire shareholding in [FT] will be transferred to a public industrial and commercial entity, ERAP. The latter will borrow on the financial markets in order to finance the [French] State's share in the strengthening of [FT]'s capital base.'

12 On 11 and 12 December 2002, FT launched two successive bond issues for a total amount of EUR 2.9 billion.

13 On 20 December 2002, the Entreprise de recherches et d'activités pétrolières (Petroleum Research and Activity Corporation, ERAP) sent FT an initialled and signed draft shareholder loan contract. FT did not sign that draft contract and the shareholder loan was never implemented.

14 On 15 January 2003, FT raised loans in the form of bond issues for a total amount of EUR 5.5 billion. Those bond issues were not covered by a State security or guarantee.

15 On 10 February 2003, FT renewed part of a maturing syndicated loan to the amount of EUR 15 billion.

16 On 4 March 2003, the operation to strengthen the capital base as envisaged by the Ambition 2005 plan was launched. On 24 March 2003, FT carried out a capital increase of EUR 15 billion. The French State participated in that operation to the amount of EUR 9 billion in proportion to its share in FT's capital. An amount of EUR 6 billion was underwritten by a banking syndicate consisting of 21 banks. That operation was terminated on 11 April 2003.

17 FT ended the 2002 financial year with a loss of approximately EUR 21 billion and a net financial debt of approximately EUR 68 billion. The accounts for 2002 published by FT on 5 March 2003 showed a rise of 8.4% in turnover, of 21% in the operating result before amortisation and of 30.9% in the operating result. On 14 April 2003, the French State held 58.9% of FT's capital, of which 28.6% through ERAP.

18 On 31 July 2003, the French Government adopted, within the Council of Ministers, a draft law providing for repeal of the requirement that the majority of FT's capital be publicly held. That draft law was passed by the French National Assembly and entered into force on 31 December 2003.

19 On 1 September 2004, the French State sold approximately 10% of FT's capital for an amount of EUR 5.2 billion, thus reducing its participation in the capital of FT to 42.25%.

II — *Administrative procedure*

20 On 4 December 2002, the French Republic notified the Commission of the European Communities of the financial measures provided for by the Ambition 2005 plan, including the shareholder loan proposal, pursuant to Article 88(3) EC and Article 2 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1).

21 On 22 January 2003, Bouygues SA and Bouygues Télécom SA (together 'the Bouygues companies'), two companies governed by French law, the latter of which is active on the French market for mobile telephony, submitted a complaint to the Commission concerning certain aids granted by the French State to FT and to Orange in connection with the refinancing of FT. That complaint related, in particular, firstly, to the announcement of an investment by the French State to the amount of EUR 9 billion and, secondly, to the public declarations made by the French authorities in favour of FT from July 2002 ('the declarations from July 2002').

22 By letter of 31 January 2003, the Commission informed the French authorities of its decision to open the formal investigation procedure provided for in Article 88(2) EC with regard to the proposed financial measures in favour of FT.

23 On 12 March 2003, the opening decision was published in the *Official Journal of the European Union* (OJ 2003 C 57, p. 5). It invited interested parties to submit their comments on the measures in question.

24 By letter of 4 April 2003, the French authorities submitted their comments on the opening decision and disputed the validity of the doubts expressed in that decision by the Commission.

25 By document of 11 April 2003, the Bouygues companies submitted their comments to the Commission while pointing out that their complaint of 22 January 2003 was to be regarded as forming an integral part of their stance in the present procedure. In addition, the Commission received comments from numerous other interested parties, including the Association française des opérateurs de réseaux et services de télécommunications (AFORS Télécom; 'AFORS') and FT. In particular, FT and the Bouygues companies submitted a number of studies by economic experts and legal opinions in the course of the administrative procedure.

26 On 30 May 2003, the Commission published an invitation to tender for a contract for 'the provision of services to assist in assessing the compliance of the financial assistance granted by the French State to FT with the principle of the private investor in a market economy and if necessary to analyse FT's recovery plan'. On 24 September 2003, that contract was awarded to a consultant, which delivered its economic report on 28 April 2004 ('the report of 28 April 2004').

27 The report of 28 April 2004 was accompanied by a legal report of 22 March 2004 ('the report of 22 March 2004'). By letter of 3 May 2004, the Commission forwarded those two reports to the French authorities, inviting them to submit their comments.

III — *Contested decision*

A — *Notification of the contested decision*

28 On 3 August 2004, the Commission notified the French authorities of Decision 2006/621/EC of 2 August 2004 on the State aid implemented by France for France Télécom (OJ 2006 L 257, p. 11; 'the contested decision').

29 On 30 August 2004, the Commission sent a copy of the contested decision to FT and to the Bouygues companies.

30 On 3 September 2004, the Commission sent a copy of the contested decision to AFORS.

B — *Operative part of the contested decision*

31 Article 1 of the contested decision provides that '[p]laced in the context of the declarations … from July 2002, the shareholder loan granted by [the French Republic] to [FT] in December 2002 in the form of a EUR 9 billion credit line constitutes State aid incompatible with the common market'.

32 Under Article 2 of the contested decision, '[t]he aid referred to in Article 1 does not have to be recovered'.

C — *The Commission's findings relating to FT's financial situation between June 2002 and March 2003*

33 In Section 3 'Chronological description of the facts and financial situation of [FT]' of the contested decision, the Commission in essence made the findings set out below.

34 Firstly, as regards FT's financial situation, the Commission found that, from June 2002 onwards, FT was a company 'with serious structural problems and an unbalanced balance sheet' (recital 17 of the contested decision). In that regard, the Commission noted, on the one hand, a rapid worsening of FT's credit rating during the first half of 2002, this being demonstrated by the announcements of the rating agencies, such as Standard & Poor's ('S & P'), Moody's and Fitch Ratings (recitals 20 to 27 of the contested decision), and, on the other, following an analysis of FT's credit spreads, a spread inversion, that is to say, an increase in the risks associated with its very short-term debt, in particular at the beginning of July 2002, compared with the level of the risks associated with its medium- and long-term debt. The spreads relating to the debt of a company reflect the assessment, by the markets, of the risk linked to its capacity to meet its obligations in respect of the payment of interest and the repayment of loans upon maturity, and are normally higher for long-term debt than for short-term debt. Such spreads thus influence the valuation of bonds and the level of interest that may be required for the issue of new bonds. According to the Commission, that increase in risk was borne out by the fall in the price of FT's bonds in June and July 2002, thus reflecting a lesser value of FT's debt due to the increased risk of default perceived by the market (recitals 28 to 31 of the contested decision). In addition, the Commission noted a significant fall in FT's share price during the first half of 2002, reaching its lowest level first on 27 June 2002 (EUR 7.79) and then on 30 September 2002 (EUR 6.01) (recital 35 of the contested decision).

35 Secondly, the Commission found, in essence, that, on the date of the declaration of 12 July 2002, any further downgrade of the rating of FT's debt would have led to the loss of its investment-grade rating and that the rating agencies S & P and Moody's were about to downgrade that rating to junk-bond level (recital 37 of the contested decision).

36 However, in its press release of 12 July 2002, S & P stated the following (recitals 37 and 38 of the contested decision):

'FT could face certain difficulties [in] refinancing its debt obligations coming due in 2003. Nevertheless, the [French] State's indication underpins [FT]'s investment-grade credit quality ... [T]he French State — which owns 55% of [FT] — has made clear to [S & P] that it will behave as an aware investor and would take appropriate steps if [FT] were to face any difficulties. [FT's] [long-term] rating cut to BBB - ...'

37 In recital 212 of the contested decision, the Commission pointed out that, as early as 24 June 2002, Moody's had downgraded FT's rating to just above that of a junk bond. In addition, in recital 221 of and footnote 142 to that decision, the Commission relied on a Deutsche Bank report of 22 July 2002, from which it quoted and commented on the following passages:

'... on 12 July 2002, S & P downgraded [FT]'s ratings to BBB- ... The agency no longer expects FT to hit the 3.5 x net debt/EBITDA target by 2003, but did assign a "stable"

outlook to the low triple B ratings. It seems that the stable outlook is anchored by [the following terms in which S & P's press release is couched:] "[T]he French State — which owns 55% of FT — has clearly indicated to [S & P] that it will behave as an aware investor and would take appropriate steps if [FT] were to face any difficulties." Interestingly, S & P had initially said it was not incorporating any extraordinary support from the French Government into its rating when it downgraded [FT]'s ratings to BBB in June. Since then, the agency appears to have taken an about face in stating that the conclusions of the creditwatch status ["]follow … an analysis of [FT]'s liquidity position through the end of 2003 and a review of the French State's potential involvement in the French telecommunications market" (p. 19); "[FT] benefited from the market's increased confidence that the French Government will in one way or another support the credit" (p. 20); "we cannot ignore the fact that FT is majority owned by the French State and recent comments from the French Finance Ministry have reassured investor[s] that liquidity will be provided" (p. 54). "However, … we expect that [FT] will ultimately find all the liquidity it needs via the so-called "implicit [French] Government support". This could take the form of banks or the [French] Government providing the necessary loans at market prices" (p. 21). However "what is the market price for, say, [EUR] 10 [billion] of new debt to a BBB- credit? [W]hat is the real price for [EUR] 10 [billion] of debt to a company that is not really a BBB- credit, just treaded there because [of] the Government support? … [W]e suspect there is no right answer to these questions, because if FT was operating in the real world, it would not be able to refinance without a debt for equity swap, in our view." (p. 33, along the same lines, see p. 54). And again[:] "There have been reports in the press that the French Government will stand behind [FT], implying that it is willing to be the "lender of last resort" to [FT]. These reports have resulted in a significant rally in both bonds and equity prices, with the equity rallying over 90% and the bonds 137 [base points] in two weeks, as nervous shorts covered position." (p. 28)[.] "It is worth noting that S & P states on its recent conference call on its downgrade of FT's credit that, in general, a company generating free cash flow with debt to EBITDA of four times would qualify as a BBB- credit, the last investment-grade rating. FT's current BBB- rating appears to be based largely on the promise of [French] Government support providing liquidity, rather than on fundamentals"."

According to Deutsche Bank's calculations, FT's debt/EBITDA ratio was 4.9 during the second half of 2002 and 5.20 on 31 December 2002.

38 The Commission therefore concluded that, in July 2002, FT was facing a crisis of confidence.

39 FT's former CEO announced in the press on 16 September 2002 that 'the fall in credit rating is preventing the planned refinancing' by FT and that 'the downgrading at the end of June [2002] of the rating attributed to FT's debt by … Moody's … has denied [it] access to the market' (footnote 131 corresponding to recital 212 of the contested decision; see also recital 248 of that decision). It is also apparent from footnote 176 corresponding to recital 252 of the contested decision that, at a hearing before the commission of inquiry of FT's auditors, FT's former CEO stated the following:

'There is one fundamental point that the black scenario never included: the fact that access to the capital market was closed off to us. We had never entertained that possibility because we thought that the [French] State's presence as majority shareholder would prevent the market [from] contemplating FT's bankruptcy without its even being necessary for the [French] State to voice its support. This view was shared by almost all market operators up until the time when one of the three rating agencies — and one only — decided that [FT] was on the verge of insolvency and reviewed its rating, denying it any market access overnight ... When, in June [2002], that one rating agency delivered its opinion and we were denied market access, I knew that, unable to borrow again, [FT] would be in payment difficulties a year later, towards the end of the first half of 2003.'

40 On the one hand, that crisis of confidence was confirmed by FT's new CEO, at his hearing on 11 December 2002 before the National Assembly's Economic Affairs Committee, the minutes of which (footnote 32 corresponding to recital 39 of the contested decision) read as follows:

'[FT's new CEO] pointed out that the financing plan that had been implemented had not been adhered to and matters had grown worse at the beginning of 2001 with the result that a liquidity crisis was foreseeable by the summer of 2003 … [He] stated that, threatened with a suspension of payments, [FT] was in a state of shock … owing to the scale of its debt, as it had to find enough liquidity to reimburse EUR 15 billion in 2003 and again in 2004, and EUR 20 billion in 2005 …'

41 Recital 248 of the contested decision states that, at a hearing on 5 December 2002 before the French Senate's Finance Committee, [FT's new CEO] stated that, 'faced with huge debts, [FT] did not seem to have woken up to the fact that its credit rating was being downgraded, that it no longer had access to the capital markets'.

42 On the other hand, the French Senate found, in an opinion presented on 21 November 2002 on behalf of the Committee on Economic Affairs and the Plan, that a downgrading of FT's rating would have worsened the crisis in the management of its short/term debt (recital 39 of the contested decision), as follows:

'It will be in June 2003, therefore, that [FT]'s financing problems may become critical or even insurmountable. If, between now and then, [FT] has not regained access to the market (owing to its penalising rating), the [French] State will have to find ways of helping [FT] to refinance itself.'

43 It is also apparent from recitals 245 and 246 of the contested decision that, in particular, in the words of a report by JP Morgan dated 2 December 2002, without the State's

support, FT would not have been capable of obtaining fresh capital on the market in order to refinance its debt. In that regard, that report states the following:

'We continue to view FT's risk/reward profile as unattractive pending the outcome of a strategy review … Although we see significant scope for FT to cut costs and deliver a compelling yield and even though the CEO has strong track record execution, the [French] Government['s] role in giving FT the flexibility it requires is pivotal. In the meantime, liquidity risk remains and in our view, a right issue is a matter of when not if … The [French] Government's role will again be pivotal in refinancing and reducing this debt. However it is [FT's] liquidity or refinancing risk that is the near-term focus of FT and rating agencies alike, with a daunting refinancing schedule ahead in 2003. This would be impossible without [French] Government intervention — even FT acknowledged this in its [third quarter] conference call.'

44 Faced with that situation, the rating agencies nevertheless maintained FT's credit rating at investment grade on the strength of the declarations by the French authorities (recital 39 of the contested decision). In addition, it is apparent from recital 222 of the contested decision that, under one of the conditions of the memoranda of understanding signed on 11 and 12 September 2002 between the French State and the group of banks participating in the recapitalisation operation, 'the maintenance of at least the current ratings (investment-grade quality) of [FT]'s long-term debt by the Moody's and [S & P] rating agencies … will be included [as a condition] in the guarantee and investment contract'. Finally, on 12 September 2002, one of the participating banks, Morgan Stanley, stated the following, concerning its commitment in relation to FT's capital increase (footnote 147 corresponding to recital 222 of the contested decision):

'We feel that the planned transaction would be difficult under present conditions and that a favourable reaction by the markets to the declarations and official statements to be published at the end of the week will be a key factor in creating the necessary conditions for carrying out the transaction.'

45 Thirdly, in the light of FT's financial situation in September 2002 (recitals 40 to 49 of the contested decision) and, in particular, of the press releases by the French authorities on 13 September 2002 (see paragraph 7 above) and 2 October 2002 (see paragraph 8 above), the rating agencies changed their assessment relating to the management of FT's debt and noted an increase in market confidence.

46 Thus, Moody's changed the outlook of FT's debt from negative to stable, owing to the French State's restated commitment to support FT, in a press release of 13 September 2002 (recital 52 of and footnote 45 to the contested decision), which reads as follows:

'Moody's [has] taken increased comfort from the [French] Government's statement, which once again confirmed [its] strong support for FT. Whilst Moody's concerns regarding the overall level of financial risk and particularly FT's weak liquidity position remain, Moody's has grown more comfortable with expectation that the French Government will act in a supportive manner, if FT started to encounter difficulties with its debt repayment schedule.'

47 Likewise, on 17 December 2002, S & P indicated, firstly, that, since July 2002, the French authorities' support had been a key factor in maintaining FT's investment-grade rating. Secondly, that the French authorities' announcement concerning the shareholder loan and their commitment to subscribe, in proportion to their holding in FT's capital, to a EUR 15 billion recapitalisation operation constituted proof of that support and of significant protection for FT's creditors (recital 58 of and footnotes 52 and 53 to the contested decision).

48 The Commission further noted that, following FT's capital increase in February and March 2003, the rating agencies ceased to consider the French State's support to be a key factor in FT's credit rating, support which still appeared very important to S & P on 17 December 2002 and to Moody's in February 2003. Thus, Moody's stated (recital 61 of and footnote 54 to the contested decision):

'The French Government has consistently stated its support for FT and its willingness to provide financial support if required, thereby addressing potential liquidity concerns. This support has been evidenced by … providing a EUR 9 billion loan facility to FT, which pays cash interest, but is only repayable in FT's equity, upon maturity in 18 months time … Moody's factors [French] Government support into the [Baa3] rating … [T]he financial risk of the highly leveraged FT is not commensurate with investment grade (compensated by strong operational performance/implicit support of French Government).'

49 Moreover, on 14 May 2003, that is to say, after the capital increase, FT's credit rating by S & P was based clearly on FT's financial data. (recital 61 of and footnote 54 to the contested decision).

50 According to recital 247 of the contested decision, in particular, a report by Global Equity Research of 20 February 2003 confirmed that it was only following the declarations by the French authorities that the capital market allowed FT to refinance itself on suitable terms. In the words of that report, '[the] immediate liquidity issues are

solved: since the Government's upfront prepayment of its [EUR] 15 [billion] equity offering in the form of a [EUR] 9 [billion] standby facility, FT has been able to reaccess the debt capital markets to solve its immediate liquidity challenges'.

D — *Object of the contested decision*

51 In Section 6 'Object of the present Decision' of the contested decision, the Commission first recalled the subject-matter of the French Republic's notification, which concerned a shareholder loan proposal intended to be implemented as part of the Ambition 2005 plan. It then noted that, '[i]n order to decide whether the measures at issue are compatible with the Treaty, [it] ha[d] examined the events connected with the proposal's notification, including the Government's declarations of July to [December] 2002', and that 'the notified measures [could not] be analysed without having regard to [those] declarations'. By those declarations, the French authorities manifested their willingness to take appropriate steps to resolve FT's financial difficulties. The shareholder loan proposal was the concretisation of their intentions expressed previously. From a material point of view, there was no legal reason to limit the examination of the relevant facts to the facts which the French State had decided to mention in the notification. The concept of aid was an objective concept based on economic reality. It followed that, if the Commission had knowledge of earlier facts which were objectively relevant, it must include them in its analysis (recital 185 of the contested decision). The Commission added that it had indicated, in recital 70 of and footnote 40 to the opening decision, that the declarations from July 2002 might constitute factors which must be taken into account in its investigation (footnote 105 to the contested decision).

52 In recital 186 et seq. of the contested decision, the Commission summed up its approach as follows:

'(186) In the present case, the Commission notes that the measures of December 2002, which were the subject-matter of the notification, were preceded by several declarations and measures by the French authorities dating from July [2002]. Firstly, these declarations and measures make it possible to better understand the reasons for and scope of the December [2002] measures. Secondly, they definitely had an impact on the perception which the markets and economic operators had of [FT]'s situation in December [2002]. Inasmuch as the conduct of economic operators was itself influenced by the conduct of the State, it does not constitute an objective parameter for then judging the conduct of the State. These prior interventions must therefore be taken into account in analysing the presence of aid in the December measures.

(187) It is possible to view the successive declarations and measures of the French authorities from July 2002 onwards as forming a set which took concrete shape in the December [2002] measures (making available of a shareholder loan), these being the measures which were notified ...

(188) The analysis of the present case suggests at first sight the existence of a time lag between the advantages for [FT], which were particularly distinct in July [2002], and the potential commitment of State resources, which seems to be more clearly established in December [2002]. Inasmuch as they clearly had an effect on the markets and conferred an advantage on [FT], the declarations by the Minister for Economic Affairs … may be characterised as aid. It would not be easy, however, to establish beyond all doubt whether the [12] July 2002 declaration … [was] of such a character as to commit, at least potentially, State resources. In this respect, the Commission has carefully analysed

numerous legal arguments seeking to show, firstly, that such public declarations were equivalent from a legal standpoint to a State guarantee and, secondly, that they placed the State's reputation on the line, with economic costs in the event of non/compliance. Taken as a whole, these elements might be thought to actually risk putting State resources in jeopardy (either by making the State liable towards investors, or by increasing the cost of future State transactions). The argument to the effect that the [12] July 2002 declaration … is aid is therefore innovative, but probably not without foundation.

(189) The Commission does not, however, have sufficient evidence in the present case to establish irrefutably the existence of aid on the basis of this innovative argument. On the other hand, it does consider that it can establish the existence of aid elements by following a more traditional approach, taking as a basis the December [2002] measures which were the subject-matter of the notification.

(190) For one thing, the existence of a commitment of State resources is clear in December [2002]. For another, the existence of an advantage for [FT] in December is also evident as soon as one takes account of the impact on the markets of the prior declarations and measures.

(191) In this connection, the "private investor in a market economy" test cannot be used to justify this December [2002] intervention as the French authorities claim, inasmuch as economic operators' conduct in December was clearly influenced by the prior actions and declarations of the Government since July [2002]. While it may be doubted that the … declarations [since July 2002] were sufficiently concrete to constitute aid in themselves, there is scarcely any doubt that such declarations were more than sufficient to "contaminate" the markets' perception and to influence economic operators' subsequent conduct. If such is the case, this conduct on the part of economic operators cannot be taken as a neutral point of comparison from which to judge the

[French] State's conduct. The presumption based on the "private investor in a market economy" test cannot therefore take as [a] point of departure the market situation as it was in December [2002] but ought logically to be based on a market situation uncontaminated by the impact of the prior declarations.'

E — *Application of Article 87(1) EC and of the principle of the prudent private investor in a market economy*

53 In Section 7 'Assessment of the measure at issue in the light of Article 87(1) [EC]' of the contested decision, the Commission noted, in particular (recital 194 of the contested decision), the following:

'[T]he shareholder loan (which constitutes the upfront prepayment by the [French] State towards [FT]'s recapitalisation) confers an advantage on [FT] as it enables it to increase its means of financing and to reassure the market as to its capacity to meet its maturities. Even if the [shareholder] loan [contract] has never been signed, the appearance given to the market of the existence of such a loan is likely to confer an advantage on [FT] as the market has considered [FT]'s financial situation to be more secure … This may have influenced [FT]'s borrowing terms.'

