OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 8 October 2008 [1]

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1 — Original language: French.

1. By their appeal, Bouygues SA and Bouygues Télécom SA ('Bouygues and Bouygues Télécom' or 'the appellants') claim that the Court of Justice should set aside the judgment in Case T-475/04 *Bouygues and Bouygues Télécom* v *Commission* ('the judgment under appeal') [2] by which the Court of First Instance of the European Communities dismissed their action for annulment of the Commission decision of 20 July 2004 (State aid NN 42/2004 — France) regarding the retroactive modification of payments due from Orange and SFR for Universal Mobile Telecommunications System (UMTS) licences ('the contested decision'). [3]

I — Legal context

2. Under Article 87(1) EC:

'Save as otherwise provided in this Treaty, 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.'

3. Article 88(3) EC provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

4. Use of the radio spectrum to provide UMTS services is governed by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services [4] and Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community. [5]

2 — [2007] ECR II-2097.
3 — OJ 2005 C 275, p. 3.
4 — OJ 1997 L 117, p. 15.
5 — OJ 1999 L 17, p. 1.

5. Article 3(3) of Directive 97/13 provides:

'Member States shall ensure that telecommunications services and/or telecommunications networks can be provided either without authorisation or on the basis of general authorisations, to be supplemented where necessary by rights and obligations requiring an individual assessment of applications and giving rise to one or more individual licences. Member States may issue an individual licence only where the beneficiary is given access to scarce physical and other resources or is subject to particular obligations or enjoys particular rights, in accordance with the provisions of Section III.'

6. Article 8(4) of Directive 97/13 is worded as follows:

'Member States may amend the conditions attached to an individual licence in objectively justified cases and in a proportionate manner. When doing so, Member States shall give appropriate notice of their intention to do so and enable interested parties to express their views on the proposed amendments.'

7. Article 9(2) of Directive 97/13 provides:

'Where a Member State intends to grant individual licences:

— it shall grant individual licences through open, non-discriminatory and transparent procedures and, to this end, shall subject all applicants to the same procedures, unless there is an objective reason for differentiation …'.

8. Under Article 10(1), (3) and (4) of Directive 97/13:

'1. Member States may limit the number of individual licences for any category of telecommunications services and for the establishment and/or operation of telecommunications infrastructure, only to the extent required to ensure the efficient use of radio frequencies or for the time necessary to make available sufficient numbers in accordance with Community law.

…

3. Member States shall grant such individual licences on the basis of selection criteria which must be objective, non-discriminatory, detailed, transparent and proportionate. Any such selection must give due weight to the need to facilitate the development of competition and to maximise benefits for users. …

4. Where, on its own initiative or following a request by an undertaking, a Member State finds, either at the time of entry into force of this Directive or thereafter, that the number of individual licences can be increased, it shall publish this fact and invite applications for additional licences.'

9. Article 11(2) of Directive 97/13 provides:

'… Member States may, where scarce resources are to be used, allow their national regulatory authorities to impose charges which reflect the need to ensure the optimal use of these resources. Those charges shall be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.'

10. According to Article 1 thereof, the aim of Decision No 128/1999 is 'to facilitate the rapid and coordinated introduction of compatible UMTS networks and services in the Community'. Article 3(1) of that decision is worded as follows:

'Member States shall take all actions necessary in order to allow, in accordance with Article 1 of Directive 97/13/EC, the coordinated and progressive introduction of the UMTS services on their territory by 1 January 2002 at the latest.'

11. Hereinunder, the provisions of Directive 97/13 and of Decision No 128/1999 will be referred to as 'the Community framework'.

II — Background to the dispute

A — *Award of UMTS licences*

12. By a decision of 28 July 2000, the French authorities launched a call for applications for four UMTS licences. The lifetime of the licences was to be 15 years. The fee for a licence was to amount to a total of EUR 4.95 billion. The four licences were to be awarded under a 'comparative' tendering procedure. That method enabled the French authorities to choose, from the operators which had declared themselves willing to pay EUR 4.95 billion, those who had entered into the most substantial commitments with regard to a number of criteria such as scale and speed of network development, quality of services provided and measures to protect the environment.

13. The final date for lodging applications was set at 31 January 2001 and applicants could withdraw their applications up until 31 May 2001. By 31 January 2001 only two applications had been received, namely from Société française du radiotéléphone — SFR ('SFR') and from France Télécom mobiles, which a few months later became Orange France ('Orange'). Other operators chose not to tender, primarily on account of the high level of the fees.

14. Accordingly, the Autorité de régulation des télécommunications (Telecommunications Regulatory Authority; 'the ART') announced in a press release of 31 January 2001 (hence on the date on which the deadline for making applications expired) that in order to promote the development of genuine competition, as sought by both Community and French legislation, a second, supplementary call for applications was necessary so as to meet the objective of awarding four licences.

15. In the light of that information, Orange and SFR drew the attention of the Minister for the Economy and Finance and of the Secretary of State for Industry to the need, when deciding the terms of future licences, to comply with the principle of equal treatment of individuals vis-à-vis financial burdens imposed by the State and the principle of effective competition between operators.

16. By two identically worded letters dated 22 February 2001, the Minister for the Economy and Finance and the Secretary of State for Industry assured SFR and Orange that the French Government shared with them this dual objective of compliance with the principle of equal treatment of individuals vis-à-vis charges levied by the State and the principle of effective competition between operators, and that the terms of the second call for applications would ensure the equitable treatment of all the operators which would ultimately be granted a licence.

17. On 31 May 2001, the ART announced that Orange and SFR had been accepted as candidates in the context of the first call for applications. The ART suggested to the French Government that the second call for applications should be launched in the first half of 2002 at the latest and that it should take account of the need for equitable conditions, especially in financial terms, as between all operators.

18. On 18 July 2001, the first two licences were awarded to SFR and Orange. Those two licences were awarded on the terms laid down in the first call for applications. [6]

19. On 14 December 2001, the second call for applications was launched. In it the ART announced that the terms for that call for applications represented a continuation of the terms for the first call for applications and were designed to ensure, in particular, compliance with the principle of the equal treatment of operators. The ART also recommended amending the terms of the licences awarded on the occasion of the first call for applications.

20. By 16 May 2002, the deadline for making applications for the second call for applications, the only company to have lodged an application was Bouygues Télécom. On 27 September 2002, the ART decided to accept the application from Bouygues Télécom. A fourth UMTS licence could not be awarded for lack of an applicant.

21. By decrees of 3 December 2002, the third UMTS licence was awarded to Bouygues Télécom and the terms of the licences of Orange and SFR were aligned with the terms of the licence granted to Bouygues Télécom ('the amendment at issue'). Thus, all the licences were valid for 20 years and the related fees consisted of a first component of EUR 619 million, to be paid on the award of the licence, and a second component, to be paid annually for the use of the frequencies and calculated as a percentage of the turnover generated by the use of those frequencies. [7]

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

22. On 4 October 2002, the Commission received a complaint from Bouygues and Bouygues Télécom against the amendment at issue. In their complaint, they maintained that the amendment at issue constituted State aid for the purposes of Article 87 EC. This complaint was one of several complaints brought by Bouygues and Bouygues Télécom in respect of measures adopted by the French State concerning France Télécom.

6 — See point 12 of this Opinion.

7 — With regard to other amendments to the technical terms, see paragraph 17 of the contested decision.

23. On 31 January 2003, the Commission initiated the formal investigation procedure [8] with regard to some of those measures. The amendment at issue was not one of the measures concerned. On 12 November 2003, Bouygues and Bouygues Télécom gave the Commission formal notice to define its position in respect of their complaint against the amendment at issue. On 21 February 2004, Bouygues and Bouygues Télécom brought an action before the Court of First Instance for a declaration that the Commission had failed to act in so far as it had not taken a decision on the complaint. By order of 14 February 2005, [9] the Court of First Instance dismissed the action as inadmissible.

24. By the contested decision, the Commission decided not to raise objections to the amendment at issue pursuant to Article 88(3) EC. It based that decision on the finding that the amendment at issue did not constitute State aid for the purposes of Article 87(1) EC.

III — Proceedings before the Court of First Instance and the judgment under appeal

25. On 24 November 2004, Bouygues and Bouygues Télécom brought an action before the Court of First Instance for annulment of the contested decision. The French Republic, Orange and SFR were granted leave to intervene in support of the forms of order sought by the Commission.

26. In support of their action, Bouygues and Bouygues Télécom relied on two pleas in law, alleging: (i) the amendment at issue constituted State aid for the purposes of Article 87(1) EC; and (ii) since the case presented serious difficulties, the Commission should have initiated the formal investigation procedure under Article 88(2) EC.

27. By the judgment under appeal, the Court of First Instance dismissed the action.

28. The Court of First Instance upheld the Commission's conclusion that there was no selective advantage, on the following grounds.