54 The Commission then noted (recital 195 of the contested decision) the following:

'[T]he fact that an advantage results from the giving of a State commitment leading to a potential, but not immediate, transfer of resources does not rule out the possibility that the advantage may have been granted through State resources. "In that respect, it should … be noted that, according to settled case-law, it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 87(1) EC" [footnote 113: Case C-482/99 *France* v *Commission* [2002] ECR I-4397 ("*Stardust*"), paragraph 36; see also Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 16]. Thus, even an advantage granted through a potential additional burden for the State constitutes State aid where it affects competition and trade between Member States [footnote 114: Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 43, and Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 80].'

55 Such a 'potential additional burden' on the State's resources was 'created by the announcement of the provision of the shareholder loan coupled with the fulfilment of the preconditions for such provision …, by the impression given to the market that the loan had actually been provided … and, lastly, by the dispatch to [FT] of the loan contract initialled and signed by ERAP'. Even though the contract was never signed by FT, this does not mean that there was no potential commitment of State resources. According to the Commission, firstly, '[i]n so far as the document constituted a contractual offer and as long as it was not rescinded, [FT] could have signed it at any time, thereby acquiring the right to obtain immediate payment of the sum of EUR 9 billion' and, secondly, '[i]nasmuch as it could not be unaware of this, the [French] State accordingly had to keep at [FT]'s disposal through ERAP the amount of the corresponding resources' (recital 196 of the contested decision). The Commission therefore had to consider whether the advantage thus granted to FT satisfied the prudent private

investor test and whether it affected competition and trade between Member States (recital 197 of the contested decision).

56 After finding that the advantage conferred on FT distorted or threatened to distort competition and was likely to affect trade between Member States (recitals 198 to 201 of the contested decision), the Commission went on to examine, in Section 8 'Principle of the prudent private investor in a market economy' of the contested decision, whether that principle had been observed taking into account all the declarations made by the French authorities during the months preceding the shareholder loan proposal (recital 202 et seq. of the contested decision).

57 In the light of the declaration of 12 July 2002 (see paragraph 4 above) and of the press releases of the French authorities of 13 September, 2 October and 4 December 2002 (see paragraphs 7, 8 and 11 above), the Commission concluded, in essence, that, '[t]aken as a whole, these declarations [could] be regarded as having made public the [French] State's intention whereby, if [FT] had any financing problems or financial difficulties, it, the State, would do whatever was necessary to overcome them' and as making plain the State's commitment in that regard. Those public declarations, which were repeated, concordant and attributable to the French State, were sufficiently clear, precise and firm for them to reflect in a credible manner the latter's unconditional commitment, in particular towards the world of finance and industry, which would have construed them thus (recitals 206 to 213 and 217 of the contested decision). Moreover, in addition to those public declarations, the French authorities also contacted the 'main market operators', such as S & P (see paragraphs 35 and 37 above), in order to inform them of their intentions and rapidly restore market confidence, thereby preventing the downgrading of FT's debt rating to junk-bond status (recital 212 of the contested decision).

58 Such declarations are, in the Commission's view, entirely likely to be considered credible by the market and as a result create an expectation on the part of the latter that the State 'will do everything necessary to resolve any financial difficulties that [FT] may face'. According to the Commission, '[a]ny failure by the [French] State to fulfil

that expectation would have directly affected its reputation in its capacity as owner, shareholder or manager of companies, whether quoted or not, and in its capacity as issuer of bonds to finance the public debt'. Thus, those declarations were the expression of a strategy based on the reputation of the State (recital 217 of the contested decision). Consequently, those factors could 'be deemed to actually endanger State resources' and 'the argument to the effect that the French authorities' declarations [since] July 2002 are aid is … innovative, but probably not without foundation' (recital 218 of the contested decision).

59 In recital 219 of the contested decision, the Commission nevertheless concluded that it could not 'establish irrefutably the existence of aid on this basis'. It did, 'on the other hand', consider 'that it [could] demonstrate the presence of aid elements in a more conventional manner taking as a basis the December 2002 measures which were the subject of the notification'. In that respect, it was sufficient 'to establish that the prior declarations had a real impact on the perception of the markets in December [2002], without having to characterise these … declarations as being in themselves State aid'.

60 Relying inter alia on the report of 28 April 2004, which referred to an abnormal and not negligible increase in the value of FT's shares (by between 37.8% and 43.8%) and bonds (by between 3.2% and 9.7%) following the declaration of 12 July 2002, on S & P's press release of the same date (see paragraph 36 above) and on the Deutsche Bank report of 22 July 2002 (see paragraph 37 above), the Commission concluded that 'the market regarded these declarations as a credible strategy of commitment by the [French] State to support FT' (recitals 220 to 222 of the contested decision).

61 The French authorities' declarations were decisive in maintaining FT's investment-grade credit rating whereas a junk-bond rating would have made the shareholder loan more unlikely and certainly much more costly (end of recital 225 of the contested

decision). In that sense, the French authorities' decision to act upfront of FT's recapitalisation by granting a credit line constituted a concretisation of their declarations (recital 226 of the contested decision).

62 According to the Commission, the fact that the operation to recapitalise FT, carried out in April 2003, was a success and the shareholder loan was never actually made is not decisive. In applying the prudent private investor criterion, the basis of assessment must be the information the investor has at his disposal at the time he takes his investment decision. The success of the operation in April 2003 cannot therefore be taken into account in assessing the French State's conduct in December 2002. Moreover, 'in applying the concomitance criterion' the Commission 'cannot base the assessment of the State's conduct on the conduct of other economic operators' in so far as their conduct and the market were influenced by the French authorities' declarations. In the Commission's view, [t]he [French] State's declarations, made in July and then repeated, to the effect that it would take the necessary steps to enable [FT] to overcome its financing difficulties distort the concomitance test in so far as private investors cannot be considered to have made up their minds on the sole basis of [FT]'s situation. This holds true irrespective of whether those declarations contain State aid or not'. The application of the principle of the prudent private investor in a market economy cannot be based on the market situation in December 2002, but must logically be based 'on the situation of a market uncontaminated by prior declarations and interventions' (recital 227 of the contested decision).

63 However, 'it would appear' that, if the investment decisions in question are examined in the context of the situation prior to July 2002, that is to say, in the light of the financial and confidence crisis affecting FT at that time and in the absence of any measures and declarations by the French authorities, they do not satisfy the prudent private investor test (recital 228 of the contested decision). In those circumstances, it is 'improbable that a private investor would, from July 2002, have made declarations

similar to those made by the French Government, likely as they were, from a purely economic point of view, seriously [to] place his credibility and reputation on the line and, from a legal point of view, even [to] oblige him from that date to support [FT] financially come what may'. Accordingly, such an investor would have assumed a very considerable risk vis-à-vis FT, without being indemnified or compensated. Even a reference shareholder in possession of the same information as that which the French authorities had at their disposal at the time would not have made a declaration of support for FT in July 2002 without first carrying out a thorough audit of FT's financial situation and taking any measures necessary for its recovery in order to be able to assess the risk involved in such a step. In any event, such a reference shareholder would have needed the financial markets' help in putting right FT's situation. However, those markets 'did not at that time seem prepared to invest in or grant much in the way of credit to [FT]' (recital 229 of the contested decision).

64 It follows from all the above that 'the test of the prudent private investor in a market economy [was] not satisfied' and that, '[c]onsequently, the advantage conferred on [FT] by the proposal to grant a shareholder loan — examined in the light of the prior declarations and interventions of the French authorities — constitute[d] State aid, even if the scale of the advantage [was] difficult to calculate' (recital 230 of the contested decision).

F — *Compatibility of the aid in question with the common market*

65 In Section 9 'Compatibility of the aid' of the contested decision, the Commission observed that, firstly, FT had to be regarded as a firm in difficulty within the meaning of points 4 to 6 of the Commission's Notice concerning the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2) and that, secondly, the aid measures at issue could not be characterised as aid for rescuing

and restructuring firms in difficulty as they did not fulfil the conditions for authorisation laid down in those guidelines (recitals 231 to 255 of the contested decision). In accordance with Article 87(3)(c) EC and with the abovementioned guidelines, it therefore concluded that those measures were incompatible with the common market (recital 256 of the contested decision).

G — *Recovery of the aid at issue*

66 In Section 10 'Recovery of the aid' of the contested decision, the Commission declared that it was unable at that stage to quantify precisely the aid in question for the purpose of its recovery pursuant to Article 14 of Regulation No 659/1999 (recitals 257 to 259 of the contested decision).

67 According to the Commission, '[d]espite all its efforts, [it] ha[d] been unable to arrive at a reasonable assessment of the notified measures' 'net' financial impact, which ought to be established on the basis of a theoretical calculation isolating the effects of the declarations and actions attributable to the [French] State from any other event which may have exerted an influence on [FT]'s situation or on the perception of that situation by the markets'. It added that '[n]or does it seem possible to incorporate in the [contested] decision calculation parameters which are sufficiently precise to be able to carry out the final calculation during the [contested] decision's implementing phase'. The Commission therefore concluded that, '[i]n these particular circumstances, respect for the Member State's rights of defence might constitute an obstacle to recovery pursuant to Article 14(1) of Regulation … No 659/1999, according to which

"the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'" (recital 261 of the contested decision).

68 According to the Commission, that conclusion is also justified in the light of the principle of the protection of legitimate expectations on the part of the aid recipient (recital 262 of the contested decision). In that regard, in recitals 263 and 264 of the contested decision, it stated the following:

'(263) The Commission has taken the [French] Government's declarations into account in its assessment of the compliance of the measure at issue with the State aid rules. Viewed in isolation, the shareholder loan proposal would probably have been considered not to constitute aid under the Treaty. However, the Commission has come to the conclusion that the declarations had the effect of restoring confidence to the market as far as [FT] was concerned, thereby ruling out the application of the prudent private investor principle and turning the shareholder loan proposal into the concretisation of the aid granted to [FT]. The Commission recognises that this is the first time it has had to examine whether this type of conduct constitutes aid. In so far as the aid depends, as a result, on conduct which preceded the notification of the shareholder loan proposal, a diligent operator could have had confidence in the lawfulness of the conduct of the Member State concerned, which, for its part, had duly notified the loan proposal. As Advocate General Darmon stated in his Opinion in Case C-5/89 [Commission v Germany [1990] ECR I-3437], "the doubts with which some undertakings may be assailed, when faced with "atypical" forms of aid, as to whether notification is necessary should not be made light of".

(264) In conclusion, the Commission finds that [FT] could legitimately have confidence in [the French Republic]'s conduct not constituting State aid. In the

light of the above, the Commission considers that, in the present case, ordering the aid's recovery would be contrary to the general principles of Community law.'

Procedure and forms of order sought

I — *Cases T-425/04 and T-444/04*

69 By application lodged at the Court Registry on 13 October 2004, the French Republic brought the action registered under number T-425/04.

70 By application lodged at the Court Registry on 5 November 2004, FT brought the action registered under number T-444/04.

71 The French Republic and FT claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

72 The Commission contends that the Court should:

— dismiss the actions as inadmissible;

— in the alternative, dismiss the actions as unfounded;

— order the French Republic and FT to pay the costs.

73 By application lodged at the Court Registry on 25 October 2007, the Bouygues companies sought leave to intervene in Case T-444/04 in support of the forms of order sought by the Commission.

74 By document lodged at the Court Registry on 20 November 2007, the Commission indicated that it had no objections to the Bouygues companies being granted leave to intervene in support of the forms of order sought by it. However, it made it clear that it reserved its position as regards the consistency of the arguments advanced by the Bouygues companies in the context of that intervention with those put forward in support of their action in Case T-450/04 (see paragraph 78 et seq. below).

75 By document lodged at the Court Registry on 21 November 2007, FT claimed that the Court should declare that application for leave to intervene inadmissible and order the Bouygues companies to pay the costs and, in the alternative, to limit that intervention to the oral procedure.

76 By document lodged at the Court Registry on 4 December 2007, FT requested confidential treatment vis-à-vis the Bouygues companies of certain information contained in the application and the reply lodged in Case T-444/04.

77 By order of 30 January 2008, the President of the Third Chamber of the Court granted the Bouygues companies leave to intervene in the oral procedure in Case T-444/04 in support of the forms of order sought by the Commission and ordered that a

provisional, non-confidential version of the Report for the Hearing be communicated to the interveners while reserving the decision on the merits of FT's request for confidential treatment None of the parties raised any objections relating to the content of that non-confidential version of the Report for the Hearing.

II — *Case T-450/04*

78 By application lodged at the Court Registry on 9 November 2004, the Bouygues companies brought the action registered under number T-450/04.

79 The Bouygues companies claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

80 The Commission contends that the Court should:

— dismiss the application for annulment of Article 1 of the contested decision as inadmissible and, in the alternative, as unfounded;

— dismiss the application for annulment of Article 2 of the contested decision as unfounded;

— order the Bouygues companies to pay the costs.

81 By documents lodged at the Court Registry on 25 and 29 March 2005, FT and the French Republic sought leave to intervene in Case T-450/04 in support of the forms of order sought by the Commission. By orders of 25 May 2005, the President of the Third Chamber of the Court allowed those interventions. The interveners lodged their statements in intervention, as did the Bouygues companies and the Commission their observations on those statements, within the prescribed periods.

82 The French Republic contends that the Court should:

— dismiss the application for annulment of Article 2 of the contested decision as unfounded;

— order the Bouygues companies to pay the costs.

83 FT contends that the Court should:

— dismiss the action as unfounded;

— order the Bouygues companies to pay the costs.

III — *Case T-456/04*

84 By application lodged at the Court Registry on 12 November 2004, AFORS brought the action registered under number T-456/04.

85 AFORS claims that the Court should:

— annul Article 2 of the contested decision;

— order the Commission to pay the costs.

86 The Commission contends that the Court should:

— dismiss the application for annulment of Article 1 of the contested decision as inadmissible;

— dismiss the application for annulment of Article 2 of the contested decision as unfounded;

— order AFORS to pay the costs.

87 By documents lodged at the Court Registry on 25 and 29 March 2005, FT and the French Republic sought leave to intervene in Case T-456/04 in support of the forms of order sought by the Commission. By orders of 12 and 25 May 2005, the President of the Third Chamber of the Court allowed those interventions. The interveners lodged their statements in intervention and AFORS lodged its observations on those statements within the prescribed periods.

88 The French Republic contends that the Court should:

— dismiss the action;

— order AFORS to pay the costs.

89 FT contends that the Court should:

— dismiss the application for annulment of Article 1 of the contested decision as inadmissible;

— dismiss the application for annulment of Article 2 of the contested decision as unfounded;

— order AFORS to pay the costs.

IV — *Measures of organisation of procedure, reassignment to a Chamber sitting in extended composition and joinder*

90 By letter of 11 December 2007, by way of measures of organisation of procedure provided for in Article 64 of the Court's Rules of Procedure, concerning Cases T-425/04, T-444/04 and T-450/04, the Court, firstly, asked the Commission to lodge certain documents and, secondly, put a number of questions in writing to the French Republic, FT and the Commission, asking them to reply to them in writing. Those parties complied with those measures of organisation of procedure within the prescribed periods.

91 On 13 February 2008, pursuant to Article 14 of the Rules of Procedure and on the proposal of the Third Chamber, the Court, having heard the parties in accordance with Article 51 of those rules, decided to reassign the four cases to a Chamber sitting in extended composition.

92 By document lodged at the Court Registry on 15 April 2008, in Case T-450/04, the Bouygues companies requested that Cases T-425/04, T-444/04, T-450/04 and

T-456/04 be joined pursuant to Article 50(1) of the Rules of Procedure. The other parties to those cases submitted their observations on that request within the prescribed periods.

93 By document lodged at the Court Registry on 14 May 2008, FT requested, in accordance with Article 50(2) of the Rules of Procedure, that certain information contained in the application, in the reply and in certain annexes to the application lodged in Case T-444/04 be accorded confidential treatment vis-à-vis the other parties in Cases T-425/04, T-450/04 and T-456/04, and produced non-confidential versions of those pleadings.

94 By order of the President of the Third Chamber, Extended Composition, of the Court of 17 February 2009, Cases T-425/04, T-444/04, T-450/04 and T-456/04 were joined for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure. In addition, the President of the Third Chamber, Extended Composition, ordered, firstly, that consultation of the pleadings in the joined cases be limited to the non-confidential versions of the documents and, secondly, that non-confidential, provisional versions of the Reports for the Hearing be communicated to the parties while reserving the decision on the merits of FT's request for confidential treatment. None of the parties raised any objections in that regard.

V — *Oral procedure*

95 On hearing the report of the Judge-Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral procedure.

96 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 21 April 2009.

97 At the hearing, the Commission withdrew its first head of claim in Case T-456/04 contending that the Court should dismiss as inadmissible AFORS' application for annulment of Article 1 of the contested decision; formal note of this was taken in the minutes of the hearing.

Law

I — *The application for annulment of Article 1 of the contested decision*

A — *The pleas of inadmissibility raised in Cases T-425/04, T-444/04, T-450/04 and T-456/04*

1. Arguments of the parties

98 The Commission contends that the actions in Cases T-425/04 and T-444/04 and the application for annulment of Article 1 of the contested decision in Case T-450/04 are inadmissible for lack of a legal interest in bringing proceedings.

99 As regards the actions of the French Republic and FT, the Commission contends that those applicants have obtained satisfaction and have no legal interest in the annulment of the contested decision in its entirety, since, even though that decision declared the aid in question incompatible with the common market, it does not order its recovery.

100 Although a Member State is a privileged applicant under the Treaty and is not required to prove that the act at issue produces legal effects with regard to that Member State, it should nevertheless have a vested and present interest in the annulment of that act. Consequently, a Member State may bring an action only against acts adversely affecting it, namely, against those which are such as to bring about a distinct change in its legal position. In addition, in order to determine whether an act produces legal effects, it is necessary to look at its substance. Those conditions also apply, a fortiori, to any other applicant, such as FT and the Bouygues companies.

101 As regards the action brought by the Bouygues companies, the Commission submits that, in their first plea for annulment, those applicants agree with the reasoning set out, in particular, as far as recital 219 of the contested decision. In reality, they are not contesting that decision in so far as it characterises the notified measures as incompatible aid, since that characterisation is in their interest and meets their wishes. They are contesting it only in so far as the Commission did not find that, taken as a whole or separately, the declarations from July 2002 constitute State aid. Article 1 of the contested decision thus gives satisfaction to the Bouygues companies and they cannot show a vested and present interest in its annulment.

102 In the view of the Commission, only the operative part of an act is capable of producing legal effects and, as a consequence, of adversely affecting the interests of those concerned. The assessments contained in the reasoning of the contested decision may not, as such, be the subject of an action for annulment and may be subject to judicial review by the Community judicature only if, as the reasoning of an act adversely affecting the interests of those concerned, they constitute the essential basis for its

operative part. It is thus accepted that a decision which gives satisfaction to the applicant is not capable of adversely affecting him, without prejudice to the rights of the third parties concerned to bring an action for annulment against that decision.

103 In that regard, the Commission refers to the order in Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177, paragraphs 18 to 25, according to which an action brought by a Member State as the addressee of a decision concerning State aid which is favourable to that Member State in that it declares certain aid measures to be compatible with the common market is inadmissible for lack of a legal interest in bringing proceedings. According to the Court of Justice, the operative part of that decision had no binding legal effects capable of affecting the applicant's interests, since it did not bring about a serious and clear change in its legal position. Admittedly, the situation which gave rise to that order differed slightly from that in this case in that the measures in favour of FT were characterised as aid incompatible with the common market. However, the fact remains that, on the one hand, by finding that it was not possible to require the recovery of that aid, the contested decision gives satisfaction to the French Republic and FT and, by its very nature, is not capable either of bringing about a change in their legal position or of adversely affecting their interests. On the other hand, in so far as Article 1 of the contested decision characterises the measures in favour of FT as incompatible aid, it gives satisfaction to the Bouygues companies and is likewise not capable of bringing about a change in their legal position or of adversely affecting their interests. Indeed, the Bouygues companies do not challenge that operative part, but merely seek the annulment of the assessment that only the shareholder loan, as placed in the context of the declarations from July 2002, constitutes State aid. In any event, those four applicants do not have a vested and present interest in the outcome of this case, since, even if their claims are well founded, their legal position would remain unchanged as a consequence of annulment of Article 1, irrespective of the grounds justifying such annulment.

104 The Commission, supported by the French Republic, adds that, although it does not dispute the legal interest of the Bouygues companies in bringing an action for annulment of Article 2 of the contested decision, it nevertheless takes the view that their position is contradictory. If the Bouygues companies' application for annulment of

Article 1 of the contested decision were deemed to be well founded, the Court could not rule on their application for annulment of Article 2 of that decision. In such a case, the shareholder loan would no longer be the aid referred to in Article 1 to be taken into account for the purpose of applying Article 2 of the contested decision. That contradiction merely reinforces the Commission's argument that it is not open to the Bouygues companies to challenge Article 1 of that decision.

105 Moreover, the possible obligation for the French Republic, based on the contested decision, to notify in the future any aid measure similar to that characterised as aid in this case would not, even if it involved a certain procedural burden, result in any change in its legal position or that of FT which would suffice for recognition of their vested and present interest in bringing proceedings. That is borne out by the order in *Netherlands* v *Commission*, paragraph 103 above, in which the Court of Justice did not find any vested and present interest on the part of the applicant State even though the latter had raised that argument. If the interest which an applicant claims concerns a future legal situation, he must demonstrate that the prejudice to that situation is already certain. Similarly, if a national court found it necessary to take the contested decision into consideration and had doubts as to its scope, that court would be able to refer a question to the Court of Justice for a preliminary ruling under Article 234 EC, so that, in any event, the applicants would not in the least be deprived, in the event of any dispute, of the opportunity to assert their rights before the national court.