29. First, the Court of First Instance examined whether Orange and SFR had benefited from a selective advantage as a result of the measures taken by the French authorities. [10] In that context, the Court initially examined whether the partial waiver by the French State of its financial claims vis-à-vis Orange and

8 — The procedure referred to in Article 88(2) EC.

9 — Order in Case T-81/04 *Bouygues and Bouygues Télécom* v *Commission*.

10 — See paragraphs 95 to 126 of the judgment under appeal.

SFR constituted a selective advantage. [11] The Court decided that this was not the case, because of the uncertain nature of the claims in question [12] and because the partial waiver was inevitable, owing to the nature and general scheme of the system. [13]

30. The Court of First Instance went on to examine whether the earlier award of licences to Orange and SFR had constituted a selective advantage. [14] Again, the Court made a negative finding, on the ground that Orange and SFR had had no competitive advantage over Bouygues Télécom [15] and because of the need to avoid giving rise to any discrimination as between Orange and SFR, on the one hand, and Bouygues Télécom, on the other, which would have been in breach of Directive 97/13. [16]

31. Secondly, the Court of First Instance examined the plea that the French authorities had failed to comply with the principle of non-discrimination. [17] It rejected that plea. [18]

32. As regards the procedure-related complaint that the Commission should have initiated a formal investigation, the Court of First Instance held that the case had not raised serious difficulties and that, accordingly, the initiation of a formal investigation was not necessary. [19]

IV — Forms of order sought before the Court of Justice

33. The appellants claim that the Court should:

— set aside the judgment under appeal;

— in the alternative, refer the case back to the Court of First Instance for judgment in the light of the legal views expressed by the Court of Justice;

— order the Commission to pay all the costs of the proceedings.

11 — See paragraphs 106 to 112 of the judgment under appeal.
12 — See paragraph 107 of the judgment under appeal.
13 — See paragraphs 108 to 112 of the judgment under appeal.
14 — See paragraphs 113 to 125 of the judgment under appeal.
15 — See paragraphs 115 to 122 of the judgment under appeal.
16 — See paragraphs 123 to 125 of the judgment under appeal.
17 — See paragraphs 127 to 154 of the judgment under appeal.
18 — See paragraph 155 of the judgment under appeal.
19 — See paragraphs 86 to 93, 126 and 155 to 160 of the judgment under appeal.

34. The Commission contends that the Court should:

— dismiss the appeal as being in part inadmissible and in part unfounded;

— order the appellants to pay all the costs of the proceedings.

35. The French Republic contends that the Court should:

— dismiss the appeal;

— order the appellants to pay the costs of the proceedings.

36. Orange contends that the Court should:

— dismiss the appeal in its entirety;

— order the appellants to pay all the costs of the proceedings.

37. SFR contends that the Court should:

— dismiss the appeal in its entirety;

— order the appellants to pay all the costs of the proceedings.

38. On completion of the written procedure, the Court held a hearing on 11 September 2008 at which the appellants, the Commission, the French Republic, Orange and SFR were represented. At the hearing, the appellants, the Commission, the French Republic, Orange and SFR supplemented their written observations.

V — Arguments of the parties on appeal

39. The appellants rely on four grounds of appeal.

A — *First ground of appeal*

40. By their first ground of appeal, the appellants maintain that the Court of First Instance was in breach of its obligation to state reasons.

41. The appellants argue that the Court of First Instance did not give sufficient grounds for its judgment as regards the exception based on the nature and general scheme of the system. In their view, it had failed to explain the nature and general scheme of the system, in that its description of the system was contradictory and not sufficiently detailed. As regards the causal link, the Court of First Instance had failed to explain why the nature and general scheme of the system made it inevitable, on the one hand, that the claims on Orange and SFR had to be waived and, on the other, that those undertakings were awarded licences earlier.

42. The Commission, the French Government, Orange and SFR contend that the Court of First Instance was not in breach of its obligation to state reasons.

43. They maintain that the Court of First Instance stated sufficient reasons with regard to the general scheme of the system and the causal link between the general scheme of the system and, on the one hand, the waiver of the claim, and, on the other hand, the earlier award of the licences to Orange and SFR.

B — *Second ground of appeal*

44. By their second ground of appeal, the appellants claim that the Court of First Instance confused the assessment of the existence of a serious difficulty and that of the merits of the contested decision. In order to establish that the Commission was not under an obligation to initiate the formal investigation procedure, the Court of First Instance had merely added formally, after weighing the merits of each of the pleas in law relied upon by the parties, that such an examination did not constitute a serious difficulty.

45. According to the appellants, the existence of serious difficulties was confirmed by the fact that, in the judgment under appeal, the Court of First Instance had replaced the Commission's assessment of several complex

matters with its own, repudiating in part the analysis contained in the contested decision.

46. The Commission, the French Government, Orange and SFR maintain that the Court of First Instance did not err with regard to the assessment of serious difficulty.

47. The Commission and the French Government note, first, that the approach taken by the Court of First Instance was consistent with the sequence in which the appellants had themselves presented their pleas in law in their application to the Court of First Instance. The Commission contends, therefore, that the argument claiming inversion of method should be rejected as inadmissible.

48. As regards the substance, the Commission maintains that the approach taken by the Court of First Instance was not contradictory and was not the result of confusion. The Court of First Instance had applied settled case-law to the effect that if there is a serious difficulty, the decision could be annulled on that ground alone, even if it were not established that the Commission's assessments as to substance were erroneous in law or in fact. Orange and SFR argue that the Court of First Instance drew a distinction between procedural rights and the soundness of the contested decision, and that the Court of First Instance had held that the assessment of the substance had revealed no serious difficulties.

49. As regards the arguments alleging that the Court of First Instance had substituted its own assessments, the Commission maintains, first, that the matters to which the appellants refer are essentially factual and thus not admissible on appeal. Lastly, the Commission, the French Government, Orange and SFR contend that the Court of First Instance did not replace the Commission's assessment with its own. SFR and Orange argue that the various assessments carried out by the Court of First Instance were intended merely to respond to the arguments put forward by Bouygues and Bouygues Télécom in their application. The Commission maintains that, in any event, such a replacement would have no implications either for the question whether there were serious difficulties or for the validity of the judgment.

C — Third ground of appeal

50. By their third ground of appeal, the appellants claim that the Court of First Instance erred in its legal characterisation of the facts. This ground of appeal is divided into three branches. The first branch is directed against the legal assessment made by the Court of First Instance as regards its treatment of the procedures for awarding UMTS licences as a single procedure; the second branch challenges the assessment of the uncertain nature of the claims waived by the French State; and the third branch concerns the wording of the ministerial letter of 22 February 2001.

1. The first branch

51. By the first branch of the third ground of appeal, the appellants maintain that the Court of First Instance erred in its legal characterisation of the facts by holding that the two consecutive calls for applications constituted one and the same procedure for the purposes of the principle of non-discrimination and that the principle of equal treatment required the fees due from Orange and SFR to be aligned with those charged to Bouygues Télécom.

52. They maintain that Article 11 of Directive 97/13 requires reasoning to be based only on the substantive organisation of the calls for applications. In that context, they refer to the differences between the two calls for applications as regards the financial terms, the period of validity and the applicants.

53. The Commission, the French Government, Orange and SFR contend that this branch should be rejected.

54. The Commission considers that the question whether the two calls for applications are categorised as a single procedure or as two separate procedures does not affect the conclusion that the three applicants were in a similar situation at the time when the licences were awarded. The Court of First Instance based its reasoning on a comparison of the factual situation in which Orange, SFR and Bouygues Télécom found themselves. According to the Commission, this branch is therefore nugatory and does not affect the reasoning of the Court of First Instance. Moreover, the Court of First Instance merely took over a finding made by the French authorities. In the view of the Commission and Orange, that factual finding cannot be reviewed on appeal.

55. The Commission and the French Government maintain that the two calls for applications should be treated as one, in particular on account of the complementary nature of the second call for applications and its continuity with the first. The French Government and Orange argue that Article 11 of Directive 97/13 does not corroborate the appellants' arguments.

56. SFR contends that the Court of First Instance was right to assess the equality of treatment by taking as a basis the context of the emerging UMTS market and by noting that none of the operators had entered the market. Finally, the Commission observes that, if the procedure were relaunched *ab initio*, the same operators would be granted licences on identical terms.

2. The second branch

57. By the second branch of the third ground of appeal, the appellants maintain that the Court of First Instance erred in its legal characterisation of the facts by categorising the French State's claims on Orange and SFR as uncertain.

58. In that context, they claim that since the amendment of the terms of the licences of Orange and SFR was made on 3 December 2002, Orange and SFR did not have an opportunity to withdraw their bid at that time. The appellants argue that, in those circumstances, the French State's claims on Orange and SFR could not be categorised as uncertain.

59. The Commission, the French Government, Orange and SFR contend that the claims were uncertain. They argue that, by the letters of 22 February 2001 guaranteeing equitable treatment, the French authorities waived their claims at a time when Orange and SFR could still have withdrawn their bid. But for those letters guaranteeing equitable treatment, Orange and SFR would probably have withdrawn their bid.

60. The Commission, the French Government and Orange maintain that in any event this branch of the ground of appeal is superfluous. In their view, since the Court of First Instance took as a basis primarily the inevitability of the waiver on account of the nature and general scheme of the system, any challenge to the argument based on the finding that the claims were uncertain would not affect the Court of First Instance's conclusion that there was no selective advantage.

61. Orange adds that since the licences relate to occupation of the public domain, the right to withdraw subsisted after 31 May 2001, because the licence-holders could have abandoned their licences at any time and, as a consequence, ceased to pay the related fees.

3. The third branch

62. By the third branch of the third ground of appeal, the appellants claim that the Court of First Instance erred in its legal characterisation of the facts by finding that, in the letter of 22 February 2001, the French authorities had guaranteed equal treatment for Orange and SFR. They claim that the French authorities had guaranteed equitable treatment, not equal treatment. The meaning of the two expressions is different. Whilst equal treatment requires identical treatment, equitable treatment in the present case required differentiation between the terms of the licences granted to Orange and SFR, on the one hand, and the terms of the licences granted to Bouygues Télécom, on the other.

63. The Commission, the French Government, Orange and SFR contend that in actual fact the appellants are not claiming that there has been an error in the legal characterisation of the facts but an error consisting in a distortion of the facts. They maintain that the Court of First Instance did not distort the content of the letters of 22 February 2001. The Commission states that the terms '*équité*' (equity) and '*égalité*' (equality) were used synonymously in the judgment under appeal. As the Commission had also used those terms synonymously, it maintains that this branch is inadmissible as the appellants should have raised this point by way of a plea at first instance.

D — *Fourth ground of appeal*

64. The fourth ground of appeal alleges infringement of Article 87 EC. It is divided into three branches, concerning respectively: (i) the implementation of the exception based on the nature and general scheme of the system; (ii) the assessment of the existence of an advantage; (iii) the implementation of the principle of non-discrimination.

1. The first branch

65. By the first branch of the fourth ground of appeal, the appellants claim that the exception based on the general scheme of the system is predicated on the assumption that the differentiation is inherent in the scheme of which it forms part. That was not so in the present case. The solution adopted by the French authorities was not inevitable. According to the appellants, the general scheme of the system in question was designed to find four operators so as to ensure compliance with the principle of equal treatment. That required a choice to be made between, on the one hand, the relaunch *ab initio* of the award procedure with the same terms for all applicants and, on the other, two successive calls for applications on different terms.

66. The choice made by the French authorities — namely to organise two successive calls for applications and, in financial terms, to treat the applicants of the two calls equally — was not inevitable. Moreover, that choice granted selective advantages to Orange and SFR, in particular the fact that they received licences earlier and the fact that they were certain of being selected as applicants. Finally, the exception based on the general scheme of the system must, as far as possible, be attained by measures of a general nature. As it is, the solution adopted by the French authorities was not a general measure.

67. The Commission, the French Government, Orange and SFR contend that the general scheme of the system in question is predicated on the assumption that the various criteria established in the Community framework for the award of UMTS licences are applied, in particular, the creation of a competitive market and compliance with the deadline of 1 January 2002.

68. The solution proposed by the appellants — that the entire award procedure should have been relaunched *ab initio* — could not have ensured the application of those criteria. First, it would not have enabled the deadline of 1 January 2002 to be met. Secondly, a wholesale relaunch of the award procedure would have entailed the risk that the applicants of the first call for applications would have changed their strategy and would have declined to lodge an application. In any event, the result of a relaunch *ab initio* would have been no different since the only applicants would have been Orange, SFR and Bouygues Télécom, and the terms of the licences awarded as a result would have been identical to the terms which the candidates were ultimately given. The other solution proposed by the appellants — the organisation of two different calls for applications on different terms — would not have been in compliance with the principle of equal treatment.

69. According to the Commission, the certainty that Orange and SFR had of being selected as applicants stemmed from the decision by Bouygues Télécom not to apply during the first call for applications. Finally, the objectives of the Community framework for the grant of UMTS licences could not have been attained through measures of a general nature.

70. According to Orange, this branch is inadmissible in so far as it seeks to bring about a reassessment of the facts and evidence relied on at first instance.

2. The second branch

71. By the second branch of the fourth ground of appeal, the appellants claim that the Court of First Instance erred in law in its application of Article 87 EC as regards the assessment of the absence of any temporal advantage as a result of the prior award of licences to Orange and SFR. According to the appellants, the Court of First Instance could not find that there was a potential temporal advantage for Orange and SFR stemming from the earlier grant of the licences and then go on to conclude that there was no aid because Orange and SFR had not, in practice, made use of that advantage.

72. In this context, the appellants maintain, first, that the existence of a potential advantage is sufficient to establish the existence of aid. As the concept of aid is objective, the Court of First Instance did not have to take account, in its assessment, of subjective factors relating to the behaviour of operators on the market or the actual effect of aid on the market. The fact that the economic situation of Orange and SFR as undertakings benefiting from the advantage had not changed was irrelevant in establishing the existence of aid. The Court of First Instance should have taken account only of the fact that Orange and SFR had benefited from an actual and immediate advantage stemming from the fact that they had received their licences earlier.

73. Furthermore, the Court of First Instance reversed the burden of proof by requiring the appellants to furnish proof of the consequences of the actual advantage. If a temporal advantage is found to exist, the burden of proving that no actual benefit has been derived from it lies with the beneficiaries of that advantage.

74. Finally, the Court of First Instance erred in law by taking account of the fact that none of the operators was present on the market, since Article 87 EC is applicable in a situation where the competition is potential.

75. The Commission, the French Government, Orange and SFR maintain that the Court of First Instance did not err. In their view, the appellants have confused the analysis relating to the existence of a selective advantage with the analysis of the criterion relating to harm to competition. The advantage must be genuine. The French Government maintains that the Commission can take account of developments which post-date the measure under examination.

76. The Commission, the French Government, Orange and SFR argue that the Court of First Instance did not err in law by holding that the two operators had derived no advantage from the earlier grant of the licences as they were not present on the market. According to the Commission and Orange, the Court of First Instance was right to rule that, because of the setbacks affecting UMTS technology, the prior award of the licences did not constitute a technological advantage. Orange and SFR contend that the Court of First Instance ruled, within its exclusive competence, that in the present case Orange and SFR had not benefited from the potential advantage.

77. The Commission adds that the argument based on the concept of competition is nugatory, since the appellants have confused the problem of defining the market with that of entry to the market. Entry to the market is the criterion to take into account in the context of the present case.

78. As regards the reversal of the burden of proof, the Commission maintains that the Court of First Instance merely found that there had been a genuine advantage in theory and that it was therefore for the appellants to prove that the advantage actually existed. According to the Commission, the French Government and Orange, it is for the party contesting a decision of the Commission to demonstrate that the Commission's finding is not valid.

3. The third branch

79. By the third branch of the fourth ground of appeal, the appellants claim that the Court

of First Instance erred in law in its application of the principle of non-discrimination. They maintain that since Orange and SFR, on the one hand, and Bouygues Télécom, on the other, are not in the same situation, their identical treatment by the French authorities was contrary to the principle of non-discrimination.

80. In that context, the appellants refer to the principle of the inviolability of the award criteria, by virtue of which the amount of the fees cannot be altered. Furthermore, compliance with the objectives laid down by Directive 97/13 is not included among the exceptions listed exhaustively in Article 87(2) EC.

81. The appellants add that the French authorities had sufficient time to relaunch the procedure *ab initio* before the deadline of 1 January 2002.

82. By contrast, the Commission, the French Government, Orange and SFR maintain that the Court of First Instance did not err in its application of the principle of non-discrimination.

83. Orange argues that this branch of the ground of appeal is inadmissible since the appellants merely reiterate the arguments put forward at first instance.

84. The Commission and Orange contend that the three UMTS licence-holders were de facto in the same situation, since Orange and SFR had not benefited in practical terms from the early grant of the licences. The French Government and SFR maintain that, for the purposes of applying the principle of non-discrimination in the context of a single selection process — albeit organised in several stages — the two calls for applications must be treated as one.