106 The Commission rejects FT's argument that the contested decision causes it to run the risk of repaying the aid at issue, in view, in particular, of the actions brought in Cases T-450/04 and T-456/04. In the present case, the mere reference to actions brought by third parties cannot in itself demonstrate that applicant's legal interest in bringing proceedings. In the Commission's view, firstly, any actions at national level are purely hypothetical. Although the implementation of the aid measures was unlawful before the adoption of the contested decision, including the decision not to order recovery of the aid in question, and the national courts must protect the rights

of individuals, it is nevertheless common ground that, in the present case, no such actions were brought prior to that decision. Secondly, so far as concerns the actions brought in Cases T-450/04 and T-456/04, the Commission points out that, if they were well founded, only a new Commission decision adopted in order to comply with the judgment in accordance with Article 233 EC would adversely affect FT's interests. However, as long as no such new decision exists, that applicant is not required to repay any incompatible aid.

107 The Commission accordingly concludes that it is not open either to the French Republic or to FT to bring proceedings for annulment of the contested decision in Cases T-425/04 and T-444/04. In Case T-450/04, it contends that the Bouygues companies' application for annulment of Article 1 of that decision is inadmissible.

108 The French Republic, FT and the Bouygues companies claim that the pleas of inadmissibility raised by the Commission should be rejected.

109 The Bouygues companies submit that their application for annulment of Article 1 of the contested decision is admissible in so far as that article, read in conjunction with the reasoning forming its essential basis, implicitly but necessarily includes the Commission's legally binding refusal to accept the Bouygues companies' argument that the declarations from July 2002 in themselves constituted State aid.

110 Finally, as regards the action brought by AFORS in Case T-456/04, FT contends that any application for annulment of Article 1 of the contested decision is inadmissible. In that regard, AFORS points out that its action covers only Article 2 of that decision.

2. Findings of the Court

(a) Preliminary observations

111 It must be observed, first of all, that, in Cases T-425/04 and T-444/04, the Commission disputes the legal interest of the French Republic and FT in bringing proceedings against the contested decision in its entirety, without distinguishing, in that regard, between Article 1 and Article 2 of that decision. In Case T-450/04, on the other hand, the Commission does make such a distinction in that it calls in question only the legal interest of the Bouygues companies in bringing proceedings against Article 1 of the contested decision, but not that in bringing proceedings against Article 2 of that decision.

112 Thus, in the view of the Commission, Articles 1 and 2 of the contested decision constitute severable elements for the purposes of a partial annulment.

113 The Court holds that that is true in this case.

114 Article 2 of the contested decision, which finds that the aid declared incompatible with the common market in Article 1 does not have to be recovered, can be annulled in isolation, without that involving an alteration of the scope of Article 1 or of the reasoning which forms its essential basis (see, to that effect Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraphs 27 and 28, and the case-law cited).

115 In addition, the fact that a possible total annulment of Article 1 of the contested decision, on the basis of the pleas put forward by the French Republic and by FT, would

be bound to render Article 2 invalid does not affect the severability of the latter article, since that invalidity has no effect on its content and is wholly separate from the question whether or not it orders recovery. Moreover, as the Bouygues companies argued at the hearing, in the event of a partial annulment of Article 1 of the contested decision, on the basis of the pleas put forward by the Bouygues companies in Case T-450/04, which would allow the finding of aid incompatible with the common market to stand, Article 2 would still be the proper subject of a separate annulment.

116 Next, as regards the legal interest in bringing proceedings, it is necessary to recall the settled case-law according to which an action for annulment brought by a natural or legal person is not admissible unless the applicant establishes a vested and present interest in seeing the contested measure annulled. Such an interest presupposes that the annulment of the measure must of itself be capable of having legal consequences or, to use a different form of words, the action must be liable, if successful, to procure an advantage for the party who has brought it. Consequently, a measure which gives full satisfaction to that person is not, by definition, capable of adversely affecting him and such a person has no interest in seeking its annulment (see, to that effect, Case T-354/05 *TF1* v *Commission* [2009] ECR II-471, paragraphs 84 and 85, and the case-law cited).

117 Those are the principles in the light of which it must be considered whether the French Republic, FT and the Bouygues companies have a legal interest in the annulment of Article 1 of the contested decision.

(b) The legal interest of the French Republic and of FT in bringing proceedings against Article 1 of the contested decision

118 Firstly, as regards the legal interest of the French Republic in bringing proceedings, it must be pointed out that the Treaty draws a clear distinction between the right of Community institutions and Member States to bring an action for annulment and that of legal persons and individuals, in that all Member States are given the right

to contest the legality of decisions of the Commission by means of an action for annulment, without having to establish any legal interest in bringing proceedings. A Member State need not therefore prove that an act of the Commission which it is contesting produces legal effects with regard to that Member State in order for its action to be admissible (order in Case C-208/99 *Portugal* v *Commission* [2001] ECR I-9183, paragraphs 22 and 23; Case T-233/04 *Netherlands* v *Commission* [2008] ECR II-591, paragraph 37; and Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark and Others* v *Commission* [2008] ECR II-2935, paragraph 63). That finding also follows from the case-law definition of a legal interest in bringing proceedings (see paragraph 116 above), which covers only actions brought by natural or legal persons and not those brought by institutions or Member States.

119 Furthermore, contrary to what the Commission seems to contemplate, the concept of a legal interest in bringing proceedings must not be confused with the concept of a challengeable act, pursuant to which an act must be intended to produce legal effects capable of adversely affecting the interests of those concerned in order for it to be capable of being the subject of an action for annulment, which must be ascertained by looking to its substance (see, to that effect, Case C-147/96 *Netherlands* v *Commission* [2000] ECR I-4723, paragraphs 25 and 27; orders in *Portugal* v *Commission*, paragraph 118 above, paragraph 24, and *Netherlands* v *Commission*, paragraph 103 above, paragraphs 18 and 19; and *TV 2/Danmark and Others* v *Commission*, paragraph 118 above, paragraph 63). The inevitable conclusion in this regard is that, in the light of its substance, the contested decision constitutes such a challengeable act producing binding legal effects.

120 In the present case, having regard to the provisions of the Treaty and in the light of the case-law referred to in paragraphs 118 and 119 above, the French Republic, solely in its capacity as a Member State, is entitled to bring an action for annulment against Article 1 of the contested decision without being required to show a legal interest in bringing proceedings in that regard.

121 Secondly, as regards FT's legal interest in bringing proceedings against Article 1 of the contested decision, it must be held, first of all, that that article is also intended to produce binding legal effects vis-à-vis FT in so far as it is the sole beneficiary of the

aid measure which is declared in that article to be incompatible with the common market.

122 In that regard, the Commission wrongly refers to the case-law according to which only the operative part of an act is capable of producing legal effects and, as a consequence, of adversely affecting a person's legal interests (see Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 186, and the case-law cited). It is clear from Article 1 of the contested decision that the Commission characterises the shareholder loan, as placed in the context of the declarations from July 2002, as State aid incompatible with the common market within the meaning of Article 87 EC. It is precisely that finding, in conjunction with the statement of reasons in that decision forming its essential basis, which FT is challenging by its action on the ground that it affects its legal position and that it adversely affects its interests. Likewise, the Commission's argument that the contested decision gives satisfaction to FT must be rejected, since that argument confuses the legal effects of Article 1 of that decision with those of Article 2, which finds that there is no need to order recovery of the aid in question.

123 Moreover, the Commission cannot reasonably contend that FT has no interest in the outcome of this case on the ground that its legal position would remain unchanged even if its action were well founded. Firstly, annulment of Article 1 of the contested decision on the basis of the pleas put forward by FT would have the consequence that the finding of unlawfulness of the aid measure in question, which is an individual measure in its favour, would be null and void, which constitutes a legal consequence bringing about a change in its legal position and procuring an advantage for it. Secondly, contrary to what the Commission maintains, that vested and present interest of FT in the annulment of Article 1 of the contested decision is confirmed by the hypothetical situation where, in Cases T-450/04 and T-456/04, the applications of the Bouygues companies and AFORS for the annulment of Article 2 of that decision are upheld, since such an annulment would have the consequence that the Commission would be obliged to order, to the detriment of FT, recovery of the unlawful aid referred to in Article 1.

124 It follows from the foregoing considerations that FT has a vested and present interest in the annulment of Article 1 of the contested decision.

125 The pleas of inadmissibility raised by the Commission in Cases T-425/04 and T-444/04 must therefore be rejected in so far as they relate to the admissibility of the applications for annulment of Article 1 of the contested decision brought by the French Republic and FT.

(c) The legal interest of the Bouygues companies in bringing proceedings against Article 1 of the contested decision

126 It must be noted, as a preliminary point, that, from the point of view both of its form and of its substance, the contested decision constitutes an act intended to produce binding legal effects. Moreover, in so far as Article 1 of the contested decision finds the existence of aid to FT and declares it incompatible with the common market, that article coincides with the claim and interests of the Bouygues companies, as set out in their complaint of 22 January 2003.

127 However, the finding of the existence of aid and of its incompatibility with the common market in Article 1 of the contested decision does not preclude a priori the existence of other incompatible aid measures which, although not referred to in that article, are also covered by the administrative procedure culminating in the adoption of that decision and which, moreover, are capable of substantially affecting the market position of certain competitors of the beneficiary of the aid (see, to that effect, Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005]

ECR I-10737, paragraph 37). That could be true of the position of the Bouygues companies in relation to that of FT on the French market for mobile telephony.

128 In that regard, the Commission again wrongly relies on the case-law according to which only the operative part of an act is capable of producing legal effects and of adversely affecting a person's legal interests (see *CMA CGM and Others* v *Commission*, paragraph 122 above, paragraph 186, and the case-law cited). In the present case, it is clearly apparent from Article 1 of the contested decision and from the reasoning forming its basis, which is set out in recitals 185 to 230 of that decision, that the Commission confines itself to characterising the shareholder loan itself, as examined in the light of the declarations from July 2002, as State aid incompatible with the common market within the meaning of Article 87 EC. However, that finding, which appears both in the operative part of that decision and in the statement of reasons on which it is based, is precisely that which the Bouygues companies are challenging by means of their action on the ground that it affects their legal position and adversely affects their interests, in so far as it refers to only one aid measure, even though, in their view, by means of the declarations from July 2002, the French State adopted further aid measures involving separate advantages for FT and further damaging their market position. In that context, the Bouygues companies are fully entitled to plead that the Commission's overall approach, as set out, in particular, in recitals 187 to 191 and 203 to 228 of the contested decision, necessarily implies its refusal to characterise the declarations from July 2002 as aid measures in themselves. Consequently, the Commission is not justified in claiming that the Bouygues companies are not, in reality, challenging Article 1 of the contested decision and that they agree with the reasoning underlying it.

129 In the same way, the Commission cannot reasonably contend that Article 1 of the contested decision gives satisfaction to the Bouygues companies and that they do not have a vested and present interest in the outcome of this case on the ground that, even if their action were deemed to be well founded, their legal position would remain unchanged. The annulment of Article 1 of the contested decision on the basis of the pleas put forward by the Bouygues companies would have the effect of invalidating the finding of the existence of an aid measure incompatible with the common market only in so far as it refers to the declarations from July 2002 as forming an integral part of that measure instead of characterising them as separate aid measures satisfying, on their own, the conditions of Article 87(1) EC. As the Bouygues companies submit,

such an annulment of Article 1 would be only partial and would allow the finding of the existence of the unlawful aid constituted by the shareholder loan to stand. However, such a partial annulment is liable to bring about a distinct change in the legal position of the Bouygues companies.

130 It has also been recognised by the case-law that, when an applicant claims that the contested measure, even though it may be partially favourable to him, none the less does not adequately protect his legal situation, it must be recognised that he has an interest in bringing proceedings to have the legality of that decision verified by the Court (see, to that effect, *TF1* v *Commission*, paragraph 116 above, paragraph 86).

131 It must therefore be concluded that the Bouygues companies have a vested and present interest in securing the partial annulment of Article 1 of the contested decision to the extent described in paragraph 129 above.

132 Finally, the Bouygues companies correctly submit that there is no contradiction between their application for annulment of Article 1 of the contested decision and that of Article 2 of that decision, since it is conceivable that those articles are vitiated by two separate illegalities consisting, firstly, in not ordering the recovery of the unlawful aid measure as found in Article 1 and, secondly, in not ordering the recovery of any other aid measures not referred to in that article, such as the declarations from July 2002.

133 Accordingly, the plea of inadmissibility raised by the Commission in Case T-450/04 must be rejected.

(d) Admissibility of the alleged application by AFORS for annulment of Article 1 of the contested decision

134 As regards the plea of inadmissibility raised by FT in Case T-456/04 against an alleged application by AFORS for annulment of Article 1 of the contested decision, it is sufficient to note, firstly, that, in the originating application, AFORS did not formally claim that that article should be annulled and, secondly, that, in the reply, it confirmed that its action concerned only Article 2 of that decision. Consequently, there is no need to rule on this plea of inadmissibility.

B — *Lawfulness of Article 1 of the contested decision*

1. Arguments of the parties

(a) Summary of the pleas for annulment

135 In Cases T-425/04 and T-444/04, the French Republic and FT raise four pleas in support of their application for annulment of Article 1 of the contested decision, namely, firstly, infringement of essential procedural requirements and of the right to a fair hearing, secondly, errors of law in the application of the concept of aid within the meaning of Article 87(1) EC, and more specifically of the prudent private investor criterion, thirdly, manifest errors in the assessment of the content and/or alleged effects of the declarations from July 2002 and, fourthly, failure to state reasons within the meaning of Article 253 EC.

136 In Case T-450/04, the Bouygues companies put forward, in support of their application for annulment of Article 1 of the contested decision, a first plea, alleging infringement of Article 87(1) EC in that the Commission refused to characterise the declarations from July 2002, considered in isolation or together, as State aid, and a second plea, alleging inconsistency and a failure to state adequate reasons, contrary to Article 253 EC.

137 The Court considers it appropriate to examine, first, the second and third pleas raised in Cases T-425/04 and T-444/04 and the first and second pleas put forward against Article 1 of the contested decision in Case T-450/04, in so far as those pleas concern, in essence, the lawfulness of the Commission's application of the concept of aid within the meaning of Article 87(1) EC.

(b) Arguments of the French Republic and FT

Preliminary observation

138 It must be observed, as a preliminary point, that some of the arguments put forward in the following paragraphs are also put forward by the French Republic and FT in their statements in intervention in Case T-450/04.

The second plea of the French Republic and FT

139 The second plea raised in Cases T-425/04 and T-444/04 is subdivided into two parts. By the first part, the French Republic and FT maintain that the Commission

misapplied the criterion of the prudent private investor in a market economy. By the second part, they contend that the Commission wrongly found that State aid existed as from two separate events which occurred at different times and of which the Commission itself acknowledges that, considered separately, neither would have sufficed to justify that finding. The French Republic points out that, although the Commission claims to have taken into account all the declarations from July 2002 (recitals 203, 218 and 229 of the contested decision), it examined only the alleged effects on the markets of the declaration of 12 July 2002, a point which is confirmed by, inter alia, the references to the report of 28 April 2004 and to the comments of the financial analysts (recital 221 of the contested decision).

The third plea of the French Republic and FT

140 By their third plea raised in Cases T-425/04 and T-444/04, the French Republic and FT maintain, in essence, that the Commission made manifest errors of assessment in considering that the declarations from July 2002 could be perceived by the markets as a commitment by the French State and that they had an impact on the situation of the markets in December 2002. FT submits, in addition, that the Commission's reasoning to the effect that the shareholder loan proposal conferred on FT an advantage not satisfying the prudent private investor criterion is also vitiated by a manifest error of assessment.

141 The French Republic and FT claim that, at the time of the declaration of 12 July 2002, the nature of the measures which the French State was contemplating taking with regard to FT had not yet been decided and that, in particular, no investment decision capable of being characterised as a firm commitment by the French State had been taken. That very general, conditional and legally non-binding declaration — which expresses, inter alia, the intention to behave like a prudent investor and denies the rumour of an increase in FT's capital decided on subsequently — cannot be characterised as a clear, precise and irrevocable commitment on the part of the French State,

which the Minister for Economic Affairs was in any case not in a position to make. The Commission therefore made a manifest error of assessment in considering that the declaration of 12 July 2002 could be perceived by the markets as a credible commitment on the part of the French State.

142 Moreover, the French Republic and FT dispute that the declarations from July 2002 produced an impact on the perception of market operators in December 2002 and led to an abnormal and not negligible increase in the value of FT's shares and bonds (recitals 217 to 222 and, in particular, 221 of the contested decision). They also dispute that that impact manifested itself primarily in the fact that, until December 2002, FT's credit rating was maintained at investment grade instead of being reduced to that of a junk bond. FT infers from this that it is even less possible to conclude that the declaration of 12 July 2002 conferred an advantage on FT (recital 188 of the contested decision). Furthermore, the conclusions of the report of 28 April 2004 are based on an inappropriate method of analysis and are manifestly insufficient to establish both the existence of significantly abnormal movements in FT's share price in July 2002 and that of a causal link between the declaration of 12 July 2002 and such movements. Consequently, the Commission made a manifest error of assessment in considering that the declaration of 12 July 2002 produced an impact on the situation of the financial markets and conferred an advantage on FT at that time.

143 In that regard, the French Republic and FT reject the finding that the report of 28 April 2004 demonstrates that 'the … declarations [from July 2002] had a real impact on the perception of the markets in December [2002]' (recitals 186 and 219 of the contested decision), since that report refers only to the alleged effects of the declaration of 12 July 2002 on the markets in July 2002. That report merely analyses the impact of each of the declarations from July 2002 on, respectively and separately, the markets in July, September, October and December 2002 and not the impact of all the declarations on the market in December 2002. In the view of the French Republic, since the Commission was not justified in concluding that the declaration of 12 July 2002 produced, at that time, an impact on the markets and involved conferring an advantage on FT, it was even less justified in doing so in respect of the situation of the markets in December 2002. Furthermore, the report of 28 April 2004 could not analyse the supposed effects of the declaration of 12 July 2002 on the market situation

in December 2002, given that it was impossible to distinguish between the effects of that declaration, on the one hand, and those of the other events which occurred between July and December 2002, on the other. FT's strong operational performance and prospects during the second half of 2002, the resolution of Mobilcom's situation, the appointment of a new CEO and the presentation of a rebalancing plan influenced the markets' perception in December 2002 (see recitals 186 and 260 of the contested decision).

144 In the view of FT, the Commission made a manifest error of assessment in considering that it was necessary to determine whether the advantage conferred by the shareholder loan proposal satisfied the prudent private investor criterion, even though it acknowledged that that proposal as such did not confer any advantage on FT (recitals 190 and 263 of the contested decision). The shareholder loan proposal did not become effective, with the result that no commitment on the part of the French State to provide a credit line entered into force. In the light of the conditions which were laid down in that proposal, FT preferred not to sign it and to resort, in December 2002 and January 2003, to refinancing on the bond markets.

145 In the view of FT, it was inconceivable that the market could perceive the shareholder loan proposal as embodying a commitment by the French State exceeding its future participation in the capital increase as majority shareholder, since that proposal was strictly limited to the amount of EUR 9 billion — corresponding to the French State's share in the capital increase envisaged by the Ambition 2005 plan — and to a period of 18 months. Furthermore, the French State took the decision to offer to make a shareholder loan available to FT only after it had been informed of the Ambition

2005 plan. Finally, the positive reaction of the markets has its origin principally in the appointment of FT's new CEO and in its operational performance improvement plan and cannot be attributed to alleged support from the French State going beyond its normal role as shareholder.

146 FT submits, finally, that the Commission also made a manifest error of assessment in considering that the conditions of the prudent private investor criterion were not satisfied in this case (recital 230 of the contested decision). An objective examination of the French State's action throughout the whole of the relevant period should have led the Commission to the opposite conclusion.

The additional arguments put forward by the French Republic and by FT as interveners in Case T-450/04 and in reply to the Court's written questions

147 In their replies to the Court's written questions, the French Republic and FT essentially reiterated that, also under French law, the French State had not committed itself, firmly and irrevocably, for the benefit of FT or third-party investors. The declarations from July 2002 are imprecise and conditional and cannot be characterised as binding legal acts or facts, or as an express or implied State guarantee for the purposes of French administrative law. Nor, in the absence of firm, clear and precise character, do those declarations constitute promises such as to render the State liable.

148 The French Republic and FT add that the interpretation of the declarations from July 2002 falls solely within the scope of French administrative law and not of French civil, commercial or criminal law. In any event, owing to their imprecise and conditional character, those declarations cannot be characterised as a contractual or unilateral

commitment, if only in the form of a letter of intent, promise to perform a natural obligation or enforceable promise. Nor are they a quasi-contractual commitment or legal facts capable of giving rise to State liability in tort.

149 Consequently, according to the French Republic and FT, the declarations from July 2002 do not involve any commitment of State resources within the meaning of Article 87(1) EC (recital 188 of the contested decision). On the contrary, it is apparent from the case-law that unilateral and autonomous decisions of the Member States, by which the latter seek to make resources available to undertakings or to procure for them advantages intended to further the achievement of the economic and social objectives pursued, must have the character of an autonomous and binding legal act. In any event, a promise made by the State cannot be characterised as aid unless that promise was unconditional and legally binding.

(c) Arguments of the Bouygues companies

The first plea of the Bouygues companies

150 The Bouygues companies dispute the finding in Article 1 of the contested decision that the shareholder loan, placed in the context of the declarations from July 2002, constitutes State aid incompatible with the common market in so far as that finding implies that those declarations could not also, and in themselves, be characterised

as State aid. In the view of the Bouygues companies, those declarations, considered in isolation or together, constitute one or more State aids for the purposes of Article 87(1) EC, the four cumulative conditions of which are satisfied. That error of characterisation of the facts therefore constitutes an infringement of Article 87(1) EC.