85. In the view of the Commission, the procedural rules applicable to public procurement and franchises are not applicable. As regards the lawfulness of amending the terms of the licences awarded during the first call for applications, the Commission points out that the principle of inviolability is nowhere to be found in Directive 97/13 or in any other applicable provision of Community law. Orange argues that, in any event, such a principle could not cast doubts concerning compliance with the principle of non-discrimination. According to the Commission, SFR and Orange, the possibility of amending the terms for granting licences is provided for expressly in Directive 97/13.

86. Finally, the Commission contends that where the State acts as regulator on the market, the mere fact that a State measure improves the situation of an undertaking does

not automatically give rise to the existence of aid. In such a case, it is necessary to examine first whether an undertaking has an advantage and, secondly, whether the situation of two undertakings is comparable in terms of the objective pursued by the measure concerned.

87. With regard to the argument based on Article 87(2) EC, the Commission and Orange point out that the appellants confuse the existence of State aid with the compatibility of such aid with the common market.

88. As regards the argument that the authorities had time to relaunch the entire procedure *ab initio* before the deadline of 1 January 2002, the French Government contends that it constitutes an assessment of the facts which is inadmissible at the appeal stage. In any case, the authorities did not have the time necessary to relaunch the entire procedure *ab initio*.

VI — Legal appraisal

89. By their third and fourth grounds of appeal, the appellants are challenging the conclusion reached by the Court of First Instance to the effect that there was no State aid. First, in Section A, I shall examine those grounds of appeal; in Section B, I shall examine the second ground of appeal concerning the existence of serious difficulties; and, lastly, in Section C, I shall examine the first ground of appeal concerning the alleged failure to state reasons.

A — *Third and fourth grounds of appeal*

90. In their third and fourth grounds of appeal, the appellants challenge the conclusion reached by the Court of First Instance concerning the absence of any element of State aid in the amendment at issue. I note that the appellants have grouped their arguments in support of the third and fourth grounds of appeal according to the types of error alleged and not so as to reflect the sequence of the grounds set out in the judgment under appeal. It seems to me, however, that if that sequence were to be followed in examining the various branches of the third and fourth grounds of appeal, [20] it would be easier to analyse the merits of those grounds of appeal.

91. First of all, I shall consider the third branch of the third ground of appeal, which concerns one of the facts of the case, namely the factual assessment of the letter of 22 February 2001 from the French authorities (1).

92. I shall then examine the branches by which the appellants challenge the finding by the Court of First Instance that the French

20 — See the description at points 27 to 32 of this Opinion.

State's partial waiver of the claims on SFR and Orange does not constitute a selective advantage, [21] that is to say, the first branch of the fourth ground of appeal, concerning the argument based on the general scheme of the system (2), and the second branch of the third ground of appeal, concerning the argument based on the uncertain nature of the claims (3).

93. I shall then move on to assess the second branch of the fourth ground of appeal, which is directed against the Court of First Instance's conclusion that the potential temporal advantage stemming from the earlier grant of the licences does not constitute a selective advantage (4).

94. Lastly, I shall examine the branches concerning the principle of non-discrimination, that is to say, the third branch of the fourth ground of appeal (5) and the first branch of the third ground of appeal (6).

1. Content of the letter of 22 February 2001 (third branch of the third ground of appeal)

95. The third branch of the third ground of appeal is directed against paragraph 107 of the judgment under appeal. In paragraph 107 of the judgment under appeal, the Court of First Instance found that in the letters of 22 February 2001 the French authorities had given an assurance to the applicants who responded to the first call for applications — namely Orange and SFR — that they would be treated equally with the second round of applicants.

96. According to the appellants, that finding constitutes a distortion of the content of the letters of 22 February 2001. The letters of 22 February 2001 contained a guarantee of 'equitable' treatment as between first-call applicants and second-call applicants. The Court of First Instance, however, construed the content of the letters as a guarantee that the two groups of applicants would be treated 'identically'.

97. First of all, it should be noted that — contrary to the title of the third ground of appeal — the appellants are not claiming that there has been an error in the legal characterisation of the facts. An error in the legal characterisation of the facts consists in an error in applying a legal rule to the facts. [22]

21 — See paragraphs 95 to 126 of the judgment under appeal.

22 — See point 3 of the Opinion of Advocate General Van Gerven in Case C-145/90 P *Costacurta* v *Commission* [1991] ECR I-5449; Lenaerts, K., Arts, D. and Maselis, I., *Procedural Law of the European Union*, 2nd edition, London, 2006, p. 457, paragraph 16-007.

98. However, what the appellants are claiming is that the Court of First Instance erred in its assessment of the content of the letters of 22 February 2001. Thus the alleged error lies in the assessment of the facts by the Court of First Instance, not in the legal characterisation of the facts. Within the framework of an appeal, which is limited to points of law, the appellants cannot challenge the assessment of the facts by the Court of First Instance unless they are claiming that the Court of First Instance manifestly distorted the facts. [23] The appellants' assertion that the content of the letters of 22 February 2001 was in fact different from that construed by the Court of First Instance constitutes such a claim.

99. A plea of error which could have been put forward at first instance, but was not, is inadmissible on appeal. [24] However, as the error alleged by the appellants does not appear to be an error committed by the Commission and repeated by the Court of First Instance but rather an error committed by the Court of First Instance alone, I do not consider this ground of appeal to be inadmissible.

100. In my view, this branch is therefore admissible.

101. On the other hand, this branch of the ground of appeal is unfounded. Contrary to the appellants' assertions, the Court of First Instance did not find that the French authorities had given an assurance to the first-call applicants that the two groups of applicants would be treated in an 'identical' manner.

102. After mentioning 'equal treatment', in paragraph 107 of the judgment under appeal, the Court of First Instance referred to paragraph 14 of the judgment under appeal, in which it had described the content of the letters of 22 February 2001. As was stated in paragraph 14 of the judgment under appeal, in those letters the French authorities had guaranteed equitable treatment as between the first-call applicants and the second-call applicants, as well as compliance with the principles of equal treatment of individuals vis-à-vis financial burdens imposed by the State and of effective competition between operators. [25] Since the French authorities appear to have used the terms '*égalitaire*' (equal) and '*équitable*' (equitable) synonymously in those letters, the mere fact that the Court of First Instance used the term '*traitement égalitaire*' (equal treatment) when describing the content of those letters does not constitute a distortion of the facts.

103. The appellants put forward no other argument in support of their assertion that the Court of First Instance distorted the content

23 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 49, and Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42; Lenaerts, K., Arts, D. and Maselis, I., op. cit. (see footnote 22), p. 455, paragraph 16-005.

24 — Lenaerts, K., Arts, D. and Maselis, I., op. cit. (see footnote 22), p. 457, paragraph 16-006.

25 — See paragraph 14 of the judgment under appeal.

of the letters of 22 February 2001 by construing them as a guarantee of identical treatment. I propose, therefore, that the third branch of the third ground of appeal be rejected as unfounded.

2. The partial waiver of the claims on Orange and SFR and the exception based on the general scheme of the system (first branch of the fourth ground of appeal)

104. In support of its finding that the partial waiver by the French State of the claims on Orange and SFR did not constitute a selective advantage, the Court of First Instance relied on the exception based on the nature and general scheme of the system. [26] In that context, the Court of First Instance found that the Community framework rests on the equal treatment of operators in relation both to the award of licences and to the determination of fees, but that it leaves the Member States free to choose the procedure for the award of licences, provided that the principles of equal treatment and freedom of competition are respected. [27] The Court of First Instance then observed that, for the purposes of applying the notion of non-discriminatory charges, referred to in Article 11(2) of Directive 97/13, account must be taken of the time at which each of the operators concerned entered the market. [28] Finally, it held that there is no element of aid, provided that the terms are applied to all the operators concerned without distinction. [29] It concluded that the fact that the State had waived resources and that this may have created an advantage for the beneficiaries of the fee reduction is not sufficient to prove the existence of State aid since the abandonment of the claims was inevitable. [30]

105. According to the appellants, the Court of First Instance did not explain adequately why the waiver was inherent in the Community framework.

106. First, I would note that, in the section of the judgment which this branch of the ground of appeal contests, [31] the Court of First Instance examined (only) the question whether the French State's partial waiver of the claims on Orange and SFR should be regarded as a selective advantage. Its conclusion, in paragraph 111 of the judgment under appeal, concerning inevitability owing to the nature and general scheme of the system was therefore limited to the inevitability of the partial waiver of the claims on Orange and SFR. [32] In this context, it is therefore necessary only to examine the soundness of the grounds stated by the Court of First Instance with regard to its finding, based on the exception relating to the nature and general scheme of the system, that the partial waiver was inevitable.