151 In the first place, each of the declarations from July 2002 procured for FT an additional, selective and unjustified advantage according to the private investor criterion. That advantage consisted in a recovery of market confidence and, in particular, in the improvement of FT's credit rating and the increase in its share price, enabling it to re-enter the financial market on very favourable terms, which, in the light of FT's disastrous financial situation at the time, would not have been possible otherwise. Thus, the declarations from July 2002 prevented the downgrading of FT's credit rating to the level of a junk bond (see recitals 37 and 212 of the contested decision) and led to an abnormal and not negligible rise in its share price (recitals 35 and 221 of the contested decision). The declarations of 12 and 13 September 2002 persuaded Moody's to change the outlook of FT's debt from negative to stable owing to the reaffirmed support of the French authorities (recital 52 of the contested decision). Subsequently, the frequency of FT's spread inversions (see paragraph 34 above) diminished, which demonstrates that the market considered that the risk associated with the short-term debts had become less significant than that associated with the long-term debts. Moreover, the same effect was observed following the declaration of 2 October 2002 (recital 30 of the contested decision), since FT's share price went up by 10.4% during the following week (recital 180 of the contested decision), reaching double its value at the end of December 2002 compared with that at the beginning of October 2002 (recital 35 of that decision). Those advantages for FT were realised before the announcement by the French authorities on 4 December 2002 of the shareholder loan proposal in the form of a EUR 9 billion credit line and enabled it to avoid additional refinancing costs (recital 222 of the contested decision).

152 The Bouygues companies maintain that they have claimed since the administrative procedure that the French State granted FT a number of aids, including the declarations from July 2002 and the shareholder loan in the form of a EUR 9 billion credit line. Although they share the Commission's view that the strategy of the French authorities was part of a continuing rescue process which culminated in the grant of an aid in the form of the shareholder loan, they dispute the Commission's finding relating to the existence of only a single aid embodied in that loan. In the submission of the Bouygues companies, the fact that the declarations from July 2002 constituted additional State aid is borne out by the case-law (Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235). That earlier aid, which is an integral part of a continuing support process, could both be penalised for itself and be taken into account, in the context of applying the private investor criterion, for the purposes of the characterisation of subsequent aid which, in view of the earlier measures, has only the appearance of an act capable of being carried out by a prudent private investor. In the situation which gave rise to the judgment in *BP Chemicals* v *Commission*, paragraph 170, several aid measures were at issue, the first two of which made it possible to characterise the third by establishing that the prudent private investor criterion was not satisfied. That is precisely what the Bouygues companies maintain in the present case by drawing attention to the existence of several aid measures which, according to a scheme orchestrated by the French State, are linked to each other. Thus, the aid consisting of the declarations from July 2002 has its logical extension in the shareholder loan. However, the Commission did not accept the existence of earlier aid, but invented, in a reductionistic and erroneous manner, the argument that the declarations from July 2002 were given concrete form in the shareholder loan.

153 The Bouygues companies add that the Commission's approach amounts to an arbitrary choice which denies the reality of the advantage resulting from the improvement in FT's credit rating following the declarations from July 2002 (see recital 222 of the contested decision and point 3.2 of the Commission Notice on the application of Articles 87 [EC] and 88 [EC] to State aid in the form of guarantees (OJ 2000 C 71, p. 14; 'the Notice on aid in the form of guarantees'), which is much more significant than that linked to the shareholder loan. Contrary to what the Commission contends, the characterisation of those declarations as aid has been at the very centre of this

case. In that regard, the argument that the shareholder loan was the only measure notified cannot be accepted, since the scope of the notification cannot influence the assessment of the concept of aid.

154 The Bouygues companies dispute FT's argument that the declarations since July 2002 cannot be characterised as State aid on the ground that they do not involve any commitment of State resources. That argument is not only incorrect but also contradicted by recitals 208 and 218 of the contested decision. Furthermore, even if those declarations were only political, non-binding, imprecise and conditional in character, which is clearly contradicted by recitals 209 and 210 of that decision, they may nevertheless involve a commitment of State resources within the meaning of Article 87(1) EC.

155 The Bouygues companies point out that a prudent private investor would not have made such declarations. Prior to those declarations, FT was an undertaking with serious structural problems and an unbalanced balance sheet (recital 17 of the contested decision). It therefore lost the confidence of the markets (see recital 20 et seq. of that decision). In such circumstances, a prudent private investor would not have displayed such clear support for FT (recital 229 of the contested decision). Furthermore, the French State gave its support to FT in July, September and October 2002 without taking any steps to satisfy itself as to the possibility of FT's recovery and to restore its viability, since such measures were adopted only subsequently (see recitals 39, 53, 54, 228 and 229 of that decision).

156 Consequently, in the view of the Bouygues companies, so far as concerns the declarations from July 2002, the first condition of Article 87(1) EC, namely the conferment of an advantage, is satisfied (recitals 188 and 229 of the contested decision).

157 In the second place, the Bouygues companies maintain that the declarations from July 2002 rendered the French State financially liable in law and in fact.

158 In that regard, the Bouygues companies recall that State aid within the meaning of Article 87(1) EC embraces interventions which, in various forms, mitigate the charges which are normally borne by the budget of an undertaking and which, without being subsidies in the strict meaning of the word, are similar in character and have the same effect. Furthermore, no distinction of principle can be drawn on the basis of the form which the aid may take, since the concept of aid is based on the economic concept of advantage and the formal criterion is immaterial. The Treaty rules on State aids do not distinguish between them according to the causes or objectives of the State interventions, but define them in terms of their effects. It follows that the concept of aid is an objective concept, the sole test being whether a State measure confers an advantage on one or more particular undertakings.

159 The Bouygues companies submit that, having regard to the general principle of the effectiveness of Community law, verbal declarations or promises may be characterised as aid in so far as they have the effects of aid. The case-law has thus recognised that declarations made through the press may constitute decisions and that, in assessing an aid measure, promises by the State may be taken into account in order to determine whether they led the undertaking to adopt conduct likely to assist attainment of one of the objectives mentioned in Article 87(3) EC (Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427). Furthermore, in its Decision 2001/89/EC of 23 June 1999 conditionally approving aid granted by France to Crédit Foncier de France (OJ 2001 L 34, p. 36; 'the Crédit Foncier decision'), the Commission characterised statements by a minister as State aid, pointing out that, in view of their effects, they were to be regarded as a guarantee. In the Bouygues companies' view, the judgment in Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109 does not contradict that decision and that case-law, since it referred to a statement

relating to possible conduct of the State in response to the future decision of a third party, the exact wording of which was not yet determined. By contrast, a firm decision by the State on its own conduct, not conditional on the conduct of a third party, may constitute State aid, even if it takes the form of a declaration.

160 Moreover, the Commission itself confirms, in point 1.1 of its Notice on aid in form of guarantees (see paragraph 153 above), that notice covers all forms of guarantees, irrespective of their legal basis and the transaction covered. In the view of the Bouygues companies, the concept of guarantee must be construed, in its widest sense, as any mechanism which protects a person against a financial loss. In the light of that definition, declarations by which the shareholder in a company undertakes to take the necessary steps, and in particular to strengthen its capital base, in order that that company does not have financing problems constitutes a form of guarantee granted to its present and potential creditors.

161 Similarly, the condition of commitment of State resources must be widely interpreted and may be characterised by a loss of revenue or by a potential commitment of such resources. Even in the absence of an immediate mobilisation of State resources, the mere fact that the State incurs, on account of such a commitment, a risk of having to pay out permits the inference that the aid is being granted by means of State resources. Any intervention by the State which has the effect of causing the State to incur, in law or in fact, a risk of having to pay out must therefore be characterised as aid in the form of a guarantee. That applies in this case.

162 In that regard, whether the decision committing State resources is or is not legally binding is immaterial for the purpose of applying Article 87(1) EC. In all fields of competition law and law concerning freedom of movement, the case-law takes account of acts having no binding force in order to ensure the effectiveness of Community law. This is also borne out by Commission practice. Thus, according to point 2.1.3 of the Notice on aid in the form of guarantees (see paragraph 153 above), the fact

that public enterprises are not subject to bankruptcy or other insolvency procedures is in itself to be regarded as aid in the form of a guarantee, and this in the absence of any obligation for the State to grant its financial support to such enterprises. As was confirmed by the Commission's letter of 4 April 2003 inviting the French Republic to submit comments concerning aid to Électricité de France (EDF) in the form of the unlimited State guarantee associated with its public enterprise status (Aid E 3/02 — Aid to Électricité de France (OJ 2003 C 164, p. 7)), the reasoning underlying that assertion is that the State is in point of fact obliged to grant such support, failing which no operator would want to sign a contract with those enterprises. In the present case, the straightforward application of those principles should have led the Commission to recognise a commitment of State resources.

163 The declarations from July 2002 constitute firm, clear and precise guarantee commitments committing State resources, whether in law or in fact. By each of its declarations, the French State gave its clear and precise commitment to the world of finance that it would provide financial support to FT in the event of difficulty in meeting its due debts. As is apparent from recital 209 of the contested decision, those repeated declarations are sufficiently precise, clear and firm to demonstrate the existence of a credible and unconditional commitment on the part of the French State. The market's reactions and, in particular, the increase in value of FT's shares and bonds following the declaration of 12 July 2002 confirm that the market believed in the French State's guarantee and support for FT (recital 221 of the contested decision). The unconditional character of that support is not called in question by the words 'if necessary', since that proviso is purely formal given that FT's situation at the time was in such jeopardy and financial difficulties were so certain to arise (recital 210 of the contested decision). Consequently, whether considered in isolation or as a whole, those declarations clearly manifest a commitment on the part of the French State to provide FT with support and a guarantee (recitals 208 and 212 of the contested decision).

164 Furthermore, in the view of the Bouygues companies, each of the declarations from July 2002 has the force of a commitment, both in French law and in Anglo-Saxon law. They point out that, in French law, the existence of a commitment entered into by an administrative authority is to be assessed in the light, not of its form, but of its intrinsic characteristics. Thus, the French administrative courts recognise that administrative decisions may take the form not only of written decisions but also of simple verbal decisions. Moreover, even where they are not accompanied by any specific legal act, promises constitute commitments as they are the embodiment of the administrative authority's will. For a commitment on the part of the State to be recognised, it is sufficient for the authority to have behaved 'in such a way as to convince others' that it would act in a certain manner. Consequently, firm, clear and precise declarations made by the State are in all cases such as to render the State liable, whether because, in granting a promise, it has created legal obligations on its part, of which it cannot rid itself without committing a fault, since, for it, the mere fact of not keeping its promise is sufficient to render it liable or because, on the contrary, in granting a promise, the State has committed itself unlawfully.

165 According to the Bouygues companies, in the light of their intrinsic characteristics, each of the declarations from July 2002 constitutes a commitment on the part of the French State. Similarly, those declarations were regarded by the market as being precise and unconditional and as embodying a credible and genuine commitment on the part of the French State, which lay behind the resolution of FT's financial crisis. Under the principles applicable in French law, if the French State had not honoured those commitments, it could have exposed itself to actions for damages on the part of any third party establishing a legal interest in bringing proceedings, whether it be FT's shareholders, its employees or its creditors. That reason alone is sufficient for it to be considered that the declarations from July 2002 in themselves committed State resources.

166 Even in the absence of binding force from the commitment resulting from the declarations from July 2002 under French law, those declarations commit State resources,

since that concept is to be widely interpreted. The French State was de facto obliged to honour its promise, in view of the real expectation which its declarations had created from the point of view of the market (see, in particular, recitals 217 and 221 of the contested decision). Failure to honour that promise would have given rise for the French State, in its capacity as an owner and manager of companies, as a major economic operator and as a major borrower on the financial markets, to a cost much higher still on account of the loss of its credibility and reputation on those markets (recitals 217 and 221 of that decision). Even in the absence of a legally binding commitment, that financial risk for the French State is equivalent to a commitment of State resources. The Bouygues companies point out that any public declaration by a member of the Government in favour of a company does not constitute State aid per se, but must be assessed by reference to its wording, its context and the circumstances of the particular case. In this case, in view of the precision of the declarations in question and of the importance of FT, of its capacity as the historical operator and of the exceptional gravity of its financial situation, the declarations in question assumed a particular significance, equivalent to a guarantee granted by the French State.

167 In the Bouygues companies' submission, it is apparent from the circular of the Minister for Economic Affairs dated 22 July 2003, headed 'Listing of the implicit or explicit guarantees granted by the [French] State' ('the circular of 22 July 2003'), and especially from the explanatory note attached to that circular, that an explicit guarantee presupposes that the words 'the State guarantees' appear in the legal basis, whereas an implicit guarantee requires only that it be determined whether the administrative act 'produces and involves financial consequences for the State'. The explanatory note further recognises that the State guarantee may result, in particular, from a 'ministerial letter or [from] any other basis' and that guarantees which may have been granted without a valid legal basis may nevertheless 'create rights for their beneficiaries'. Since the Commission admits that the declarations from July 2002 involve a financial risk and that they were sufficiently clear, precise and firm to embody a

credible commitment on the part of the French State, it should have found that an implicit guarantee constituting State aid existed.

168 In the third place, the Bouygues companies submit that the declarations from July 2002 distorted competition and affected trade between Member States.

169 The Bouygues companies conclude from all the foregoing considerations that the declarations from July 2002 conferred a selective advantage on FT, which was not justified in the light of the private investor criterion, which commits resources of the French State, distorts competition and affects trade between Member States. Consequently, those declarations, considered in isolation or together, satisfy the four conditions laid down in Article 87(1) EC and constitute one or more State aids which are separate from the aid involved in the shareholder loan. Consequently, by refusing to characterise the declarations as separate aid, the Commission failed to have regard to Article 87(1) EC.

The second plea of the Bouygues companies

170 In the submission of the Bouygues companies, Article 1 of the contested decision must also be annulled on account of a twofold infringement of essential procedural requirements, namely contradictory and insufficient reasoning.

171 As regards contradictory reasoning, the Bouygues companies submit that, whereas a first series of reasons establishes that the declarations from July 2002 satisfy all the preconditions for the existence of State aid, other reasons contradict that view.

172 Thus, on the basis of the findings set out in recitals 36, 51 and 53 of the contested decision, the Commission held, firstly, that the declarations from July 2002 were sufficiently clear, precise and firm for a finding that there was an unequivocal, firm and credible commitment on the part of the French State (recitals 185 and 207 to 210 of that decision). The Commission then found that that commitment involved State resources in that it was capable of giving rise to a cost for the French State. The latter has a legal obligation or de facto duty to honour that promise, failing which it must indemnify FT's creditors for their loss or, at the very least, suffer a loss of credibility with the financial markets, which would have represented a much greater financial loss (recitals 217 and 221 of that decision).

173 Furthermore, the Commission found that the declarations from July 2002 conferred a definite and additional advantage on FT by helping to maintain its credit rating and to increase its share price (recitals 188 and 221 of the contested decision), an advantage from which FT could not have benefited under normal market conditions in the light of its disastrous financial situation (recital 212 of that decision). It is apparent from a combined reading of recitals 56, 221 and 222 of the contested decision that that advantage for FT, namely the opportunity to approach the financial market on favourable terms, pre-dated the announcement of the shareholder loan. Similarly, recital 188 of that decision confirms that the Commission took the view that, from July until October 2002, FT benefited from a selective advantage.

174 Moreover, it follows from recitals 17, 20 to 35, 37, 39, 41, 49, 59, 229 and 230 of the contested decision that, in view of FT's difficult financial situation at the time, the advantage thus conferred was not justified in the light of the prudent private investor criterion. Finally, the Commission acknowledged that that advantage distorted

or threatened to distort competition to a particularly appreciable extent (recital 198 of the contested decision) and that that situation was likely to affect trade between Member States (recital 200 of that decision).

175 However, in spite of the finding that all the conditions inherent in the concept of aid within the meaning of Article 87(1) EC were satisfied, the Commission refused to characterise the declarations from July 2002 as State aid (recital 219 of the contested decision), on the ground that it did not have sufficient evidence to prove irrefutably the existence of such aid (recitals 189 and 219 of that decision). In the view of the Bouygues companies, that conclusion is contradictory in so far as the reasons for the contested decision establishing the fulfilment of all the conditions inherent in the concept of aid were sufficient and did not require further evidence.

176 As regards insufficient reasoning, the Bouygues companies raise the point that the refusal to characterise the declarations from July 2002 as State aid is based on insufficient reasoning. The Commission first acknowledged, in recitals 188 and 218 of the contested decision, the possibility of characterising those declarations as aid by considering it however to be an 'argument … innovative, but probably not without foundation'. In recitals 189 and 219 of that decision, the Commission nevertheless stated that it did not have 'sufficient evidence … to establish irrefutably the existence of aid on the basis of this innovative argument'. In the submission of the Bouygues companies, such vague reasoning does not justify the Commission's refusal to characterise the declarations from July 2002 as State aid and is contrary to the requirement to state reasons. On the one hand, the Commission does not explain for what reason the characterisation as aid is 'innovative'. On the other hand, it does not identify the evidence which is lacking in order to establish the existence of aid.

177 Firstly, as regards the alleged innovative character of the characterisation as aid, the Bouygues companies point out that the concept of aid is an objective concept embracing all State measures which are likely, directly or indirectly, to favour an undertaking.

That concept has a strictly legal character and is therefore dependent only on whether the beneficiary undertaking receives an economic advantage which it would not have received under normal market conditions. It follows that the Commission does not have any discretion in determining whether a measure constitutes State aid. It is only at the stage of the examination of possible compatibility of aid, as provided for in Article 87(3) EC, which involves complex economic, social, regional and sectoral assessments, that it has wide discretion. The Commission is therefore bound to characterise as State aid any measure which objectively satisfies the conditions laid down in Article 87(1) EC.

178 The Commission cannot therefore content itself with asserting the innovative character of a particular application of Article 87(1) EC in order to refrain from finding that State aid exists. To admit the contrary would amount to acknowledging that the concept of State aid is not an evolving one, which would have the effect of depriving Article 87 EC et seq. of their effectiveness.

179 The Bouygues companies point out that, in any event, the present case is not the first in which the Commission has ruled on the legal characterisation, under Articles 87 EC and 88 EC, of declarations of support made by the authorities of a Member State for an undertaking. In the Crédit Foncier decision (see paragraph 159 above), the Commission held that public statements by the French authorities had the objective of reassuring the creditors of Crédit Foncier de France ('CFF') as to the quality of their claims and characterised them as State aid. In the view of the Bouygues companies, a similar assessment is called for in the present case, since both cases display significant factual similarities. Firstly, CFF and FT experienced similar financial difficulties characterised by high levels of debt and falling ratings precluding recourse to the bond market (recital 14 of the Crédit Foncier decision). Secondly, in a press release of 26 July 1996, the Minister for Economic Affairs announced, along similar lines to what he stated in the declaration of 12 July 2002, that 'the [French] Government had given an assurance that all CFF debt represented by securities would be honoured in

terms of principal and interest over the whole maturity range' (recital 36 of the Crédit Foncier decision; see also recital 208 of the contested decision). Thirdly, in recital 40 of the Crédit Foncier decision, the Commission drew attention to the need to take account of the effects of support measures and that, in that regard, 'by reassuring creditors as to the quality of their claims, the statement in question had the effect of averting demand for reimbursement of CFF securities during a serious liquidity crisis, at a time when the institution was unable to obtain finance on the market on normal terms'. In FT's case, the effects noted with regard to regained market confidence were identical. Finally, recital 44 of the Crédit Foncier decision, according to which '[t]he Commission takes the view that, although the statement issued by the Minister [for Economic Affairs] in April 1996 was not legally formalised, it nevertheless had substantial effects and should therefore be deemed equivalent to a guarantee', is perfectly applicable to FT's case. The Bouygues companies admit, however, that, unlike the press release of the Minister for Economic Affairs at issue in the Crédit Foncier decision, the declarations from July 2002 did not include the word 'commitment'. Nevertheless, the commitment may result from the words used, from their firmness and from their repetition, as is the case in those declarations.

180 It follows from the foregoing that the reason relating to the alleged innovative nature of characterisation as aid is inadequate.

181 With regard, secondly, to the alleged lack of sufficient information to establish irrefutably the existence of aid (recital 189 of the contested decision), the Bouygues companies complain that the Commission did not explain what evidence was lacking for that purpose. Since it had available to it the report of 28 April 2004 and several reports and studies produced by third parties, including by the Bouygues companies, the Commission cannot reasonably claim that it did not have sufficient information to rule on the legal characterisation of the declarations from July 2002. On the basis of that information, the Commission could have reached a definitive characterisation of those declarations or, at the very least, should have examined the relevance of

that information for the purpose of stating clear and precise reasons for the rejection of that characterisation. Even if that was not possible, the Commission should have obtained further information before concluding the administrative procedure and adopting the contested decision.

(d) Arguments of the Commission

The first part of the second plea of the French Republic and FT

182 The Commission contends, as a preliminary point, that the French Republic wrongfully isolates the reading of recital 194 of the contested decision, under which the shareholder loan procures an advantage for FT, from that of recitals 197 and, in particular, 203 to 230 of that decision, in which the Commission considered whether the advantage thus conferred satisfied the prudent private investor criterion.

183 In the view of the Commission, the French Republic and FT wrongly make a static and 'photographic' interpretation of the operation in question and a narrow and partial reading of the contested decision. Their approach has the objective of limiting the examination solely to the measures notified in December 2002, to the exclusion of the declarations from July 2002, which were intended to reassure the markets prior to the provision of a EUR 9 billion credit line in December 2002. However, a

compartmentalised analysis of the events which preceded the shareholder loan proposal of December 2002 is not possible. In recitals 187 and 222 et seq. of the contested decision, the Commission did in fact explain the reasons why it was bound to view the declarations from July 2002 and the shareholder loan as a set. It also stated, in the same recitals, that, irrespective of whether those declarations, on their own, could be regarded as aid, it was established, at the time when that series of events took concrete shape in December 2002, that the French State's commitment, which was now irrevocable, did not satisfy the private investor criterion and constituted State aid. The French authorities' strategy was part of a continuing process of rescuing FT which was not confined to the events of December 2002 (recital 219 et seq. of the contested decision). This aspect is demonstrated with sufficient precision in the contested decision, in particular in recitals 191 and 223.