107. The Court of First Instance based its conclusion on the exception based on the nature and general scheme of the system. The application of that exception, which has been developed and applied in the field of national systems regulating the imposition by the State

26 — See paragraphs 108 to 112 of the judgment under appeal.
27 — See paragraph 108 of the judgment under appeal.
28 — See paragraphs 109 and 110 of the judgment under appeal.
29 — See paragraph 110 of the judgment under appeal.
30 — See paragraph 111 of the judgment under appeal.
31 — See paragraphs 108 to 111 of the judgment under appeal.
32 — It does not relate to the inevitability of the other advantages claimed by the appellants, such as the claimed temporal advantage stemming from the prior award of the licences or the claimed advantage of guaranteed selection.

of burdens on individuals, calls in the present case for some thought regarding the legal basis for such an exception (a). Below I shall examine the way in which the Court of First Instance applied this exception (b).

(a) Applicability in the present case of the exception based on the nature and general scheme of the system, and the legal basis for that exception

108. Before taking the exception based on the nature and general scheme of the system as a basis for concluding that there was no selective advantage, the Court of First Instance referred to the judgments in *Italy* v *Commission*, [33] *Spain* v *Commission* [34] and *AEM and AEM Torino*. [35] As those judgments show, the exception based on the nature and general scheme of the system was developed by the case-law in the field of national systems regulating the devolvement of public charges on individuals or undertakings. [36] According to that case-law, different treatment as between undertakings does not constitute a selective advantage for the purposes of Article 87(1) EC, if that difference is inherent in the nature and general scheme of the national system regulating the devolvement of public charges on individuals or undertakings, [37] or, to put it another way, if that difference results from the logic of such a national system. [38]

109. In terms of legal theory, this exception can be equated with the question whether the difference in treatment constitutes a special advantage. [39] Another interpretation categorises the exception based on the nature and general scheme of the system as an application of a 'rule of reason' in the field of national systems regulating the imposition of public financial burdens. [40]

110. Irrespective of the theoretical classification, I would note that the decisive question for the purposes of applying the exception based on the nature and general scheme is whether the difference in treatment in question is inherent in the internal logic of the national system. The application of the exception in the present case — where there is neither a difference in treatment as a result of the logic of a public charges system nor a difference in treatment as a result of a national system — is therefore far from evident.

33 — Case 173/73 [1974] ECR 709, paragraph 33.

34 — Case C-351/98 [2002] ECR I-8031, paragraph 42.

35 — Joined Cases C-128/03 and C-129/03 [2005] ECR I-2861, paragraph 39.

36 — The Court ruled that this exception existed for the first time in *Italy* v *Commission*, cited in footnote 33 above, paragraph 33.

37 — *Italy* v *Commission*, cited in footnote 33 above, paragraph 33; Case C-251/97 *France* v *Commission* [1999] ECR I-6639, paragraph 36; and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 33.

38 — Joined Cases T-92/00 and T-103/00 *Diputación Foral de Ávala* v *Commission* [2002] ECR II-1385, paragraph 60.

39 — See inter alia Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 137 and 138; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 51; Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 119; and Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraphs 94 to 102. However, it should be noted that in certain judgments the selective nature of a measure and the exception based on the nature and general scheme of the system are examined separately; see Case C-53/00 *Ferring* [2001] ECR I-9067, paragraphs 17 and 18; Case T-233/04 *Netherlands* v *Commission* [2008] ECR II-591, paragraphs 97 to 99; and also points 315 to 319 of the Opinion of Advocate General Léger in *Belgium and Forum 187* v *Commission*.

40 — See Heidenhain, M., *Handbuch des Europäischen Beihilfenrecht*, Munich, 2003, p. 163.

111. Admittedly, in *AEM and AEM Torino* the Court of Justice held that the internal logic of a national public charges system can be influenced by rules of Community law. In that judgment, the Court accepted that a distinction in the national public charges system, designed to offset the advantage created for certain undertakings through the transposition of a directive, resulted from the nature and general scheme of the national public charges system. [41] However, even having regard to that aspect of *AEM and AEM Torino*, I do not believe that the exception based on the nature and general scheme of the public charges system, as laid down in case-law, can be applied directly in the present case.

112. Given the special features of the present case, I see no need to apply that exception by analogy.

113. According to case-law of the Court of Justice, Article 87(1) EC refers to the decisions by which Member States, in pursuit of their own economic and social objectives, give undertakings or other persons resources or procure for them advantages — by unilateral and autonomous decisions — intended to encourage the attainment of the economic or social objectives sought. [42]

114. Since Article 87(1) EC does not apply to measures adopted by the Community legislature, [43] it follows that for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must, inter alia, be imputable to the State. [44] Accordingly, a measure adopted by a Member State in pursuance of Community law cannot be categorised as State aid within the meaning of Article 87(1) EC. Otherwise, a lawful legislative act adopted by the Community legislature would be subject to review under Article 87(1) EC. [45]

115. Under Article 10 EC, the Member States are required to implement the rules of Community law. More specifically, the third paragraph of Article 249 EC provides that a directive is to be binding, as to the result to be achieved, upon each Member State to which it is addressed, and the fourth paragraph of Article 249 EC provides that a decision is to be binding in its entirety upon those to whom it is addressed.

116. It is therefore necessary to examine whether, by partially waiving the claims on Orange and SFR, the French authorities merely fulfilled their obligations under the Community framework, that is to say, under Article 10 EC and the third and fourth

41 — See *AEM and AEM Torino*, cited in footnote 35 above, paragraphs 39 to 43.

42 — Case 61/79 *Denkavit italiana* [1979] ECR 1205, paragraph 31, and Case T-351/02 *Deutsche Bahn* v *Commission* [2006] ECR II-1047, paragraph 100.

43 — Joined Cases 213/81 to 215/81 *Norddeutsches Vieh- und Fleischkontor Will and Others* [1982] ECR 3583, paragraph 22; Heidenhain, M., op. cit. (see footnote 40), p. 23.

44 — Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 24 and the case-law cited therein, and *Deutsche Bahn* v *Commission*, cited in footnote 42 above, paragraph 100.

45 — An approach similar to that adopted by the Court of First Instance in *Deutsche Bahn* v *Commission*, cited in footnote 42 above, paragraphs 100 to 105.

paragraphs of Article 249 EC. If so, it would mean that the measure is not imputable to the French State but arises, in actual fact, from an act on the part of the Community legislature and is therefore not subject to Article 87(1) EC.

117. In conclusion, I consider that although the exception based on the nature and general scheme of a national public charges system is not applicable in the present case, an exception based on the inevitability of a national measure owing to the nature and general scheme of the Community framework may be applicable. Accordingly, it is necessary to examine — as the Court of First Instance did — whether the partial waiver resulted inevitably from the Community framework in the present case.

(b) The application of the exception based on the nature and general scheme of the Community framework

118. The appellants maintain that the Court of First Instance failed to explain why the partial waiver of the claims on Orange and SFR was inevitable.

119. First of all, it should be remembered that in the relevant section of the judgment under appeal the Court of First Instance merely touched on the question whether the partial waiver of the claims on Orange and SFR was inevitable. [46]

120. Since the French authorities had opted for a 'comparative' tendering procedure, [47] they announced, on 31 January 2001, that the first call for applications had been partly unsuccessful. They realised that the presence of only two operators on the market was not sufficient to guarantee the development of genuine competition and that the lack of applicants was due to the high fees.

121. Given the obligation on the Member States, pursuant to Article 10(4) of Directive 97/13, to grant a maximum number of licences so as to ensure the development of competition on the UMTS market, the French authorities were unable to call a halt after granting two licences to Orange and SFR but were required to attract other operators by offering more advantageous terms for licences, in particular with regard to the fees.

122. In view of that obligation, the French authorities had to examine what impact the reduction of the fee for future applicants would have on the terms of the licences

46 — See point 106 of this Opinion.

47 — The Court of First Instance found that the Community framework does not require the French authorities to use public auctions (see paragraph 108 of the judgment under appeal).

awarded to Orange and SFR. As the Court of First Instance found in the judgment under appeal, [48] the authorities were required to respect the principle of non-discrimination under Article 11(2) of Directive 97/13. The French authorities were therefore required partially to waive the claims on Orange and SFR in so far as that waiver was necessary in order to comply with the principle of non-discrimination as between Orange and SFR, on the one hand, and future applicants, on the other.

123. As the Court of First Instance held, discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations. [49] However, the assessment of two situations to establish whether or not they are comparable for the purposes of the principle of non-discrimination depends, inter alia, on the objectives of the Community framework in question. [50]

124. An important objective of the Community framework is the need to promote the development of competition, in accordance with Article 11(2) of Directive 97/13. In the economic field, the interaction between competition and non-discrimination is intimately linked. [51]

125. One of the basic conditions for the development of effective competition on a market is the ensuring of fair conditions of competition as between the various operators. An amendment of the terms of the licences of Orange and SFR was therefore required under Article 11(2) of Directive 97/13 in so far as the application of the original terms of the first call for applications to the licences of Orange and SFR was not likely to ensure fair conditions of competition as between Orange and SFR, on the one hand, and future applicants, on the other.