184 The approach described above is summarised in recital 191 and is reflected in particular in the chronological account of the facts in recitals 20 et seq. and 36 et seq. of the contested decision. In that regard, the Commission cites the judgment in *BP Chemicals* v *Commission*, paragraph 152 above, paragraph 179, in which the Court drew attention to the need to take into account the entirety of an operation to rescue an undertaking and annulled a Commission decision which had wrongly severed the various relevant transactions to inject capital. It follows that there is an obligation for the Commission, in particular in the context of assessing complex rescue and restructuring operations, to examine the extent to which acts which have taken place in the past, which could not have been carried out by a prudent investor, were a precondition for or facilitated a present course of action. In such cases, an isolated act at the end of a process could appear 'prudent' if it was taken out of its context, as the French Republic and FT are attempting to do in this case. The Commission adds that, in *BP Chemicals* v *Commission*, paragraph 152 above, the Court did not conclude that the third capital injection constituted aid.

185 However, the series of principal events, as described in recitals 36 to 56 of the contested decision, clearly shows the French Republic's declared intention to support FT in order to prevent any further downgrading of its credit rating. In that regard, the financial markets did not question whether or not the declarations from July 2002 were binding and whether or not they embodied an irrevocable commitment. Rather, it was the impression created by the French State that that commitment was binding which was decisive in the perception both of the rating agencies and of the markets, in the light of the increase in FT's share price after the declaration of 12 July 2002. The French Republic has neither explained nor demonstrated the reasons why the markets should have doubted the firmness of the French State's commitment. On the contrary, it is apparent from a presentation of the 'inventory' exercise to the meeting of FT's board of directors on 4 December 2002 that FT was in no doubt that the French State's support had been important to the rating agencies. Consequently, the question whether or not the declarations from July 2002 constituted aid is no longer relevant, since, by the time those declarations were given concrete expression in December 2002, in the form of the shareholder loan proposal, it was established, on the one hand, that the commitment had now become irrevocable and, on the other hand, that it did not satisfy the private investor criterion, in view of the fact that it was no longer taking place under normal market conditions.

186 That conclusion is not called in question by the judgment in *Air France* v *Commission*, paragraph 159 above, paragraphs 74 and 79. That judgment instead confirms that, in the light of FT's situation in July 2002, a private investor would not have made declarations such as those made by the French authorities from July 2002, which were likely to place his credibility and reputation on the line, without having, at the very least, first carried out an audit of FT (recital 228 et seq. of the contested decision). At the time of the declaration of 12 July 2002, the French authorities did not know the true extent of FT's financial difficulties. However, the Commission acknowledges that, in *Air France* v *Commission*, paragraph 159 above, the Court did not take a view on whether the prudent investor criterion applies only to a legally irrevocable commitment.

187 The Commission maintains that it has never denied that the declarations from July 2002 were likely to involve a financial risk. However, it considered that it did not have sufficient evidence to establish irrefutably, on the basis of that innovative argument, that those declarations constituted an irrevocable commitment of State resources and, therefore, aid within the meaning of Article 87 EC (recitals 218 and 219 of the contested decision). It was nevertheless entitled to ascertain whether, in circumstances such as those of July 2002, a prudent private investor would have assumed the same risk (recitals 218 and 229 of that decision), which consisted, firstly, of an economic risk associated with the credibility of those declarations on the market (recitals 217, 220 and 221 of that decision) and, secondly, of a legal risk, since those declarations could have been regarded as binding in a number of national legal orders (recital 215 of that decision). For that reason, the Commission firstly characterised as 'innovative, but probably not without foundation' the argument that the declaration of 12 July 2002, on its own, constituted aid (recitals 188 and 218 of that decision), then stated that it could not demonstrate irrefutably the existence of aid on that basis (recitals 189 and 219 of that decision) and, finally, adopted a 'more conventional' approach to the concept of aid (recitals 219 to 230 of that decision). It inferred from this that, from July 2002 onwards, it had become impossible to compare the behaviour of a public investor with that of a private investor in a normal market situation, since no private investor would have been capable of influencing the market as the French authorities did by their declarations from July 2002. Accordingly, the Commission reached the conclusion that the application of the prudent investor criterion to the situation in the month of December 2002 alone was distorted, since, by that time, it was no longer possible to pass judgement on FT's situation under normal market conditions (recitals 219 to 230 of that decision).

188 The Commission rejects the argument that it prevents Member States from behaving like prudent investors. A private operator can also make comments or behave in such a way as to give rise to an irrevocable legal commitment involving a financial risk, without its irrevocable character being certain. Consequently, the Commission can legitimately ascertain whether a private operator has assumed such a risk and, therefore, apply the private investor criterion to courses of action which do not potentially give rise to irrevocable legal commitments. Accordingly, it confined itself to

comparing the behaviour of the French State to that of a private operator throughout the process which led that State to give formal status to its support in the form of a shareholder loan, that loan being merely the concrete embodiment of its decision in principle to support FT by appropriate steps announced by the declarations from July 2002 (recitals 36 and 185 of the contested decision). However, the public expression of that clear and categorical commitment vis-à-vis the market involved financial risks which a private investor would not have taken with as much imprudence, at the very least, before having obtained full information on FT's economic situation (recital 229 of the contested decision). The French authorities themselves admitted, during the administrative procedure, that, on 12 July 2002, they knew neither FT's exact situation nor the effective means of ensuring its recovery. In such a situation, any prudent shareholder would have avoided making declarations which could give rise to even a future commitment on his part which might jeopardise his own financial situation on the markets. The Commission points out that, when the State is considering adopting measures of support for an undertaking in difficulty and communicating its intention to the market, it must endeavour not to create distortions of competition and to comply, where appropriate, with the rules on State aid. Consequently, if that support is likely to constitute aid, any declaration of support must be accompanied by an explicit reservation to the effect that any subsequent intervention will be notified in advance to the Commission and implemented only after it has been approved, which would render that declaration conditional.

The second part of the second plea of the French Republic and FT

189 In the view of the Commission, given the material and economic link between the declaration of 12 July 2002 and the shareholder loan proposal, it was necessary to examine the whole of the French State's conduct from July 2002 onwards (recital 187 of the contested decision). To limit the examination solely to the facts covered by the notification would amount to allowing the Member State the freedom to determine

the relevant analysis period, which would be contrary to the objective character of the concept of aid, which is based on economic reality. Consequently, if the Commission is faced with earlier facts which are objectively relevant, it must include them in its analysis. In this case, the declaration of 12 July 2002 forms part of a longer sequence of measures, of which the shareholder loan proposal and the subscription to the capital increase are only the final elements. For that reason, the Commission was bound to examine them in their entirety, which led it to find correctly that the constituent elements of the concept of aid were present in December 2002.

190 The Commission disputes that the declaration of 12 July 2002 did not involve a State commitment as regards possible financial support for FT and that it based its assessment on a purely subjective impression of the way in which that declaration could, in its view, have been perceived by the markets. On the contrary, it based its assessment on objective facts demonstrating that, from the point of view of the market, that declaration had created the impression of a binding commitment and a future intervention by the French State. Thus, the declarations from July 2002 were intended to reassure the markets and the French authorities contacted the rating agencies in order to prevent the rating of FT's bonds being downgraded to that of a junk bond. Furthermore, as is apparent from recital 210 of the contested decision, the argument of the French Republic and FT is contradictory. In the absence of a detailed objection by the applicants to the lawfulness of that recital, that argument must be rejected as unfounded.

191 The Commission concludes from all the foregoing that the second plea of the French Republic and FT must be rejected as unfounded.

The third plea of the French Republic and FT

— Manifest error of assessment relating to the declaration of 12 July 2002

192 In the view of the Commission, the French State's decision to support FT had been taken as of 12 July 2002, although the details of its commitment were not yet specified at that time. The declaration of 12 July 2002 formed part of a 'credible strategy of commitment by the State to support [FT]' and was perceived as such by the markets (recital 220 et seq. of the contested decision). A literal analysis of that declaration and of its context shows that that commitment was clear and that it was, moreover, repeated (recitals 205 to 212 of that decision), in particular vis-à-vis the rating agencies. In its press release of 12 July 2002, S & P stated that the French authorities had contacted it directly to assure it of their support for FT (recital 38 of that decision). From the point of view of the rating agencies contacted, the declaration of 12 July 2002 was therefore the expression of a declared intention on the part of the French State to support FT. Such repeated and concordant declarations, emanating as they did from the Minister responsible for managing the French State's shareholdings and representing FT's majority shareholder, would certainly be regarded by the market as constituting a credible and unconditional commitment on the part of the French State to support FT financially (recital 217 of that decision). The Commission has demonstrated that that markets' perception was confirmed by the reaction and by the comments of financial analysts, who interpreted the declaration of 12 July 2002 as a firm commitment of financial support and as supporting FT's investment-grade rating (recitals 220, 221, 37, 38, 52 and 58 of that decision).

193 According to the Commission, the fact that the French State characterised its behaviour as prudent does not call in question the unconditional character of its commitment. Similarly, the mention of the possible occurrence of financial problems for FT

cannot be interpreted as a condition prior or subsequent to that commitment (recital 210 of the contested decision). There are no factors which demonstrate that the market had perceived any condition in that regard. If the Minister for Economic Affairs had intended to make his commitment conditional on compliance with Community law, he would not have contented himself with using the words 'prudent investor', which would not necessarily be regarded by the markets as falling within the scope of the law on State aid, but he would have had to express an explicit reservation to the effect that any subsequent intervention would be notified in advance to the Commission and implemented only after it had been approved (recital 229 of the contested decision). Finally, as regards the distinction made between the Crédit Foncier decision (see paragraph 159 above) and the contested decision, the Commission acknowledges that, in the present case, the French State's commitment did not have the same precision as in the situation which gave rise to that other decision.

194 As to whether the declaration of 12 July 2002 had an impact on the market situation in December 2002, the Commission refers to its arguments set out in its response to the first and second pleas of the French Republic and FT. The main consequence of that declaration was that, until December 2002, FT's rating was able to be maintained at investment grade instead of being downgraded to that of a junk bond. In September 2002, the French State reiterated its support for FT, with the result that Moody's changed the outlook of FT's debt from negative to stable (recital 52 of the contested decision). In December 2002, S & P repeated that the French State's support since July 2002 was a key factor in maintaining the rating at investment grade (recital 58 of that decision). Had its rating not been maintained at that grade in July 2002, the strengthening of FT's capital base, an essential component of the Ambition 2005 plan, could not have been achieved on the same terms. The declaration of 12 July 2002 therefore produced an impact on the December 2002 measures, and all the events subsequent to July 2002 occurred in a market context 'contaminated' by that declaration. In that regard, the French Republic wrongly claims that its contacts, as FT's majority shareholder, with the rating agencies are not unusual. In the light of the size of FT's debt (EUR 70 billion) and in the absence of clear and complete information on FT's economic situation, a majority private shareholder would not have made such

declarations of support for FT in the same circumstances (recital 229 of the contested decision). In the view of the Commission, for that reason, the declarations from July 2002 and the contacts made with the rating agencies 'contaminated' the market situation, with the result that, at the time of the announcement, in December 2002, of the shareholder loan proposal, that announcement could not be considered to have been made under normal market conditions. That 'pollution' effect was not eliminated by other events which influenced the market's perception after July 2002 (recitals 260 and 261 of that decision).

195 The Commission further rejects the criticisms put forward against the methodology applied in the report of 28 April 2004. Finally, it disputes the relevance of the comparison between Deutsche Telekom and FT, as drawn by the French Republic and FT, in order to demonstrate that the declarations from July 2002 were not decisive.

— Manifest error of assessment concerning the applicability of the prudent private investor criterion

196 Concerning the alleged manifest error of assessment consisting in applying the prudent private investor criterion despite the fact that the Commission did not acknowledge the existence of an advantage, the Commission refers to its defence relating to the second part of the second plea of the French Republic and FT. Nevertheless, it adds that it always considered that the irrevocable offer of the shareholder loan involved an advantage for FT. However, the Commission did not consider it appropriate to take a view on the theoretical question of whether that advantage, when viewed in isolation and therefore without taking into account the declarations from July 2002,

might have satisfied the prudent investor criterion. That question had become redundant for the reasons set out in recital 225 of the contested decision.

197 In that regard, the Commission refers to recitals 187 and 222 et seq. of the contested decision and to its arguments developed in response to the second plea of the French Republic and FT setting out the reasons why it had to analyse the declarations from July 2002 and the shareholder loan proposal of December 2002 as a whole. Irrespective of whether those declarations or that proposal, considered in isolation, fulfilled all the constituent conditions of the concept of aid, the Commission established that, at the time when the series of events took concrete shape in December 2002, the French State's now irrevocable commitment, when placed in the context of the declarations from July 2002, did not satisfy the private investor criterion and therefore constituted State aid. As regards FT's argument that the shareholder loan was never signed by it, the Commission refers to recital 196 of the contested decision. Furthermore, it never claimed that the offer of the shareholder loan had been perceived by the market as embodying a commitment by the French State which went beyond its future participation in the capital increase. The main point was the importance which the rating agencies attached to the French State's support. That support and the rating agencies' reaction were given as of July 2002. Moreover, the Commission does not dispute the markets' positive reaction following the announcement on 2 October 2002 of the appointment of FT's new CEO. FT has however failed to explain the reasons why that appointment was more decisive than the declarations and direct contacts with the rating agencies in July 2002 for the purpose of preventing the downgrading of FT's rating to that of a junk bond. The impact on the market of the shareholder loan proposal of December 2002 was also less than that of the declarations from July 2002, since, in December 2002, the market had already been largely reassured as to the reality and firmness of the French State's support for FT. In view of the effects produced by the declarations from July 2002, the shareholder loan was therefore made under abnormal market conditions and thus conferred an advantage on FT.

— Manifest error of assessment concerning the conduct of the French State as a prudent investor

198 The Commission considers that it has fully responded to the complaint concerning the alleged manifest error of assessment relating to the application of the prudent private investor criterion, which it does not regard as a separate complaint. Consequently, examination of that complaint is either devoid of purpose or inadmissible within the meaning of Article 44 of the Rules of Procedure.

199 The Commission concludes from all the foregoing considerations that the third plea of the French Republic and FT is in part devoid of purpose or inadmissible and in part unfounded and must be rejected.

The first plea of the Bouygues companies

— Arguments of the Bouygues companies

200 The Commission takes issue with the Bouygues companies' static and 'photographic' approach to the operation to rescue FT, which seeks to limit the examination under Article 87(1) EC to the declarations from July 2002, while, in Case T-425/04, the French Republic wishes to limit that examination to the notified measures of

December 2002. In the Commission's view, the argument that those declarations satisfy, either individually or as a whole, the four conditions of the concept of aid depends on a narrow, partial and incorrect reading of the contested decision and does not take account of the fact that the events which preceded the shareholder loan of December 2002, as part of a continuing rescue process, are interconnected from both a material and an economic point of view.

201 The Commission was obliged, under the prudent investor criterion, to analyse the declarations from July 2002 and the shareholder loan proposal as a whole, since that proposal was merely the concrete embodiment of the series of earlier events (recitals 187 to 189, 191 and 215 to 230 of the contested decision). That approach is consistent with the case-law, which requires that account be taken of the entirety of a complex rescue and restructuring operation and, in particular, that the extent to which an actual and isolated act, which might appear 'prudent' if taken out of context, was made necessary or facilitated by past acts which a prudent investor operating in a market economy would not have carried out be examined (*BP Chemicals* v *Commission*, cited in paragraph 152 above, paragraph 179). The Commission adds that, under the private investor criterion, earlier aid forming part of a continuing process could, in principle, both be penalised on its own account and be taken into account in order to establish subsequent aid which, in the light of that earlier aid, has only the appearance of an act which could have been carried out by a prudent private investor. However, the Bouygues companies have not disputed the fact that the contested decision characterises the shareholder loan as aid. Consequently, the question whether or not the declarations from July 2002 constitute aid was no longer relevant, since, at the time when those declarations were given concrete expression in December 2002, in the form of the shareholder loan proposal, it was established, firstly, that the French State's commitment had become irrevocable and, secondly, that it did not satisfy the private investor criterion.

202 In that regard, the Commission disputes the similarity of the facts in this case to those which gave rise to the Crédit Foncier decision (see paragraph 159 above). In the present case, the declarations by the Minister for Economic Affairs did not have the same force and the same degree of precision as regards a firm commitment on the part of

the French State as those which were the subject-matter of the Crédit Foncier decision (see recital 36 of the Crédit Foncier decision, on the one hand, and recital 219 of the contested decision, on the other).

203 The Commission adds that it is not for either the notifying State or the interested parties to determine the relevant analysis period. The concept of aid is objective and based on economic reality. Consequently, in so far as the Commission investigates objectively relevant earlier facts, it must include them in its analysis. In this case, the declarations from July 2002 form part of a longer series of measures, of which the shareholder loan and the subscription to FT's capital increase were only the final elements. The Commission was therefore justified in finding that, in this case, all of the constituent elements of the concept of aid were present only from December 2002 onwards.

204 Consequently, the first plea of the Bouygues companies should be rejected as unfounded.

— Arguments of the intervener FT

205 As regards the arguments put forward by the intervener FT, the Commission points out, first of all, that interveners must accept the case as they find it at the time of their intervention and the submissions made in their application to intervene are to be limited, pursuant to the fourth paragraph of Article 40 of the Statute of the Court of Justice, to supporting the submissions of one of the main parties, since an intervener does not have standing to raise a plea not raised by the applicant.

206 The Commission is surprised that the intervener FT maintains its submissions in defence of the lawfulness of Article 1 of the contested decision, even though, in Case T-444/04, it seeks, admittedly on other grounds, the annulment of that article. The Commission therefore calls in question the admissibility of FT's submissions in intervention, given that, in that other case, FT complains that the Commission went too far by deciding, in Article 1 of the contested decision, that, placed in the context of the declarations from July 2002, the shareholder loan constitutes State aid incompatible with the common market. However, by arguing in Case T-450/04 that the Commission did not go too far, in that it did not characterise the declarations from July 2002 as aid, FT contradicts its own position expressed in its action in Case T-444/04. FT cannot, on the one hand, in its intervention, maintain that Article 1 of the contested decision is valid and, on the other hand, in its action, seek the annulment of that article. In the view of the Commission, that new position expressed in its intervention must logically lead FT to withdraw its action in Case T-444/04.

207 In the alternative, the Commission disputes that the declaration of 12 July 2002 would have been made by any majority private shareholder and that it was so general and conditional that it cannot be interpreted as a guarantee to support FT. The Commission pointed out that it was decisive for the French State to give the impression to the rating agencies and to the financial markets that the declaration of 12 July 2002 constituted a binding commitment. That declaration, accompanied by direct contacts between the French authorities and the rating agencies, was clearly intended to reassure the markets and to prevent a downgrading of the rating of FT's bonds to that of junk bonds, which is confirmed by the increase in the price of FT's shares and bonds after that declaration. The fact of the matter is that that commitment was not made conditional on compliance with the Community rules on State aid (recital 229 of the contested decision). Finally, the Commission rejects the argument that the declaration of 12 July 2002 did not confer any advantage on FT. The advantage resulting

from that declaration consisted in maintaining FT's investment-grade rating until December 2002 instead of its rating being downgraded to that of a junk bond (recital 219 et seq. of that decision).

The second plea of the Bouygues companies

208 The Commission contends that it has sufficiently reasoned its position to the effect that it was unable to conclude that the declarations from July 2002 on their own constituted State aid (see, inter alia, recitals 188, 189, 215 and 217 to 230 of the contested decision). In the view of the Commission, the statement of reasons for the contested decision suffers neither from inconsistency nor from insufficiency, since the Bouygues companies are confusing review of the duty to state reasons with examination of the question of any manifest error.

The additional arguments put forward by the Commission in reply to the Court's written questions

209 In its reply to the Court's written questions, the Commission refers, in essence, to the considerations set out in recitals 188 and 214 to 216 of the contested decision and to the legal and economic studies which it had received or commissioned and analysed during the administrative procedure, the majority of which concluded that the declarations from July 2002 were binding. The Commission thus reached the conclusion that it was unable to establish 'irrefutably the existence of aid' solely on the basis of those declarations, in view of the difficulty of establishing reliably that they were such as to commit, at the very least potentially, State resources. The expert studies contain

quite divergent interpretations of those declarations on the basis of French civil, commercial and administrative law and of complex and controversial concepts in French case-law and doctrine. The result of that analysis is summarised in recitals 216 to 218 of the contested decision.

210 On the other hand, the Commission does not deny that certain aspects of national law could legitimately support the argument that the declarations from July 2002 involved a unilateral commitment on the part of the French State, an argument which is therefore not manifestly unfounded. In that regard, the Commission cites two judgments of the French Cour de cassation (Court of Cassation). However, particularly in the light of the circular of 22 July 2003 (see paragraph 167 above), which points out that only a finance law passed by the National Assembly can render the French State financially liable, those judgments are not capable of being directly applied to French administrative law. In addition, the criticisms put forward by FT during the administrative procedure with regard to the report of 22 March 2004 demonstrate the absence of fault on the part of the French State under French administrative law. Moreover, in the view of the Commission, even though the report of 22 March 2004 found that the French State's guarantee commitment, *qua* obligation as to the result to be achieved, dated from the declaration of 12 July 2002, that same report acknowledged that it was difficult to consider that the French State had intended to be bound, at that stage, with regard to its participation in a capital increase for FT, a commitment which was made, according to it, on 13 September 2002 (point 62 of the report of 22 March 2004).