126. In my view, the starting point for ensuring fair conditions of competition between operators on an emerging market is first to guarantee equal conditions for all operators. In this context, I note that — as the Court of First Instance found [52] — the ratio between the level of fees originally demanded from Orange and SFR and the fee level which the French authorities considered capable of attracting additional applicants was about 8:1.

48 — See paragraph 108 of the judgment under appeal.

49 — See paragraph 129 of the judgment under appeal.

50 — Herny, R., 'Principe d'égalité et principe de non-discrimination dans la jurisprudence de la Cour de justice des Communautés européennes', *LGDJ*, 2003, p. 357, considers that there is no similarity or singularity of situations per se but that the assessment of the situation is made only on the basis of the objective and purpose of the rule concerned. See also Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 47; Case C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraphs 41 and 42; and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40. It is true that the judgments in these cases relate to the interpretation of Article 87(1) EC. Nevertheless, I consider that it is possible to deduce from this case-law that the assessment of two situations to establish whether they are comparable or different must be made having regard to the objectives of the Community framework.

51 — Herny, R., op. cit. (see footnote 50), p. 263.

52 — See paragraph 145 of the judgment under appeal.

It seems clear [53] that a downward revision of the fees which was initially provided for in respect of the first-call applicants was necessary in order to guarantee fair conditions of competition as between Orange and SFR, on the one hand, and future applicants, on the other. [54]

(c) Interim conclusion

127. It is apparent from the foregoing considerations that the Court of First Instance was correct to hold in paragraph 111 of the judgment under appeal that the partial waiver of the claims on Orange and SFR was inevitable. Since these considerations were fairly evident and had already been discussed in the proceedings before the Commission, I do not consider that the Court of First Instance failed to explain why the waiver of the claims on Orange and SFR was inevitable.

128. I therefore propose that the first branch of the fourth ground of appeal be rejected, replacing the grounds stated by the Court of First Instance concerning the legal basis for the exception based on the nature and general scheme of the system.

53 — Furthermore, in their appeal the appellants do not appear to challenge the principle by which the French authorities were able partially to waive the claims on Orange and SFR. In their view, one of the options available to the French authorities was to relaunch the entire procedure *ab initio*, thereby creating identical conditions for all the applicants accepted during this new procedure. What the appellants criticise, however, is the fact that the French authorities' method of proceeding gave Orange and SFR an advantage in the form of an earlier grant of licences and a guarantee of being selected.

54 — As I have already mentioned above (see points 106 and 119 of this Opinion), this examination is limited to the question whether the partial waiver of the claims on Orange and SFR was inevitable. Evaluating the method which the French authorities used to organise two successive calls for applications and to apply retroactively identical terms to the applicants of the two calls is a different matter. This matter will be examined later (see points 144 to 179 of this Opinion).

3. The uncertain nature of the claims (second branch of the third ground of appeal)

129. The Court of First Instance found in paragraph 107 of the judgment under appeal that the State's claim was not certain since the applicants were free, up until 31 May 2001, to withdraw their applications, thereby relinquishing the benefit of the licence and ceasing to pay the fee.

130. The appellants dispute that assessment. They maintain that the French State partially waived the claims on Orange and SFR on 3 December 2002. At that time, Orange and SFR were no longer able to withdraw their applications.

131. In my view, this branch of the ground of appeal is nugatory. A branch of a ground of appeal is nugatory if it is incapable of undermining the contested conclusion. [55] The Court of First Instance based its assessment that the partial waiver does not constitute a selective advantage on two arguments, relating respectively to: (i) the uncertain nature of the claims; (ii) the exception based on the nature

55 — Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603, paragraphs 26 to 29; Lenaerts, K., Arts, D. and Maselis, I., op. cit. (see footnote 22), p. 465, paragraph 16-019.

and general scheme of the system. Since the first branch of the fourth ground of appeal — which is directed against the grounds stated by the Court of First Instance relating to the exception based on the nature and general scheme of the system — must be rejected, [56] that ground in itself provides a sufficient basis for the conclusion reached by the Court of First Instance. Accordingly, any possible faults in the grounds based on the uncertain nature of the claims cannot, in any event, have any impact on the operative part of the judgment under appeal. This branch of the ground of appeal is therefore nugatory.

132. As regards the merits of this branch of the ground of appeal, I consider it appropriate, first, to draw a distinction between, on the one hand, the stage from 31 January 2001 to 31 May 2001 and, on the other, the amendment at issue of 3 December 2002.

133. On 31 January 2001, the French authorities noted that two applicants had lodged applications and that that would not be sufficient to ensure genuine competition on the UMTS market. They therefore announced that a second call for applications would be necessary. It was after that announcement that Orange and SFR contacted the French authorities, calling on them to comply with the principle of equal treatment of individuals vis-à-vis financial burdens imposed by the State and the principle of effective competition between operators.

134. At that time, Orange and SFR could still have withdrawn their applications. As the Commission stated, the possibility that Orange and SFR would have accepted the terms of the first call for applications if the terms of the second call for applications had been much more advantageous is somewhat hypothetical. [57]

135. In view of those circumstances, I believe that the French State's claims on Orange and SFR could correctly be categorised as uncertain, at least from the time the French authorities announced their intention of launching a second call for applications on considerably more advantageous terms.

136. It was in those circumstances that the French authorities gave assurances, at the explicit request of Orange and SFR, that both groups of applicants would be given equitable treatment. On the basis of those assurances, Orange and SFR could rightly assume that the terms of their licences would be amended to the extent necessary to ensure equitable treatment. It was therefore clear before 31 May 2001 that the terms of the licences awarded to Orange and SFR contained a reservation relating to amendment. Since the French authorities had announced that the fees would be significantly lower for the second round of applicants, that reservation already covered the commitment to the partial waiver of the claims on Orange and SFR. That is what the Commission was saying in the contested decision [58] when it pointed out that 'the retroactive alignment already flowed implicitly from the terms laid down in the licences of the first wave'. I do not consider

56 — See points 104 to 128 of this Opinion.

57 — See paragraph 27 of the contested decision.

58 — See paragraph 27 of the contested decision.

that it is possible in those circumstances to categorise the claims on Orange and SFR as actual and incontestable.

137. In conclusion, the claims on Orange and SFR had therefore to be regarded as uncertain before the assurances of equitable treatment given in the letters of 22 February 2001. Following those letters, it is clear that the terms of the licences awarded to Orange and SFR contained a reservation relating to partial waiver. In view of those circumstances, the fact that Orange and SFR were no longer able to withdraw their bids on 3 December 2002 does not undermine the conclusion reached by the Court of First Instance in paragraph 107 of the judgment under appeal that there was a partial waiver of uncertain claims.

138. I therefore propose that the second branch of the third ground of appeal be rejected as nugatory or, in the alternative, as unfounded.

4. The selective temporal advantage (second branch of the fourth ground of appeal)

139. In paragraphs 113 to 122 of the judgment under appeal, the Court of First Instance examined whether the earlier award of licences to Orange and SFR had given those undertakings a selective temporal advantage over Bouygues Télécom. After categorising the earlier award of the licences as a potential advantage, [59] the Court of First Instance found that Orange and SFR had not benefited from it [60] and concluded in paragraph 122 of the judgment under appeal that the prior award of the licences to Orange and SFR did not constitute a competitive advantage over Bouygues Télécom.

140. In paragraphs 123 to 126 of the judgment under appeal, the Court of First Instance added that in any case the advantage potentially granted to Orange and SFR was the only way of acting in accordance with the requirements of the Community framework.

141. By the second branch of the fourth ground of appeal, the appellants maintain that the Court of First Instance erred in law with regard to the notion of aid for the purposes of Article 87(1) EC. Since the Court of First Instance found in paragraph 113 of the judgment under appeal that there had been a potential advantage, that was sufficient for a finding of State aid for the purposes of Article 87(1) EC.

59 — See paragraphs 113 to 115 of the judgment under appeal.
60 — See paragraphs 115 to 121 of the judgment under appeal.

142. First of all, this branch of the ground of appeal strikes me as nugatory. [61] The Court of First Instance based its conclusion that the alleged temporal advantage did not constitute a selective advantage on (i) the assessment that the advantage had not been of benefit to Orange and SFR (paragraphs 113 to 122 of the judgment under appeal) and (ii) the finding that in any case granting the alleged temporal advantage was the only way of acting in accordance with the requirements of the Community framework (paragraphs 123 to 125 of the judgment under appeal). The appellants do not appear to have formally challenged the alternative ground stated by the Court of First Instance in paragraphs 123 to 125 of the judgment under appeal. Accordingly, I consider that this branch of the ground of appeal is nugatory, since any faults in the grounds stated in paragraphs 113 to 122 of the judgment under appeal could have no impact on the alternative grounds stated in paragraphs 123 to 125 of the judgment under appeal, or thus on the conclusion reached by the Court of First Instance.