211 The Commission reiterates its approach with regard to the application of the private investor criterion and its analysis of the perception by the financial markets of the declarations from July 2002, which were part of a strategy of commitment and rescue for FT. In those circumstances, the Commission preferred not to adopt an interpretation which was particularly strict and restrictive for the French State and for FT on a very controversial point of national law. However, while it did not have sufficient certainty as regards the scope of the declarations from July 2002 under national law to conclude that they involved a binding commitment of State resources, the Commission could reach the conclusion that the grant of the shareholder loan involved such a commitment (recital 219 of the contested decision). The Commission infers from this that, on the basis of the material and economic link between the declarations from

July 2002 and the shareholder loan, it was justified in assessing them as a whole. In the light of the concrete expression given to those declarations in December 2002, in the form of the shareholder loan, the only measure notified by the French Republic, it was established, firstly, that the commitment had become irrevocable and, secondly, that it did not satisfy the private investor criterion. Consequently, the question whether or not the declarations from July 2002 constituted aid was no longer relevant.

2. Findings of the Court

(a) The concept of aid within the meaning of Article 87(1) EC

212 As to whether, in this case, the Commission failed to apply the concept of aid, it must be recalled, first of all, that, under Article 87(1) EC, '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 shall, in so far as it affects trade between Member States, be incompatible with the common market'.

213 Secondly, it must be noted, as has been acknowledged by settled case-law, that the definition of aid is more general than that of subsidy, because it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of

an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 35, and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 29, and the case-law cited).

214 Moreover, the case-law has acknowledged that only advantages granted directly or indirectly through State resources are held to be aid within the meaning of Article 87(1) EC. The distinction made in that provision between aid granted 'by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid, but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 179; and Case T-95/03 *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* [2006] ECR II-4739, paragraph 104).

215 It follows that, in order for a measure to be characterised as State aid within the meaning of Article 87(1) EC, it must, firstly, involve an advantage, which may take various forms ('in any form whatsoever'), and, secondly, that advantage must derive, directly or indirectly, from public resources (granted 'by a Member State or through State resources').

216 The case-law has further clarified the concept of State aid in the light of the principle that the public and private sectors are to be treated equally as meaning that the intervention of public authorities in the capital of an undertaking, that is to say, a financial contribution from public resources, nevertheless does not constitute State aid within the meaning of Article 87(1) EC where that intervention takes place in circumstances which correspond to normal market conditions. In that regard, it is necessary to determine whether, in similar circumstances, a private investor of a dimension comparable to that of the bodies managing the public sector could have been prevailed upon to make capital contributions of the same size, having regard in particular to the information available and foreseeable developments at the date of those contributions (*Italy and SIM 2 Multimedia* v *Commission*, paragraph 213 above, paragraphs 37 and 38). In addition, although the conduct of a private investor, with which the intervention of a public investor pursuing economic policy aims must be compared, need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy, whether general or sectoral, and guided by prospects of profitability in the longer term (Case C-42/93 *Spain* v *Commission* [1994] ECR I-4175, paragraph 14, and judgment of 18 December 2008 in Case T-455/05 *Componenta* v *Commission*, not published in the ECR, paragraph 86).

217 As the parties acknowledged at the hearing, the application of the private investor criterion necessarily presupposes that the measures taken by the State in favour of an undertaking confer an advantage deriving from State resources (see, to that effect, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 214 above, paragraphs 180 and 181).

218 Firstly, as regards the scope of the judicial review to be carried out, it should be recalled that the concept of aid is objective and that, consequently, the characterisation of a measure as State aid, which, according to the Treaty, is the responsibility of both the Commission and the Community Courts, cannot in principle justify the attribution of a broad discretion to the Commission, save for particular circumstances owing to the complex nature of the State intervention in question. It is only in cases

where Article 87(3) EC falls to be applied and where, accordingly, the Commission, in the context of its determination of whether certain measures are compatible with the common market, must rely on complex economic, social, regional and sectoral assessments that a broad discretion is conferred on that institution (see, to that effect, Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 52, and the case-law cited).

219 In that regard, the Court of Justice has held that State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community Courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25; Joined Cases C-341/06 P and C-342/06 P *Chronopost* v *UFEX and Others* [2008] ECR I-4777, paragraph 141; and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 111).

220 It is in the light of those principles that it must be determined whether, in this case, the Commission correctly applied the concept of aid within the meaning of Article 87(1) EC.

221 To that end, having regard to the complaints put forward by the applicants in Cases T-425/04, T-444/04 and T-450/04, alleging, in part, errors of law and, in part, manifest errors of assessment, it is necessary to determine, firstly, whether the declarations from July 2002 and the shareholder loan proposal of December 2002, considered in isolation or together, conferred one or more advantages on FT. If so, secondly, it must be determined whether those possible advantages for FT derive from a transfer of State resources. If so, thirdly, it must be examined whether those possible advantages

deriving from State resources were granted in compliance with the criterion of the prudent private investor in a market economy.

(b) Existence of an advantage conferred by the declarations from July 2002 and by the shareholder loan proposal

Preliminary observations

222 It must be examined, as a preliminary point, whether and to what extent, in the contested decision, the Commission identified one or more advantages linked to the declarations from July 2002. For that purpose, in view of the close link between the criterion of advantage and that of transfer of State resources, it is necessary to take account of all the considerations which are set out on that subject in that decision.

223 It should be noted that, in Article 1 of the contested decision, the Commission characterised as State aid within the meaning of Article 87(1) EC the shareholder loan in the form of a EUR 9 billion credit line for FT, as placed in the context of the declarations from July 2002, that is to say, of the declarations made prior to the notification of the shareholder loan proposal on 4 December 2002.

224 In support of that conclusion, the Commission essentially found that, by means of the declarations from July 2002, made at a time when FT faced a financial crisis due to a high level of short-term debt, the French authorities managed to ensure that FT

regained the confidence of the financial markets in order to be able to gain access to new loans, which laid the foundations for the measures to rebalance FT's balance sheet and refinance FT, including the shareholder loan proposal, as initiated subsequently. In that regard, the Commission considered, in essence, that, when assessed as a whole, those declarations and measures, which form part of a continuing process of rescuing FT orchestrated by the French State, do not satisfy the criterion of the prudent private investor in a market economy, since a private investor would not have made such declarations of support in the crisis situation in which FT found itself in July 2002. Thus, those declarations 'contaminated' the market situation which gave rise to the shareholder loan proposal, since that proposal could not have been contemplated in the absence of the effects which those declarations produced on the financial markets (see, in particular, recitals 225 to 230 of the contested decision).

225 As regards, more specifically, the concept of advantage committing State resources, the Commission considered, in essence, that, even though the declarations from July 2002 could be characterised as aid, in so far as they had produced an effect on the markets and conferred an advantage on FT, they are not necessarily such as to commit, 'at least potentially, State resources' (recital 188 of the contested decision). In recital 189 of the contested decision, the Commission maintained that it did not have sufficient evidence to establish irrefutably the existence of aid on the basis of that 'innovative' argument. However, it considered that it was able to establish the existence of aid by taking account of the advantage and of the commitment of State resources linked to the shareholder loan proposal viewed in the context of the declarations from July 2002 (recital 190 of that decision).

226 Accordingly, in recital 194 of the contested decision, it is found that 'the shareholder loan … confers an advantage on [FT] as it enables it to increase its means of financing and to reassure the market as to its capacity to meet its maturities'. Notwithstanding the fact that the shareholder loan contract was never signed by FT, 'the appearance given to the market of the existence of such a loan' was likely to confer an advantage

on FT as the market considered its financial situation to be more secure, which may have influenced its borrowing terms.

227 As regards the criterion of commitment of State resources, the Commission pointed out, in recital 195 of the contested decision, firstly, that 'the fact that an advantage results from the giving of a State commitment leading to a potential, but not immediate, transfer of resources d[id] not rule out the possibility that the advantage may have been granted through State resources' and, secondly, referring to the judgment in *Stardust*, paragraph 54 above, paragraph 36, that 'it [wa]s not necessary to establish in every case that there [was] a transfer of State resources for the advantage granted … to be capable of being regarded as a State aid'. Thus, in the view of the Commission, based on the case-law, even an advantage granted through a potential additional burden for the State may constitute State aid (*Ecotrade*, paragraph 54 above, paragraph 43, and *EPAC* v *Commission*, paragraph 54 above, paragraph 80).

228 As set out in recital 196 of the contested decision, the announcement of the provision of the shareholder loan coupled with the fulfilment of the preconditions for such provision, the impression given to the market that the loan had actually been provided and the dispatch of the signed shareholder loan contract involved a 'potential additional burden for the [French] State', which was sufficient for the finding that there was a 'potential commitment of State resources'. According to the Commission:

'In so far as the document constituted a contractual offer and as long as it was not rescinded, [FT] could have signed it at any time, thereby acquiring the right to obtain

immediate payment of the sum of EUR 9 billion … the [French] State accordingly had to keep at [FT]'s disposal … the amount of the corresponding resources.'

229 By their second and third pleas put forward in Cases T-425/04 and T-444/04, the French Republic and FT have essentially argued that neither the declarations of support nor the shareholder loan proposal on their own fulfil the constituent conditions of the concept of aid and, in particular, the criterion of advantage deriving from State resources, and that it is not possible to assess those various elements as a whole in order to reach the conclusion that the French State's conduct did not satisfy the prudent private investor criterion. The Commission's approach is contradictory in that the Commission itself acknowledged that, in isolation, neither those declarations nor the shareholder loan constituted State aid within the meaning of Article 87(1) EC. In any event, the declarations of support cannot be characterised as a firm commitment on the part of the French State granting an advantage to FT and involving State resources.

230 On the other hand, by their first plea raised in Case T-450/04, the Bouygues companies submit, in essence, that the Commission did not go far enough in the contested decision by failing to characterise each of the declarations from July 2002 as separate State aid. Each of those declarations fulfils the cumulative conditions of the concept of aid, including that of an advantage committing State resources.

The advantage deriving from the declarations from July 2002

231 It is apparent from the case-law cited in paragraph 213 above that the concept of advantage implies that the State measure must have the consequence of an improvement

in the economic and/or financial position, or even an enrichment of the beneficiary by, for example, mitigating the charges which are normally included in its budget.

232 It must therefore be ascertained whether the declarations from July 2002 and the announcement on 4 December 2002 of the shareholder loan proposal involved, in themselves, the conferment of such an advantage on FT.

233 In that regard, a distinction must be drawn between, on the one hand, the possible advantage consisting in facilitating FT's access to the financial markets and in reducing its refinancing costs and, on the other, the possible positive impact of those declarations on the prices of FT's shares and bonds.

234 As regards the impact of the declarations from July 2002 on FT's access to the financial markets and on its refinancing costs, it must be held that the Commission has demonstrated satisfactorily, in the contested decision, that those declarations resulted in an appreciable advantage for FT inasmuch as they enabled the financial markets to regain confidence, made it possible, easier and cheaper for FT to gain access to new loans necessary in order to refinance its short-term debts to the amount of EUR 15 billion and, in the end, helped to stabilise its very fragile financial situation which, in June and July 2002, was on the point of deteriorating substantially.

235 More specifically, it is apparent from the summary of the contested decision in paragraphs 33 to 50 above that the Commission assembled a body of evidence capable of establishing that, following the declaration of 12 July 2002, the subsequent declarations and the announcement on 4 December 2002 of the shareholder loan proposal, the rating agencies adopted a more favourable rating for FT than those which they had adopted or envisaged previously in the light of its financial crisis, in particular, of

the size of the spread inversion, of the corresponding fall in its bond prices and of that in its share price, as observed, in particular, in June and July 2002 (see paragraph 34 above).

236 It follows from the convergent comments of FT's former CEO and new CEO, the rating agencies and Deutsche Bank that the rating adopted or envisaged previously by those agencies had the effect, at that time, of denying FT access to the capital markets, thereby preventing it from refinancing its short-term debt, and that that denial of access was able to be avoided only as a result of the maintenance of a more favourable rating which had in turn been made possible by the declaration of 12 July 2002 (see paragraphs 37 to 43 and 47 above). In the light of the considerations set out in paragraphs 45 to 48 above, the Commission has also established satisfactorily that the declarations of September, October and December 2002 also exerted a positive influence on the rating agencies' decisions to maintain FT's rating and boosted the financial markets' confidence, in order thereby to enable FT to regain control over the management of its debts due in the short term and to refinance itself on suitable terms.

237 Without there being any need to specify in more detail the impact which those declarations had, individually and separately, on the financial markets, it must be concluded that, in any event, as a whole, those declarations decisively influenced the reaction of the rating agencies and that that reaction was then decisive for the improvement of FT's image in the eyes of investors and creditors and for the conduct of the financial market operators which subsequently participated in the refinancing of FT. The causal link between those various factors is demonstrated, inter alia, by the fact that, in September 2002, the group of banks associated with the implementation of the Ambition 2005 plan made its participation in the recapitalisation of FT conditional on the maintenance of its current rating by Moody's and S & P (see paragraph 44 above). In addition, in response to the announcement on 4 December 2002 of the shareholder loan proposal, S & P confirmed, on 17 December 2002, that, firstly, the support of the French authorities for FT, as consistently affirmed since July 2002, was a key factor in maintaining FT's investment-grade rating, and that, secondly, their announcement of that shareholder loan proposal was proof of that support and of significant protection

for FT's creditors (see recital 58 of and footnotes 52 and 43 to the contested decision). Thus, in the light of S & P's abovementioned comment, the Commission was also justified in concluding that the advantageous effects arising from the declarations of support reiterated since July 2002 were perpetuated until December 2002 (see also the observations of Moody's in February 2003, quoted in paragraph 48 above, and the Deutsche Bank report quoted in paragraph 37 above).

238 Moreover, it must be stated that, under the principles governing the granting of loans and refinancing on the capital markets, as referred to in recital 28 et seq. of the contested decision, a company's rating and, therefore, the risk of default associated with the loans granted to it, is decisive for the purpose of measuring the cost of refinancing which that company must bear, in particular, in terms of interest payable on the issue of new bonds. It follows that the lower that risk of default, the easier and cheaper it is to refinance the loans in question on the capital markets. In other words, any positive influence on a company's rating, if only as a result of public declarations which are likely to create or strengthen investor confidence, produces an immediate impact on the level of costs which the company must incur in order to refinance itself on the capital markets. In that regard, the Commission referred to a document from FT, the relevance of which was not challenged by the French Republic and FT, mentioning the assumption of an automatic increase in annual interest expense of EUR 75 million in the event of a decrease of one notch in FT's long-term debt rating by S & P and Moody's (see recital 222 of and footnote 148 to the contested decision).

239 It should be pointed out, for the sake of completeness, that the Commission has also demonstrated that that causal link between the declarations from July 2002, the maintenance of FT's rating and the facilitation of its access to new loans, including the reduction of its refinancing costs, was not only foreseeable for the French authorities, but also planned by them. As is apparent from recitals 38 and 212 of the contested decision, on the very day of the declaration of 12 July 2002, the French authorities

contacted the rating agencies, such as S & P (see paragraphs 35 and 37 above), to inform them of their intentions in order to reassure the market rapidly and prevent any subsequent downgrading of FT's rating to that of a junk bond. This aspect is not disputed by the French Republic and FT, since they have merely submitted that that approach is in keeping with the prudent private investor criterion.

240 The positive and stabilising effect on FT's rating, stemming directly from the declarations from July 2002 and from the intention of the French authorities, was therefore bound to result in the conferment of a financial advantage on FT and in a strengthening of its economic position. That finding on its own led the Commission to conclude that FT had been granted an advantage as referred to in Article 87(1) EC, without there being any need to quantify it.

241 Consequently, the arguments of the French Republic and FT that the declarations from July 2002 did not have an impact on the markets and did not confer an advantage on FT must be rejected.

242 In those circumstances, there is no need to rule on the question whether the declarations from July 2002 also involved an advantage for FT by exerting a positive influence on its share and bond prices.

The advantage resulting from the shareholder loan proposal

243 It must be examined whether the shareholder loan on its own, which remained at the stage of a draft contract which was not signed by FT and was never performed, produced an additional and separate advantage for FT, as distinct from the advantage described in paragraphs 235 to 237 above. In that regard, it should be pointed out

that, as was stated in the abovementioned paragraphs, the Commission established satisfactorily that, when assessed in conjunction with the declarations from July 2002, the public announcement by the French authorities on 4 December 2002 of the shareholder loan proposal involved an advantage for FT in that it led to a positive reaction on the part of the financial market operators and, therefore, in particular, improved the conditions for its refinancing.

244 As to whether, as distinct from that latter advantage, the shareholder loan proposal involved an additional and separate advantage, reference must be made, in particular, to recital 194 of the contested decision, according to which, notwithstanding the fact that the shareholder loan contract was never signed by FT and therefore never performed, it conferred an advantage on FT as it enabled it to increase its means of financing, to reassure the market as to its capacity to meet its maturities and thus to influence FT's borrowing terms. It was 'the appearance given to the market of the existence of such a loan [which was] likely to confer an advantage on [FT] as the market has considered [FT's] financial situation to be more secure'.

245 However, in so far as the Commission treats the advantage so described as comparable to a reassuring effect for the market and to the appearance to third parties of provision of the shareholder loan to FT, that advantage is manifestly indissociable from that deriving from the declarations from July 2002 and, in particular, from that associated with the announcement on 4 December 2002 of the shareholder loan proposal, both of which had already produced such an effect on the financial markets and led to an improvement in borrowing terms for FT (see paragraphs 235 to 237 above).

246 It seems inconceivable that the shareholder loan proposal which was the subject-matter of the contract signed, initialled and dispatched by ERAP to FT could, along the

lines of its announcement on 4 December 2002, have had an identical or, at the very least, similar impact on those markets. As the French Republic itself submitted at the hearing in reply to a question put by the Court, formal note of which was taken in the minutes of the hearing, the dispatch of the shareholder loan contract by ERAP to FT on 20 December 2002 was not made public separately and in addition to the announcement, made on 4 December 2002, of the shareholder loan proposal. In the absence of such publicity, which FT confirmed at the hearing, there was no 'appearance' to third parties of provision of the shareholder loan, as referred to in recital 194 of the contested decision, which could have been attributed specifically to the dispatch of that shareholder loan contract. The reaction of Moody's, to which reference is made in footnote 112 to the contested decision, is not capable of calling in question that assessment, given that that reaction had already occurred on 9 December 2002, that is to say, probably in response to the announcement of 4 December 2002 and, in any event, before the dispatch of the shareholder loan contract by ERAP to FT on 20 December 2002. The same applies to the reaction of S & P, referred to in recital 58 of and footnotes 52 and 53 to the contested decision, which is dated 17 December 2002.

247 In reply to a question put by the Court, the Commission nevertheless maintained at the hearing that it had always considered that the shareholder loan proposal as such and its provision involved an additional and separate advantage for FT (see also paragraph 196 above), inasmuch as the latter obtained, following the dispatch of the contract signed by ERAP on 20 December 2002, the unilateral and unconditional option of activating the shareholder loan by signing that contract. From the economic point of view, that option of having available to it a EUR 9 billion credit line, dependent only on the intention of the beneficiary, constitutes a separate advantage from that deriving from the announcement on 4 December 2002 of the shareholder loan proposal. FT disputed that assessment at the hearing, referring to recitals 188 and 190 of the contested decision.

248 It is therefore necessary to establish, firstly, whether the Commission's argument is sufficiently supported by the contested decision.

249 In that regard, it must be pointed out that recital 194 of the contested decision alludes to the fact that the shareholder loan confers an advantage on FT 'as it enables it to increase its means of financing'. Although this latter finding is quite vague, brief and directly linked to the description of the advantage referred to in paragraph 245 above, the fact remains that the second and third sentences of recital 196 of that decision, which refer, admittedly, to the criterion of transfer of State resources, add the clarification that, in so far as the shareholder loan contract 'constituted a contractual offer and as long as it was not rescinded, [FT] could have signed it at any time, thereby acquiring the right to obtain immediate payment of the sum of EUR 9 billion' and that the French State 'accordingly had to keep at [FT]'s disposal through ERAP the amount of the corresponding resources'. Finally, in recital 197 of that decision, the Commission concluded that it was necessary to consider whether 'the advantage thus granted to [FT]' satisfied the prudent private investor criterion and whether it affected competition and trade between Member States.

250 It follows that, even though the contested decision is ambiguous as regards the distinction between the various elements constituting the advantage(s) in question, it nevertheless expresses, with the requisite minimum of clarity and precision, that the Commission was of the opinion that the dispatch to FT of the shareholder loan contract involved an additional and separate advantage as distinct from that described in paragraphs 235 to 237 above.

251 It is necessary, next, to determine whether the Commission has established to the required legal standard that the mere option for FT to use, unilaterally and unconditionally, the EUR 9 billion credit line which was the subject-matter of the shareholder loan contract constituted an advantage for it, even though the draft contract was never signed by it and never performed.

252 In that regard, FT, which disputes the existence of such an advantage, reiterated at the hearing that it had refused to sign the shareholder loan contract on the ground that it

imposed overdemanding conditions and that, in any event, FT would have preferred to refinance its debts on the bond market.

253 It should be recalled that the Commission is required to establish on the basis of objective factors that all the cumulative conditions of the concept of aid within the meaning of Article 87(1) EC, including the existence of an advantage, are satisfied (*British Aggregates* v *Commission*, paragraph 219 above, paragraph 111), taking account of the economic effects of the measure in question (see, to that effect, *Chronopost* v *UFEX and Others*, paragraph 219 above, paragraph 123, and *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 214 above, paragraph 180).

254 It must nevertheless be held that, other than its characterisation, in recital 196 of the contested decision, of the dispatch of the shareholder loan contract as a 'contractual offer' which FT could have accepted 'at any time' in order to acquire 'thereby … the right to obtain immediate payment of the sum of EUR 9 billion', the Commission, upon which the burden of proof falls, has neither established nor demonstrated any improvement in FT's economic position which could result from that offer as distinct from the situation in which it found itself, in particular, following the opportunity which had become available to it to refinance its debts to the amount of EUR 9 billion under the conditions prevailing at that time on the bond market.

255 The Commission cannot presume, solely on the basis of a unilateral offer by the State to grant a credit line of a certain amount, that that offer involves advantageous economic effects for the beneficiary, without nevertheless taking account of the conditions governing the performance of the loan contract in question and, in particular, of those relating to the grant and repayment of that loan, and especially not where the beneficiary did not accept that offer but confined itself to refinancing itself on the terms prevailing on the market. If it were otherwise, even a loan contract containing objectively disadvantageous terms, such as higher interest rates and stricter

repayment terms than those offered by the market, would have to be characterised as an advantage as referred to in Article 87(1) EC, and this merely on the ground that a public creditor declared itself prepared to make a certain sum available to the beneficiary.

256 Such an approach would not satisfy the obligation for the Commission to establish, on the basis of substantiated and complete objective evidence, the existence of an advantage as referred to in Article 87(1) EC (see, to that effect, *British Aggregates* v *Commission*, paragraph 219 above, paragraph 111; *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 214 above, paragraph 180; and Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, paragraph 126). On the one hand, such an approach would not enable such an offer to be assessed in its entirety and in its economic context and, on the other, it would not take account either of the real and possibly disadvantageous economic effects which it may involve for the beneficiary or of his intention not to accept it.

257 In those circumstances, it must be held that the Commission was not entitled to limit itself to the finding that a contractual offer signed by ERAP existed in order to conclude that that offer involved an additional and separate advantage for FT as referred to in Article 87(1) EC.

258 Nevertheless, the fact that the Commission has not satisfactorily established an additional and separate advantage deriving from the shareholder loan proposal as such cannot, in itself, lead to the annulment of the contested decision (see, to that effect, *Graphischer Maschinenbau* v *Commission*, paragraph 159 above, paragraph 49, and the case-law cited, and Case T-318/00 *Freistaat Thüringen* v *Commission* [2005] ECR II-4179, paragraph 191, and the case-law cited).

259 In the light of all the foregoing considerations, the Commission has demonstrated satisfactorily that the declarations from July 2002 and the announcement on 4 December 2002 of the shareholder loan proposal, as a whole, involved the conferment of an advantage on FT as referred to in Article 87(1) EC, without there being any need to quantify it.

260 In those circumstances, the argument of the French Republic and FT that the Commission was not entitled to find the existence of an advantage deriving solely from the declarations from July 2002 on the ground that, firstly, that advantage is not identifiable in the light of the positive effects of other events and of measures taken by FT itself during the second half of 2002 and that, secondly, the report of 28 April 2004 did not examine and determine the precise nature and value of the advantage resulting from all those declarations must be rejected.

261 It is necessary to examine at this stage whether and to what extent the advantage identified above is linked to a transfer of State resources within the meaning of Article 87(1) EC.

(c) Existence of a transfer of State resources

Preliminary observations

262 It is apparent from the considerations set out in paragraphs 214 and 215 above that the advantage identified in paragraphs 234 to 259 above must derive from a transfer of State resources. That requirement of a connection between the advantage identified

and the commitment of State resources presupposes, in principle, that the advantage in question is closely linked to a corresponding charge included in the State budget or to the creation, on the basis of legally binding obligations entered into by the State, of a sufficiently real economic risk to that budget (see, to that effect, Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 21; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 27; *PreussenElektra*, paragraph 214 above, paragraph 58; and Opinion of Advocate General Jacobs in *PreussenElektra*, paragraph 214 above, ECR I-2103, points 115 to 117).

263 It must be recalled that, in the present case, the parties disagree as to whether, in particular, the declarations from July 2002 — concerning which the Commission correctly established that they conferred an advantage on FT — involve a transfer of State resources. Whereas the French Republic and FT dispute the existence of a transfer of State resources, the Bouygues companies submit that each of those declarations involves a commitment of such resources, whether on the basis of a legally binding obligation on the part of the French State, or on account of a sufficiently real and immediate economic risk to it, which exposes it to a financial liability, in any form whatsoever, for FT's debts vis-à-vis the Bouygues companies, its shareholders and its creditors.

264 In the contested decision, the Commission first took as its basis the premiss that a potential transfer of State resources is sufficient for the purpose of applying Article 87(1) EC. In that connection, it expressed itself, in recitals 195 to 197 of that decision, as follows:

'(195) As to the condition relating to State resources, the Commission would point out that the fact that an advantage results from the giving of a State commitment leading to a potential, but not immediate, transfer of resources does not rule out the possibility that the advantage may have been granted through State resources. "In that respect, it should … be noted that, according to settled case-law, it is not necessary to establish in every case that there has been

a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 87(1) EC" [footnote 113: Stardust, paragraph 54 above, paragraph 36; see also Banco Exterior de España, paragraph 54 above, paragraph 14, and Italy v Commission, paragraph 54 above, paragraph 16]. Thus, even an advantage granted through a potential additional burden for the State constitutes State aid where it affects competition and trade between Member States [footnote 114: Ecotrade, paragraph 54 above, paragraph 43, and EPAC v Commission, paragraph 54 above, paragraph 80].

(196) … [T]he Commission finds that a potential additional burden on the State's resources was created by the announcement of the provision of the shareholder loan coupled with the fulfilment of the preconditions for such provision …, by the impression given to the market that the loan had actually been provided … and, lastly, by the dispatch to [FT] of the loan contract initialled and signed by ERAP … While it is true that the contract was never signed by [FT], this does not mean that there was no potential commitment of State resources. In so far as the document constituted a contractual offer and as long as it was not rescinded, [FT] could have signed it at any time, thereby acquiring the right to obtain immediate payment of the sum of EUR 9 billion. Inasmuch as it could not be unaware of this, the [French] State accordingly had to keep at [FT]'s disposal through ERAP the amount of the corresponding resources.

(197) The Commission must therefore consider whether the advantage thus granted to [FT] satisfies the prudent private investor test and whether it affects competition and trade between Member States.'

265 Next, in the course of its assessment of the criterion of the prudent private investor in a market economy, after finding, in recitals 208 to 213 of the contested decision, in essence, that the declarations from July 2002 were 'sufficiently clear, precise and firm for them to attest to the existence of a credible commitment on the part of the [French] State', the Commission stated, in recitals 214 to 216 and 218 and 219 of that decision, the following:

'(214) … [T]he Commission has studied the question whether, under domestic law, a private investor who has made the same declarations as the State would be obliged to keep his promises. In view of the fact that, in the present case, the investor is the [French] State, the study of domestic law also included administrative law.

(215) The Commission commissioned an expert report on the subject and it also received several reports from third parties. On the basis of this information, the Commission cannot rule out at this stage that the declarations in question may have binding force under French administrative, civil, commercial and criminal law … as well as under the law of the State of New York.

(216) The main criticism levelled by the French authorities is that, under domestic law, unilateral commitments are the exception, and that letters of intent, which do not form a homogeneous category, are treated as equivalent to a unilateral commitment only in exceptional circumstances. But the question is not whether French law is unequivocal on this matter, but whether there is any basis in private law for concluding that there exists a unilateral commitment in circumstances such as those of the present case. The fact that there

exists a usable body of case-law of the Court of Cassation [footnote 134: See Com, 28.3.2000, D. 2000, cah. dr. aff., p. 210], of which the French authorities are trying simply to minimise the scope …, is incontestable.

…

(218) Taken as a whole, these factors may be deemed to actually endanger State resources (either by incurring the State's responsibility vis-à-vis investors, or by increasing the cost of the State's future transactions). The argument to the effect that the … declarations … from July 2002 are aid is therefore innovative, but probably not without foundation.

(219) Nevertheless, the Commission is not of the opinion that it can establish irrefutably the existence of aid on this basis. It does, on the other hand, consider that it can demonstrate the presence of aid elements in a more conventional manner taking as a basis the December 2002 measures which were the subject of the notification. In this respect, it is sufficient to establish that the prior declarations had a real impact on the perception of the markets in December, without having to characterise these … declarations as being in themselves State aid.'

266 In its reply to the Court's written questions, the Commission essentially stated that, in the light of the various studies received and analysed during the administrative procedure, which gave quite divergent interpretations of the declarations from July 2002 under French civil, commercial and administrative law, it refrained from finding definitively that a unilateral commitment on the part of the French State existed on that basis alone, even though it acknowledged that certain aspects of national law could legitimately support that view. Instead of adopting a particularly rigorous and restrictive interpretation on a very controversial point of national law, it opted for an overall approach which takes account of the material and economic link between the

declarations from July 2002 and the shareholder loan and of the fact that the grant of that loan involved such a commitment.

267 It must therefore be examined whether the Commission was justified, on the one hand, in rejecting the existence of a transfer of State resources linked to the declarations from July 2002 as such and, on the other hand, in acknowledging that that criterion was nevertheless satisfied by the shareholder loan proposal of December 2002.

Transfer of State resources linked to the declarations from July 2002

268 It is necessary to determine, first of all, the nature of the declarations from July 2002, since it is decisive for their characterisation under both Community law on State aid and the relevant national rules.

269 In that regard, it should be pointed out that, in Community proceedings concerning State aid, the assessment of facts and evidence falls within the Court's complete discretion. In addition, in that context, the question whether and to what extent a rule of national law applies to the case in point falls within the scope of a factual assessment by the Court and is subject to the rules on the taking of evidence and on the apportionment of the burden of proof.

270 Moreover, it must be recalled that, although the Commission acknowledged, in recital 208 of the contested decision, that the declarations from July 2002 were 'sufficiently clear, precise and firm for them to attest to the existence of a credible commitment on the part of the [French] State', it ultimately rejected the view that those declarations were to be regarded as legally binding under the relevant national law and, accordingly, characterised as aid measures committing State resources (recitals 188, 218 and 219 of the contested decision). In essence, the Commission nevertheless considered that, in the light of the impact which those declarations had produced on the perception of the markets, the French State had incurred a certain financial risk, including under national law, which gave grounds for regarding the shareholder loan proposal as incompatible with the prudent private investor criterion (recitals 220 to 230 of that decision). In so doing, both in the contested decision and during the proceedings, the Commission did not clearly and definitively adopt a position on the question whether the declarations from July 2002 were inherently capable of involving a transfer of State resources, where appropriate, depending on the circumstances, under the relevant national law.

271 For the purpose of determining the nature of the declarations from July 2002, they must be interpreted only in the light of objective findings (see, to that effect, *SIC* v *Commission*, paragraph 256 above, paragraph 126). The fact remains that the perception and reaction of market operators, where they are established, may provide useful indicia for the purpose of determining the nature of those declarations.

272 As regards the declaration of 12 July 2002 (see paragraph 4 above), that declaration was made by the Minister for Economic Affairs, above all, in his capacity as representative of the French State *qua* FT's majority shareholder ('[w]e are the majority shareholder …'). In that capacity, he gave the express assurance that, whatever its method of intervention might be, the French State intended to behave like a prudent investor ('[t]he State shareholder will behave like a prudent investor …'). In that regard, neither the Commission nor the Bouygues companies have adduced any evidence that the intention to make the French State's future intervention subject to compliance with the

prudent private investor criterion was merely a display and not genuine and serious at the time of that declaration.

273 Furthermore, the declaration of 12 July 2002 was vague and imprecise as regards the possible measures of support which the French State might take at a later, still unspecified, stage ('will behave like a prudent investor and would take appropriate steps'). In the light of the open-ended and vague nature of those comments, the Commission was not justified in finding that an alleged commitment given by the French State, of which only the 'means of intervention, i.e. the detailed arrangements for carrying [it] out' were yet to be specified (recital 209 of the contested decision), was clear, since any such clear commitment necessarily presupposes identification of the nature and scope of that possible future intervention. As is confirmed by the Deutsche Bank report of 22 July 2002, on which the Commission itself relied in recital 221 of and footnote 142 to the contested decision, in the light of the declaration of 12 July 2002, the market could not yet determine the nature and scope of that future intervention by the French State ('[FT] benefited from the market's increased confidence that the [French] Government will in one way or another support the credit'; that 'implicit [French] Government support … could take the form of banks or the [French] Government providing the necessary loans at market prices'). In addition, by way of confirmation of the future, conditional and imprecise character of such intervention, the declaration of 12 July 2002 expressly rejected the possibility of a capital increase for FT, even though the French State was to pursue precisely that option in December 2002 ('No, certainly not! I am simply saying that we shall take appropriate measures when the time comes. If it is necessary …').

274 That reading is borne out in the light of the factual context in which the declaration of 12 July 2002 was made. As the Commission seems to acknowledge itself (see paragraphs 188 and 189 above), at that stage, in the absence of relevant information on the exact extent of the financial difficulties faced by FT, on the future reaction of the financial markets caused by that declaration and on the movements and trends

which began following the proposed restructuring of FT, the French State could not yet know and determine, with sufficient precision, the nature, scope and conditions for the granting of any measures of support for FT. It is, on the contrary, apparent from all the acts of the French authorities performed on 12 July 2002, including the fact that they directly contacted the rating agencies, that those authorities were seeking to reassure the financial markets rapidly as to the French State's potential and future support for FT with the sole aim of preventing further downgrading of its rating and denial of its access to new loans on the bond market, without however specifying the concrete form of that possible support at that precise moment. Indeed, prematurely specifying the concrete form of any measures of support could have run the risk of pointlessly restricting the refinancing options which might subsequently become available for FT's debt while creating the need to notify such measures to the Commission under Article 88(3) EC. Moreover, because of its precipitate character, such an approach would have been liable to undermine the confidence of creditors and investors in the reliability of the French State's action. In those circumstances, contrary to what is stated in recital 212 of the contested decision, the fact of having contacted the rating agencies could not be construed as a factor supporting the firm character of the alleged commitment given by the French State, but only as a first step intended to relieve the pressure to which FT's position on the financial markets was subject in July 2002.

275 Contrary to what the Bouygues companies and the Commission argue (see recital 210 of the contested decision), the mere fact that, at the time of the declaration of 12 July 2002, FT was already facing serious refinancing difficulties (see paragraph 236 above) does not in any way alter either the open-ended and vague character of that declaration as a whole or its significance in the light of the factual context in which it was made (see paragraph 274 above). Consequently, even assuming that those difficulties existed at that stage, the fact that that declaration did not correctly reflect the critical situation of FT's short-term debt at the time is not decisive ('if [FT] were to face any difficulties'; 'if [FT] were to face any financing problems, which is not the case today, the [French] State would take whatever decisions were necessary to overcome them').

276 Furthermore, in the context of its literal interpretation of the declaration of 12 July 2002, the Commission cannot reasonably maintain that '[t]here is nothing to show that the market had knowledge of any such condition' (recital 210 of the contested decision) and that 'the market's reaction and the comments by financial analysts confirm that the market regarded these declarations as a credible strategy of commitment by the [French] State to support [FT]' (recital 220 of that decision), since that subjective perception or reaction on the part of certain market operators is not decisive for the purpose of characterising the nature of such a declaration (see paragraph 271 above). Moreover, that consideration takes no account of the fact that, on the contrary, at that stage, Deutsche Bank was incapable of anticipating the nature and scope of any future intervention by the French State in favour of FT (see paragraph 273 above).

277 As regards the declaration of 13 September 2002 (see paragraph 7 above), it must be pointed out that that declaration is also future-oriented, conditional and imprecise as to any measures envisaged by the French State in the long term ('[t]he [French] State will help [FT] implement th[e] plan [for improving FT's accounts] and will contribute to a very substantial strengthening of [FT]'s capital base, according to a timetable and in a manner to be determined in the light of market conditions'), since the only certainty lies in the affirmation of a future contribution 'to a very substantial strengthening of [FT's] capital base' and in the fact that this will be made under 'market conditions'. Furthermore, like the declaration of 12 July 2002, the declaration of 13 September 2002 omits to specify further the nature, scope and conditions of the French State's future intervention in favour of FT and makes any measures of support subject to the criterion of necessity ('[i]n the meantime, the [French] State will, if necessary, take steps to prevent [FT] from being faced with any financing difficulties').

278 As regards the declaration of 2 October 2002 (see paragraph 8 above), it is no less vague and provides no appreciable clarification as compared with the content of the

declaration of 13 September 2002 ('[t]he [French] State will assist in implementing the recovery measures and will contribute, for its part, to the strengthening of [FT]'s own capital base in a manner to be determined … the [French] State will [in the meantime], if necessary, take steps to prevent [FT] from being faced with any financing difficulties'). By that declaration, the French State confines itself to anticipating vaguely some future and potential assistance on its part in order to strengthen FT's capital base, the nature, scope and conditions for the grant of which are not yet determined. At the same time, along the same lines as the earlier declarations, some possible intermediate French State assistance, the particulars of which are not further clarified, is made subject to the need to resolve any potential financial problems faced by FT.

279 It follows from the foregoing considerations that, contrary to what the Bouygues companies submit, because of their open-ended, imprecise and conditional character, in particular as regards the nature, scope and conditions of any State intervention in favour of FT, and in the light of the factual context in which they were made, the declarations of 12 July, 13 September and 2 October 2002 cannot be treated in the same way as a State guarantee or interpreted as disclosing an irrevocable commitment to provide specific financial assistance for FT, such as repayment of its short-term debts.

280 A concrete, unconditional and irrevocable commitment of public resources on the part of the French State would have required those declarations to set out explicitly either the exact sums to be invested, or the specific debts to be guaranteed, or, at the very least, a predefined financial framework, such as a credit line up to a certain amount, as well as the conditions for granting the proposed assistance. However, the declarations from July 2002 omit to adopt a position on those aspects while rejecting the possibility of a future increase in FT's capital of a certain amount, even though, subsequently, the French State was to pursue precisely the latter option, firstly, in the form of the shareholder loan proposal designed to provide FT with a EUR 9 billion credit line, and then by contributing up to the same amount, in proportion to its shareholding in FT, to the increase in the latter's capital (see paragraph 16 above).

281 It should be added that, in that regard, the Bouygues companies cannot rely on the Crédit Foncier decision (see paragraph 159 above), the lawfulness of which had not been subject to review by the Court, since, unlike the declarations from July 2002, the statement by the French Minister for Economic Affairs which was the subject of that decision expressed the firm and unconditional intention of the French State to commit itself to honouring 'all CFF debt represented by securities … in terms of principal and interest over the whole maturity range' (recital 36 of the Crédit Foncier decision).

282 The fact remains that, in the present case, by the declarations from July 2002 and by invoking, from the point of view of the financial markets, its reputation as a solvent and reliable creditor and debtor, the French State intended actively to influence the reaction of those markets, restore their confidence and, in particular, sought to secure the maintenance of FT's rating with the aim of preparing for its refinancing, at a later stage, under more favourable economic conditions and at less cost, without that involving, immediately and in a predefined way, recourse to the State budget. In so doing, instead of committing, directly or indirectly, State resources within the meaning of Article 87(1) EC, the French State made use of the particular rules by which the financial markets operate in order to stabilise FT's economic position in the short term, specifically with the aim of satisfying the entrepreneurial and financial conditions necessary for the adoption of more concrete measures of support which would have to be taken subsequently. The mere fact that, in such a context, the French State used its particular reputation with the financial markets cannot suffice to demonstrate that its resources were exposed to a risk such as can be considered to constitute a transfer of State resources within the meaning of Article 87(1) EC, which is sufficiently linked to the advantage conferred on FT by the declarations from July 2002.

283 In those circumstances, the Bouygues companies have not demonstrated that the national courts, in particular the French administrative or civil courts, are entitled to conclude that the declarations from July 2002 nevertheless fulfilled the conditions for a legally binding unilateral commitment on the part of the French State, if only in the form of a letter of intent, involving a transfer of State resources within the meaning of Article 87(1) EC. Having regard to the arguments of the Bouygues companies and to the legal studies produced in support of them, it must be held that the application

of the relevant rules of national law to the declarations from July 2002 depends, in turn, on the prior interpretation of the nature of those declarations, that is to say, in particular, on whether they are of a sufficiently clear, precise, unconditional and firm character, a source of legally binding effects capable of giving rise to a financial liability on the part of the French State.

284 Thus, firstly, the argument of the Bouygues companies, based on the case-law of the French Council of State, that the declarations from July 2002 are clear, precise and firm and, therefore, such as to render the French State liable vis-à-vis FT's shareholders, employees or creditors, either because, by making a promise, the French State created for itself legal obligations of which it cannot rid itself without committing a fault, or because, on the contrary, in keeping its promise it behaves unlawfully on account of the unlawfulness of the promise made, cannot be accepted. Contrary to what the Bouygues companies maintain (see paragraphs 164 and 165 above), it is specifically not established that, in view of their intrinsic characteristics, those declarations are capable of creating such a legally binding and unconditional commitment on the part of the French State to support FT.

285 Secondly, the Bouygues companies cannot legitimately rely on the circular of 22 July 2003 and on the explanatory note attached to it (see paragraph 167 above), since, as was held in paragraph 284 above, the declarations from July 2002 do not contain anything to show that there is an implicit guarantee on the part of the French State in favour of FT. Since the conditions for a finding that such a guarantee exists are not satisfied, the Bouygues companies' argument based on the French legislation retroactively validating certain State guarantees must be rejected as ineffective. In any event, as the French Republic pointed out at the hearing, the French Loi de finances rectificative pour 2002 (Rectifying Finance Law for 2002) (No 2002-2576 of 30 December 2002; published in JORF (Official Journal of the French Republic) of 31 December 2002, p. 22070) refers in Article 80 only to '[l]oans contracted by ERAP as part of its shareholder support for [FT]', and not to any other State guarantees in favour of FT.