143. As regards the merits of this branch of the ground of appeal, I shall first examine the way in which the notion of advantage for the purposes of Article 87(1) EC was applied in paragraphs 113 to 122 of the judgment under appeal (a). I shall then assess whether the contested conclusion can be based on the alternative grounds stated in paragraphs 123 to 125 of the judgment under appeal, which are based on the exception relating to on the nature and general scheme of the Community framework (b).

61 — As mentioned above (see point 131 of this Opinion), a branch of a ground of appeal is nugatory if the contested conclusion can be based on reasoning in the alternative and that branch cannot therefore undermine the contested conclusion.

(a) Notion of advantage for the purposes of Article 87(1) EC

144. In the judgment under appeal, the Court of First Instance first of all found that the award of licences to Orange and SFR approximately one and a half years before the award to Bouygues Télécom could in principle have given them a selective advantage over Bouygues Télécom. [62] The Court went on to conclude that Orange and SFR had not benefited from that potential advantage [63] and that, at the date of the contested decision, the Commission was in a position to find that Orange and SFR had not made use of the temporal advantage of receiving their licences before Bouygues Télécom and that the Commission was accordingly able to conclude that Orange and SFR did not in fact have a competitive advantage to the detriment of Bouygues Télécom. [64]

145. The appellants maintain, inter alia, that the earlier award of the licences constituted per se a genuine and immediate advantage. By rejecting the existence of an advantage on the ground that Orange and SFR were unable to make use of that advantage, the Court of First Instance had vitiated its judgment by an error of law. Whether the situation of the beneficiary has improved over time is irrelevant for the notion of aid for the purposes of Article 87(1) EC.

146. In my view, this ground of appeal is without foundation.

62 — See paragraphs 113 and 114 of the judgment under appeal.
63 — See paragraphs 115 to 121 of the judgment under appeal
64 — See paragraph 122 of the judgment under appeal.

147. The existence of aid for the purposes of Article 87(1) EC presupposes that a State measure favours one undertaking over another. [65] I note that, at the time when Orange and SFR received their licences, they were the only undertakings able to enter the UMTS market. In my view, that exclusive possibility of entering the UMTS market constituted advantageous treatment for Orange and SFR as compared with the other undertakings.

148. In paragraphs 116 to 122 of the judgment under appeal, the Court of First Instance ruled out the existence of aid, stating that the beneficiaries were unable to make use of that advantageous treatment. In my view, that approach is wrong.

149. First, the question whether the beneficiaries of a State measure have been able to take advantage of that measure would seem to me to relate more to the effects on the competitive relationship between the undertakings than to the existence of the advantage.

150. Admittedly, an advantage conferred on an undertaking present on a market is capable of distorting competition or threatening to distort it to the detriment of the other undertakings present on the same market. The link between the advantage and the distortion of competition is thus quite obvious. [66] However, the inference *a contrario* that the absence of any distortion of competition is a sign that there is no advantage is not consistent with Article 87(1) EC. That provision applies both to aid which distorts competition and to aid which threatens to distort competition. Since it is not necessary for aid actually to distort competition, the *ex post facto* finding that Orange and SFR did not benefit from the prior award of their licences does not mean that no advantage existed.

151. Secondly, the analysis of the existence of aid must be made at the time when the State measure is adopted. [67] To my mind, it does not seem possible, therefore, that the existence of an advantage to Orange and SFR can be ruled out on the basis of an *ex post facto* analysis of the competitive benefits which Orange and SFR derived from advantageous treatment. In any event, it is wrong to take account of the competitive benefits at the time when the Commission adopted its decision, as the Court of First Instance did in paragraph 122 of the judgment under appeal. Since the

65 — Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 52, and Case T-613/97 *UIFEX and Others* v *Commission* [2006] ECR II-1531, paragraph 67.

66 — Cremer, W., 'Artikel 87', in Calliess, C., and Ruffert, M., *Kommentar zu EU-Vertrag und EG-Vertrag*, edited by Beck, 3rd edition, 2007, p. 1176, paragraph 21.

67 — See, to that effect, Case C-482/99 *France* v *Commission*, cited in footnote 44 above, paragraph 71. According to that judgment,'it is necessary to place oneself in the context of the period during which the … measures were taken in order … thus to refrain from any assessment based on a later situation'. Although this paragraph relates to the criterion of prudent investor operating in a market economy, I consider that this rule can be applied in the present case. See also *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in footnote 50 above, paragraph 41, according to which it is irrelevant that the situation of the beneficiary has not altered over time. It is therefore necessary to examine the conditions for application at the time the State measure was adopted.

competitive benefits of a State measure can alter over time, the question whether an advantage exists cannot be answered exclusively by reference to the time when the Commission adopted its decision. [68]

152. Thirdly, the grounds stated by the Court of First Instance cannot be based, either, on the argument that, at the time when the licences were awarded to Orange and SFR, it was foreseeable that they would be unable to make use of that advantageous treatment. On the contrary, the French authorities decided not to relaunch the entire award procedure *ab initio* precisely so as to ensure that, as from 1 January 2002, it would be possible to have a minimum number of operators present on the UMTS market. Accordingly, at the time when the licences were granted to Orange and SFR, the possibility that the award would enable those operators to enter the UMTS market ahead of future applicants could not be ruled out.

153. Thus, by taking as a basis an *ex post* analysis of the competitive benefits which Orange and SFR could have derived from the earlier award of licences, in order to rule out the existence of a selective advantage, the Court of First Instance vitiated its reasoning in paragraphs 113 to 122 of the judgment under appeal by an error of law.

154. Since the Court of First Instance based its conclusion concerning the lack of any selective advantage not only on that erroneous reasoning but also on the exception based on the nature and general scheme of the system, it is necessary to examine whether that alternative argument is capable of substantiating the conclusion reached by the Court of First Instance.

(b) The argument based on the exception relating to the nature and general scheme of the Community framework

155. The Court of First Instance found that, in any case, 'the advantage potentially granted to Orange and SFR' was the only way to avoid adopting a measure in breach of the Community framework. [69] In that context, it referred, inter alia, to the significant difference between the two successive fee regimes devised by the national authorities, the absence of operators on the UMTS market at the time of the amendment at issue, and the identical nature of the licences awarded to the three operators. [70]

156. In finding that the earlier grant of licences to Orange and SFR was inevitable, the Court of First Instance again based its finding on the exception relating to the nature and general scheme of the Community framework. [71]

68 — Moreover, such an approach would be inconsistent with the principle of prior notification of State aid.

69 — See paragraph 123 of the judgment under appeal.

70 — See paragraph 123 of the judgment under appeal.

71 — With regard to the legal basis for this exception, I refer to points 108 to 117 of this Opinion.

157. I note that, in paragraphs 123 to 126 of the judgment under appeal, the Court of First Instance merely explained that applying the same terms in respect of the licences was inevitable. In my view, the grounds stated by the Court of First Instance in paragraphs 123 to 126 of the judgment under appeal are inadequate.

158. Since the prior award of licences to Orange and SFR was in itself likely to affect the competitive relationship between Orange and SFR, on the one hand, and future applicants, on the other, a finding — based on the exception relating to the nature and general scheme of the Community framework — that there was no selective advantage must be founded on two factors: (i) the earlier grant of the licences to Orange and SFR, which took place on 18 July 2001, had to be inevitable under the Community framework; and (ii) the application of identical licence terms to Orange, SFR and Bouygues Télécom, which took place on 3 December 2002, had to be mandatory under the Community framework, despite the fact that Orange and SFR had received their licences before Bouygues Télécom.

(i) Inevitability of the earlier grant of licences to Orange and SFR

159. As I have already mentioned above, in paragraphs 123 to 126 of the judgment under appeal, the Court of First Instance did not give any reasons why it was inevitable that licences would be awarded to Orange and SFR before Bouygues Télécom. However, that point was explained in the section of the judgment under appeal concerning compliance with the principle of non-discrimination. [72]

160. The Court of First Instance held that, under Decision No 128/1999, the Member States were to take all actions necessary to enable the coordinated and progressive introduction of UMTS services on their territory by 1 January 2002 at the latest. [73] That deadline was one of the binding elements of the Community framework.