286 Thirdly, the Bouygues companies have not demonstrated that the declarations from July 2002 involved a commitment of State resources under the law of contract of the State of New York. Thus, the study which the Bouygues companies had produced for that purpose during the administrative procedure states that it does not constitute a legal opinion and starts from the manifestly erroneous premiss of a unilateral contract offer by the French State to investors, including a promise designed to guarantee FT's debts, which those investors accepted by investing in FT. Similarly, in its assessment of the binding and enforceable character of that offer, that study merely reiterates the existence of a promise and draws a vague comparison with the case-law of the competent courts relating to promises contained in prospectuses and to advertising in newspapers. Moreover, that study refrains from adopting a position, definitively, on whether those courts are likely to find that such a contractual promise is of a sufficiently firm character. Finally, as regards the conditions of a quasi-contract or promissory estoppel, the study notes that the promise in question must be clear and unambiguous, which does not apply in this case (see paragraphs 272 to 279 above).

287 Fourthly, in so far as the Commission itself refers to the judgment of 28 March 2000 of the French Court of Cassation (footnote 134 to the contested decision), it must be noted that that judgment recognised the effectiveness *erga omnes* and binding and enforceable character in favour of any interested person of a unilateral declaration on the part of the buyer of an undertaking in difficulty, made in the course of administration proceedings and in the form of a judgment laying down a disposal plan. However, it is not established that that case-law is capable of being applied to the present case. That is due, in particular, to the fact that the binding and enforceable character recognised by that judgment is based on an express provision of the French Commercial Code governing administration proceedings, under which 'the judgment which lays down the [disposal] plan shall render its provisions effective against all parties'.

288 Fifthly and finally, it is not established that, even in the absence of legally binding character under national law of the alleged commitment resulting from the declarations from July 2002, they would involve a transfer of State resources. In that regard,

on the one hand, the argument of the Bouygues companies that the French State was de facto obliged to honour its alleged promise, in view of the genuine expectation which its declarations had created from the point of view of the market, is inherently contradictory and does not take account of the fact that recognition of the existence of aid must be based on objective findings and not on the mere perception of market operators. In any event, a mere expectation on the part of the market cannot as such create any legal obligation whatsoever to act along particular desired lines (see paragraph 271 above). On the other hand, even assuming that non-compliance with any promise of support by the French State for an undertaking is capable of jeopardising its credibility and reputation on the financial markets, the fact remains that, in the present case, it is not demonstrated that the declarations from July 2002 included a precise, unconditional and firm commitment in favour of FT capable of giving rise to such detrimental consequences. As was stated in paragraphs 273 and 282 above, the conduct of the French authorities from July 2002 was specifically designed to avoid such consequences by allowing uncertainty to persist as to the nature, scope and exact conditions of any future intervention, which is borne out by the reaction of Deutsche Bank (see paragraph 273 above). For those same reasons, the Commission's argument set out at the end of recital 221 of the contested decision that 'the French Government was obliged, in order to keep its reputation intact on the financial markets, to respect the promises it had made' cannot succeed. In any event, it must be recalled that, despite the doubts expressed, the Commission expressly refrained from adopting a definitive position on whether the declarations from July 2002 involved a transfer of State resources (recitals 118, 218 and 219 of the contested decision).

289 In those circumstances, it must be concluded that the declarations from July 2002 did not involve any commitment of State resources within the meaning of Article 87(1) EC.

290 Consequently, the first plea of the Bouygues companies, alleging infringement of Article 87(1) EC, must be rejected.

Transfer of State resources linked to the announcement on 4 December 2002 of the shareholder loan proposal and to the offer on 20 December 2002 of the shareholder loan contract

— Preliminary observations

291 It must be pointed out that it was only by publishing, on 4 December 2002, the announcement of the shareholder loan proposal, that is to say, on the very day of the notification of that measure to the Commission (see paragraph 20 above), that the French State, for the first time, explained and clarified to the public the financial contribution which it was contemplating for FT, which consisted in opening a EUR 9 billion credit line in the form of a loan contract, the offer of which, initialled and signed by ERAP, was not dispatched to FT until 20 December 2002.

292 In that regard, it must be recalled that, like the declarations from July 2002, that announcement involved the conferment of an advantage on FT inasmuch as it helped to strengthen the confidence of the financial markets and to improve the conditions of FT's refinancing (see paragraph 234 et seq. above). However, as was stated in paragraph 243 et seq. above, the Commission has neither examined nor demonstrated to the required legal standard that the offer of a shareholder loan contract of 20 December 2002, which was never accepted by FT or performed, involved a separate and additional economic advantage as distinct from the advantage deriving from the declarations from July 2002 and from the announcement on 4 December 2002 of the shareholder loan proposal.

— The announcement on 4 December 2002 of the shareholder loan proposal

293 As to whether the announcement on 4 December 2002 of the shareholder loan proposal involved a transfer of State resources, it must be observed that neither the

Commission nor the Bouygues companies has maintained that that announcement, in itself, contained a sufficiently precise, firm and unconditional and, therefore, legally binding commitment, where appropriate, under the relevant national law, supporting a finding of the existence of a transfer of State resources within the meaning of Article 87(1) EC.

294 Thus, the only relevant reference to that announcement is to be found at the end of recital 205 of the contested decision, that is to say, in the context of the assessment of the prudent private investor criterion, and the Commission did not attach any, even implicit, consequences to it as regards the existence of any transfer of State resources. Similarly, in their first plea, the Bouygues companies refer only to the declarations from 2002 without taking account of the announcement of 4 December 2002 and limit their arguments to the alleged transfer of State resources linked to those declarations.

295 In the absence of any relevant and conclusive evidence adduced by the Commission and by the Bouygues companies in this connection, it is not the task of the Court to ascertain whether the announcement on 4 December 2002 of the shareholder loan proposal involved a transfer of State resources under French administrative or civil law.

296 In any event, a transfer of State resources resulting from the announcement of 4 December 2002 could correspond only to an advantage residing in the opening of the EUR 9 billion credit line expressly envisaged in that announcement. On the one hand, as was recalled in paragraph 292 above, the Commission failed to characterise, to the required legal standard, such an advantage in the contested decision. On the other hand, that advantage is separate from that deriving from the declarations from July 2002, as found in that decision (see paragraph 243 et seq. above), without prejudice to the question whether the latter advantage consists in the improvement of the terms of FT's refinancing and/or in any increase in its share and bond prices.

297 It is apparent from the case-law cited in paragraph 214 above that, pursuant to Article 87(1) EC, the advantage in question must derive from public resources. That requirement of a connection between the advantage identified and the transfer of State resources presupposes that the advantage in question corresponds to an equivalent

charge included in the State budget (see paragraph 262 above). However, that does not apply in this case as regards the relationship between the advantage found in the contested decision, which results from the declarations from July 2002, on the one hand, and the alleged transfer of public resources consisting in the opening of a EUR 9 billion credit line, as envisaged in the announcement on 4 December 2002 of the shareholder loan proposal, on the other.

298 It must therefore be concluded that the Commission has not demonstrated that the announcement on 4 December 2002 of the shareholder loan proposal involved a transfer of State resources.

— The offer on 20 December 2002 of the shareholder loan contract

299 As to whether the dispatch of the shareholder loan contract signed by ERAP to FT on 20 December 2002 involved a transfer of State resources, it must be held that, in so far as the Commission did not establish satisfactorily in the contested decision an advantage deriving from the contractual offer as such (see paragraphs 264 to 267 above), it is not, a fortiori, possible for the Court to find the existence of any transfer of State resources linked to that advantage.

300 It follows from all the foregoing considerations that neither the Commission nor the Bouygues companies have demonstrated that the announcement on 4 December 2002 of the shareholder loan proposal or the offer on 20 December 2002 of the shareholder loan contract involved a transfer of State resources within the meaning of Article 87(1) EC.

301 It must however be examined whether, on the basis of its overall approach (see paragraph 266 above), the Commission was nevertheless entitled to assess the declarations from July 2002 in conjunction with the announcement of the shareholder loan proposal and the dispatch of the shareholder loan contract in order to conclude that the criterion of transfer of State resources was satisfied in this case.

— Transfer of State resources linked to the declarations from July 2002 and to the December 2002 measures

302 It must be ascertained, firstly, whether the potential burden for the State budget which the Commission found as regards the announcement of the shareholder loan proposal and the dispatch of the shareholder loan contract was already implicit in the declarations from July 2002 and, secondly, whether that burden corresponded to the advantage which the Commission attributed to those declarations.

303 Although the announcement on 4 December 2002 of the shareholder loan proposal fits into the French State's pattern of reasoning and strategy from July 2002, which had the objective and consequence, as a whole, of restoring the confidence of the markets in order to be able to refinance, under more favourable conditions, FT's short-term debt (see paragraphs 234 to 240 above), it nevertheless does not follow that the declarations from July 2002 already contained, in themselves, the anticipation of specific financial support on the lines of that which eventually took concrete form in December 2002.

304 It follows from the considerations set out in paragraph 270 et seq. above that, unlike the announcement on 4 December 2002 of the shareholder loan proposal, which made public the offer to open a EUR 9 billion credit line in favour of FT, the declarations from July 2002 had an open-ended, imprecise and conditional character as regards the nature, scope and conditions of any future intervention by the French State.

Thus, if only on the basis of that substantially different character of the declarations from July 2002, the French State's decision in December 2002 to announce and put forward a shareholder loan proposal amounted to a significant break in the series of events which led to the refinancing of FT.

305 In that regard, the largely unsubstantiated argument, set out in recitals 185 and 226 of the contested decision, that the shareholder loan proposal was the concrete embodiment of the French State's earlier declarations must be rejected, since the Commission has not demonstrated — and is in fact unable to demonstrate in the light of the declarations from July 2002 — that the French State had envisaged such concrete financial assistance since July 2002. That argument is particularly implausible since the French State first had to wait and see whether, following the declarations from July 2002 and their hoped-for effect, namely the restoration of the financial markets' confidence and the maintenance of FT's credit rating, and following the restructuring and rebalancing measures taken within FT, the economic conditions for such State intervention were actually fulfilled. As was noted in paragraph 274 above, at the stage of those declarations, in the absence of relevant information, in particular, as to the future reaction of the financial markets and the success of the measures taken, the French State could not yet know and determine, with sufficient certainty, the nature, scope and conditions of any measure of support for FT, including any capital increase which the Minister for Economic Affairs had still expressly rejected in July 2002. It was clearly not until December 2002 that the French State considered that the economic conditions for such financial assistance were fulfilled, which confirms the occurrence of a significant break in the series of events at that stage.

306 Recitals 186 to 190 of the contested decision, which seek to explain the overall approach undertaken by the Commission, far from adducing evidence in support of its argument that the declarations from July 2002 took concrete form in the shareholder loan proposal, merely summarise, in an ambiguous manner, the considerations which

led to the finding that an advantage was conferred on FT, but that there was no transfer of State resources linked to the set of declarations made and measures taken by the French State from July 2002.

307 Thus, the vague finding that it is 'possible to view the successive declarations and measures of the French authorities from July 2002 onwards as forming a set which took concrete shape in the December [2002] measures' (recital 187 of the contested decision) or the assertion of the existence of a continuing rescue process similar to that which gave rise to the judgment in *BP Chemicals* v *Commission*, paragraph 152 above, do not entitle the Commission to free itself from its duty to identify a specific advantage involving a corresponding transfer of State resources. This is particularly true since the judgment in *BP Chemicals* v *Commission*, paragraph 152 above, concerned only the question whether there were serious difficulties, justifying the opening of the formal investigation procedure under Article 88(2) EC, as regards the application of the prudent private investor criterion to a set of capital injections in favour of the beneficiary undertaking, the advantageous character and State origin of which were not in doubt.

308 Moreover, in view of the significant break in the series of events and in the conduct of the French authorities in December 2002, the Commission was not entitled to establish a link between any commitment of State resources at that stage and advantages conferred by earlier measures, namely the declarations from July 2002, a fortiori because those measures were substantially different in character from those taken in December 2002 (see paragraph 303 above). Such a link — not covered by *BP Chemicals* v *Commission*, paragraph 152 above — between the constituent elements of the concept of aid in the case of separate facts which occurred at different stages would be contrary to the requirement of a connection between the advantage and the transfer of State resources (see paragraph 262 above), as confirmed by the judgment in *PreussenElektra*, paragraph 214 above, paragraph 58.

309 Consequently, even though it was permissible for the Commission to take account of all the events which preceded and influenced the final decision taken by the French

State in December 2002 to support FT by means of a shareholder loan in order to characterise an advantage, it failed to demonstrate the existence of a transfer of State resources connected to that advantage. As was held in paragraph 297 above, the fact that the declarations from July 2002 and the announcement of 4 December 2002 resulted in an advantage for FT inasmuch as they restored the confidence of the financial markets and improved the terms of its refinancing is not offset by a corresponding reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget. In particular, that advantage is separate from that which the shareholder loan proposal of 20 December 2002 is likely to involve and which the contested decision failed to establish satisfactorily in order to be able to find that State aid existed (see paragraph 296 above).

310 Consequently, the Commission failed to apply the concept of aid within the meaning of Article 87(1) EC by finding that the shareholder loan, when placed in the context of the declarations from July 2002, involved the conferment of an advantage on FT which resulted from a transfer of State resources.

311 In those circumstances, the second part of the second plea and the third plea raised by the French Republic and FT, in so far as that part and that plea criticise the application of the concept of aid and, in particular, the application of the criteria of advantage and transfer of State resources within the meaning of Article 87(1) EC, must be upheld.

312 It also follows that it is not necessary to examine the first part of the second plea and the third plea put forward by the French Republic and FT, in so far as that part and that plea dispute the lawfulness of the Commission's application of the prudent private investor criterion.

313 Given that Article 1 of the contested decision must accordingly be annulled for error of law and manifest errors of assessment in the application of Article 87(1) EC, nor

is there any need to examine the first plea put forward by the French Republic and FT, alleging infringement of essential procedural requirements and the right to a fair hearing, or the fourth plea of the French Republic, alleging failure to state reasons.

(d) The second plea of the Bouygues companies, alleging inconsistency and failure to state adequate reasons, contrary to Article 253 EC

314 It must be observed, as a preliminary point, that the second plea of the Bouygues companies, alleging failure to state reasons, is, to a very large extent, merely a repetition of the substantive complaints which those applicants raised in their first plea.

315 In that regard, it should be recalled that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. Moreover, the duty to state adequate reasons in decisions is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, the latter will vitiate the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraphs 166 and 181, and the case-law cited).

316 As regards the alleged inconsistency of reasoning, it must be held that the Bouygues companies allege, in essence, a substantive error and not a formal defect in the statement of reasons.

317 In that regard, it is clear from the grounds of the contested decision, in particular, on the one hand, from recitals 188 to 190 and, on the other, from recitals 218 and 219, that the Commission considered itself — correctly, moreover (see paragraphs 268 to 290 above) — unable to find definitively, on the basis of the legal studies brought to its attention, that the declarations from July 2002 satisfied, as such, the criterion of transfer of State resources within the meaning of Article 87(1) EC. Only the taking into account of the measures adopted in December 2002 enabled the Commission to find, on the basis of an overall approach — albeit erroneous as to the substance (see paragraph 303 et seq. above) —, that the continuing process of FT's rescue as a whole, including the declarations from July 2002, had the effect that the criterion of transfer of State resources was satisfied.

318 Consequently, even though the Commission's overall approach is erroneous as to the substance, it follows from the considerations in paragraph 268 et seq. above that the contested decision sets out to the required legal standard the reasons why the Commission was of the opinion that it could not find that the declarations from July 2002 as such — even though they involved the conferment of an advantage on FT — gave rise to a transfer of State resources. It also follows that the Bouygues companies' argument that the Commission found, in the contested decision, that all the conditions characterising State aid were satisfied as regards the declarations from July 2002 (see paragraphs 171 and 175 above) is manifestly unfounded.

319 Moreover, the Bouygues companies do not put forward any argument which would give grounds for believing that, as a result of the alleged inconsistency of reasoning, they were unable to challenge the validity of the Commission's approach before the Court, or that the latter is unable to discharge its duty of review of legality in that regard. In any event, in the light of the considerations set out in paragraph 268 et seq. above, it is established that that is not true in this case.

320 Consequently, the first part of the present plea, alleging inconsistency of reasoning, must be rejected as unfounded.

321 As regards the alleged failure to state adequate reasons, it should be noted that the grounds of the contested decision, in particular, on the one hand, recitals 188 to 190 and, on the other, recitals 218 and 219, indicate with sufficient precision and clarity the reasons why the Commission considered itself unable to find that the declarations from July 2002 constituted, in themselves, State aid (see also paragraph 318 above).

322 The Bouygues companies do not put forward any evidence to show that the statement of reasons in the contested decision does not enable them to ascertain and understand the scope of the reasons underlying that finding by the Commission and to challenge its validity before the Court and that the latter is not able to exercise its power of review of legality in that regard. On the contrary, it is apparent from the considerations set out in paragraph 268 et seq. above that such a review of legality is perfectly possible in the light of the grounds of the contested decision. In particular, the Bouygues companies cannot legitimately claim that the Commission did not give a satisfactory statement of reasons for its finding that the declarations from July 2002 did not involve a transfer of State resources despite the various legal studies produced during the administrative procedure, which came to the opposite view, since those reasons are set out, in particular, in recitals 214 to 219 of that decision.

323 Finally, it must be observed that the Bouygues companies' arguments summarised in paragraphs 177 to 181 above are really intended to challenge the validity of the Commission's refusal to characterise the declarations from July 2002 as State aid and not an alleged failure to state the reasons on which the contested decision is based, within the meaning of Article 253 EC.

324 Consequently, the second part of the present plea and, therefore, the second plea of the Bouygues companies in its entirety must also be rejected.

325 The Bouygues companies' claim for annulment of Article 1 of the contested decision must therefore be rejected in its entirety, without there being any need to examine the contentions of inadmissibility of the submissions of the intervener FT in Case T-450/04.

326 In the light of all the foregoing considerations, Article 1 of the contested decision must be annulled on the grounds of unlawfulness put forward in the second and third pleas of the French Republic and FT.

II — *The claim for annulment of Article 2 of the contested decision*

327 In the light of the annulment of Article 1 of the contested decision, on the basis of the pleas which the French Republic and FT put forward in Cases T-425/04 and T-444/04, their claims, that of the Bouygues companies in Case T-450/04 and that of AFORS in Case T-456/04 for annulment of Article 2 of that decision, which finds that there is no need to recover the aid referred to in Article 1, have lost their purpose.

328 The annulment of Article 1 of that decision in response to the actions brought in Cases T-425/04 and T-444/04 produces an effect *erga omnes*, which is capable of giving it the force of *res judicata* with absolute effect (Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraph 43, and judgment of 4 March 2009 in Joined Cases T-265/04, T-292/04 and T-504/04 *Tirrenia di Navigazione and Others* v *Commission*, not published in the ECR, paragraph 159).

329 The consequence of that annulment is the disappearance with retroactive effect of the finding of the existence of aid incompatible with the common market contained in Article 1 of the contested decision. It follows that the declaration of non-recovery of that aid, contained in Article 2 of that decision, also loses its purpose with retroactive effect.

330 In those circumstances, as the parties unanimously acknowledged at the hearing in reply to a question put by the Court, which was duly noted in the minutes of the hearing, there is no need to adjudicate on the claims of the French Republic, FT, the Bouygues companies and AFORS for annulment of Article 2 of the contested decision, or to assess the validity of the pleas and arguments which those applicants have put forward in support of those claims.

Costs

I — *General points*

331 Under Article 87(2) 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.

332 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court.

333 Finally, under the first and third subparagraphs of Article 87(4) of the Rules of Procedure, on the one hand, the Member States and institutions which intervened in the proceedings are to bear their own costs and, on the other, the Court may order an intervener to bear his own costs.

II — *Cases T-425/04 and T-444/04*

334 Since the Commission has been unsuccessful in Cases T-425/04 and T-444/04 and in view of the secondary character, in those cases, of the claim for annulment of Article 2 of the contested decision, on which there is no need to adjudicate, the Commission must be ordered to bear its own costs and to pay those incurred by the French Republic and FT.

335 In accordance with the third subparagraph of Article 87(4) of the Rules of Procedure, the Bouygues companies shall bear their own costs.

III — *Case T-450/04*

336 Since the Bouygues companies have been unsuccessful in their claim for annulment of Article 1 of the contested decision and there is no need to adjudicate on their claim for annulment of Article 2 of that decision, they must be ordered to bear their own costs and to pay half of the costs incurred by the Commission. The Commission shall bear half of its own costs.

337 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the French Republic shall bear its own costs.

338 In accordance with the third subparagraph of Article 87(4) of the Rules of Procedure, FT shall bear its own costs.

IV — *Case T-456/04*

339 Since there is no need to adjudicate on the claim for annulment of Article 2 of the contested decision, AFORS and the Commission must be ordered to bear their own costs.

340 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the French Republic shall bear its own costs.

341 In accordance with the third subparagraph of Article 87(4) of the Rules of Procedure, FT shall bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. Annuls Article 1 of Commission Decision 2006/621/EC of 2 August 2004 on the State aid implemented by France for France Télécom;

2. Rules that there is no need to adjudicate on the claims for annulment of Article 2 of Decision 2006/621;

3. **In Cases T-425/04 and T-444/04, orders the European Commission to bear its own costs and to pay those incurred by the French Republic and France Télécom SA;**

4. **In Cases T-425/04 and T-444/04, orders Bouygues SA and Bouygues Télécom SA to bear their own costs;**

5. **In Case T-450/04, orders Bouygues and Bouygues Télécom to bear their own costs and to pay half of the costs incurred by the Commission;**

6. **In Case T-450/04, orders the Commission to bear half of its own costs;**

7. **In Case T-456/04, orders the Association française des opérateurs de réseaux et services de télécommunications (AFORS Télécom) and the Commission to bear their own costs;**

8. **In Cases T-450/04 and T-456/04, orders the French Republic and France Télécom to bear their own costs.**

Azizi Cremona Labucka

Frimodt Nielsen O'Higgins

Delivered in open court in Luxembourg on 21 May 2010.

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