161. The Court of First Instance found that it was not possible to organise a new procedure *ab initio* before that deadline. [74] The appellants contest that finding. They maintain that the organisation of a new procedure *ab initio* was possible. In that context, it should be borne in mind that, since there is a right of appeal to the Court of Justice solely on points of law, the appraisal of the facts by the Court of First Instance can be disputed solely within such a framework. [75] Since the appellants merely dispute the factual assessment made

72 — See paragraphs 127 to 154 of the judgment under appeal. In this context, I consider that the approach adopted by the Court of First Instance, namely examining separately the existence of a selective advantage in paragraphs 95 to 126 of the judgment under appeal and compliance with the principle of non-discrimination in paragraphs 127 to 154 of the judgment under appeal, is wrong. The existence or otherwise of aid turns on the question whether the measures by the French authorities were required by the Community framework. As the principle of non-discrimination is an element of that Community framework, the Court of First Instance should have examined the principle of non-discrimination as an element of the Community framework.

73 — See paragraphs 141 and 142 of the judgment under appeal.

74 — See paragraph 141 of the judgment under appeal.

75 — *Commission* v *Brazzelli Lualdi and Others*, cited in footnote 23 above; Lenaerts, K., Arts, D. and Maselis, I., op. cit. (see footnote 22), p. 453, paragraph 16-003.

by the Court of First Instance and do not claim that there has been an error of law in that connection, that claim by the appellants must be rejected as inadmissible.

162. Furthermore, by relaunching the entire procedure *ab initio* the French authorities would have risked jeopardising the applications of Orange and SFR, hence the possibility of the two applicants being present on the UMTS market as from 1 January 2002. [76]

163. Since the Community framework required the French authorities to make it possible for a sufficient number of operators to enter the UMTS market and, failing that, a minimum number of operators as from 1 January 2002, I consider that the Court of First Instance was right to hold that relaunching the procedure *ab initio* would not have been an option consistent with the Community framework. On the contrary, the Community framework required the French authorities to do just what they did: first to grant the licences to Orange and SFR, so as to guarantee the possibility of a minimum number of operators on the UMTS market as from 1 January 2002.

164. I therefore consider, first, that the earlier grant of licences to Orange and SFR on 18 July 2001 was an inevitable consequence of the Community framework.

(ii) Inevitability of applying identical terms to Orange, SFR and Bouygues Télécom on 3 December 2002

165. As I have already mentioned above, [77] not only the earlier grant of licences to Orange and SFR was an inevitable consequence of the nature and general scheme of the Community framework: so, too, was the decision of the French authorities of 3 December 2002 to apply the same terms to the licences of Orange, SFR and Bouygues.

166. The appellants argue that the French authorities should have applied different terms to Orange and SFR, on the one hand, and Bouygues Télécom, on the other. It is therefore necessary to examine whether the application of the same terms was an inevitable result of the Community framework or whether different treatment was required. This examination must be made by reference to the time when the measure was adopted, hence to 3 December 2002.

76 — See paragraph 146 of the judgment under appeal.

77 — See point 158 of this Opinion.

167. As the Court of First Instance found, the French authorities were under a duty to respect the principle of non-discrimination. [78] The Court of First Instance also held that the fees charged to different operators must be equivalent in economic terms. [79]

168. I would point out that the French authorities were required to ensure fair conditions of competition between the operators on the UMTS market. [80] In my view, fair conditions of competition between various operators is a basic condition for the development of effective competition on a market. The starting point for ensuring fair conditions of competition between operators on an emerging market is first to guarantee equal conditions for all operators. It is therefore necessary, in principle, to treat all operators on the market in the same way, provided that there are no circumstances justifying different treatment.

169. The fact that Orange and SFR received their licences before Bouygues Télécom is a circumstance which could have affected the competitive relationship between the operators. The effect of that circumstance on the competitive relationship between Orange, SFR and Bouygues Télécom had therefore to be taken into account.

78 — See paragraph 123 of the judgment under appeal.

79 — See paragraph 109 of the judgment under appeal with reference to Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 90.

80 — See Articles 10(3) and 11(2) of Directive 97/13.

170. It is therefore necessary, first, to examine the effects of that circumstance and the account taken thereof in the fee model applied by the French authorities.

171. In that context, I would note first of all that the second component of the fee model is based on the turnover generated through the licence. The earlier entry of Orange and SFR to the UMTS market would therefore have had an impact on the amount of their fees. The fee model applied to all the operators by the French authorities consequently took account of the possibility that Orange and SFR would enter the market before future applicants.

172. It is true that on 3 December 2002 — in other words, at the time when the French authorities decided to apply the new fee model to all operators — none of them was present on the market. However, the application of the new fee model did not necessarily lead to identical and undifferentiated treatment between the operators since it was able to take account of developments after 3 December 2002. If the prior award of the licences had had an impact on prior entry to the market, the new fee model would have taken that impact into account.

173. As regards the possibility open to Orange and SFR of entering the market before 3 December 2002, the Court of First Instance noted the existence of difficulties with UMTS technology and the economic

context unfavourable to its development. [81] Accordingly, the fact that Orange and SFR were unable to make use of their licences was not due to a lack of initiative or merit on the part of those operators.

174. Secondly, as regards the advantages alleged by the appellants, the Court of First Instance found that there were no such advantages or that, in any event, they did not affect the competitive relationship between the operators on the UMTS market. [82]

175. The appellants maintain that the Court of First Instance reversed the burden of proof first by accepting the existence of a potential temporal advantage and then by asking the appellants to furnish proof of the actual consequences of that advantage.

176. In my view, that criticism is unfounded. Firstly, in the context of the alternative grounds stated in paragraphs 123 to 126 of the judgment under appeal, which are based on the exception relating to the nature and general scheme of the system, the existence of an advantage for the purposes of Article 87(1) EC is not established. [83] Furthermore, although there is an evident link between the prior award of the licences and potential prior entry to the market, no such link is evident between the prior award of the licences and the advantages alleged by Bouygues and Bouygues Télécom at first instance, as described in paragraphs 117 to 121 of the judgment under appeal. In my view, the appellants should therefore have substantiated the reasons why the prior award of the licences had led to the advantages alleged, as well as their claims regarding the impact of those alleged advantages on the competitive relationship between Orange and SFR, on the one hand, and Bouygues Télécom, on the other. Finally, it is for the appellants, as the parties which contested a decision of the Commission, to demonstrate that the Commission's findings were not valid. [84]

177. In conclusion, I consider that the new fee model took account of the potential effect that the prior award of the licences could have had at the time when the operators entered the market, and that no other effects on the competitive relationship between the operators had been established. In my view, the Court of First Instance was right to hold that the new fee model was not discriminatory. [85]

81 — See paragraph 116 of the judgment under appeal.

82 — See paragraphs 117 to 126 of the judgment under appeal.

83 — The appellants' argument is directed against the erroneous reasoning of the Court of First Instance in paragraphs 113 to 122 of the judgment under appeal.

84 — Case T-117/89 *Sens* v *Commission* [1990] ECR II-185, paragraph 20.

85 — See paragraph 109 of the judgment under appeal with reference to *Connect Austria*, cited in footnote 79 above, paragraph 90.

(c) Interim conclusion

178. The earlier grant of licences to Orange and SFR and the application of the new fee model to Orange, SFR and Bouygues Télécom were therefore inevitable. As the Court of First Instance found, [86] the French authorities' method of proceeding was the only way of ensuring fulfilment of their obligations under the Community framework. Consequently, I consider that the conclusion reached by the Court of First Instance regarding the absence of a selective advantage stemming from the earlier grant of the licences is correct.

179. I therefore propose that the second branch of the fourth ground of appeal be rejected, and the reasoning of the Court of First Instance substituted in part. [87]

5. Principle of non-discrimination (third branch of the fourth ground of appeal)

180. By the third branch of the fourth ground of appeal, the appellants allege an error of law concerning the application of Article 87(1) EC in the implementation of the principle of non-discrimination.

181. According to Orange, this ground of appeal is inadmissible since the appellants are merely reiterating the arguments put forward at first instance.

182. It is true that a branch of a ground of appeal which reiterates arguments already stated at first instance may be inadmissible. [88] However, that is the case only if the branch of the ground of appeal concerned does not seek a review of the judgment of the Court of First Instance but rather a reassessment of the substance of the dispute. [89] In the present case, this branch of the ground of appeal is in fact directed against the legal act contested at first instance and not against the judgment of the Court of First Instance. On the other hand, where — as in the present case — the appellant maintains that the Court of First Instance has erred in law by confirming the reasons stated by the Commission, which are vitiated by the same error, that branch of the ground of appeal is directed against the judgment of the Court of First Instance and is therefore admissible. [90]

183. The appellants base this branch of their ground of appeal, inter alia, on the principle of non-discrimination, the inviolability of the terms of the first call for applications, and Article 87(2) EC.

86 — See paragraph 148 of the judgment under appeal.

87 — Replacing the Court of First Instance's reasoning would also make it possible to remedy the Court of First Instance's erroneous approach, namely examining separately the existence of a selective advantage in paragraphs 95 to 126 of the judgment under appeal and compliance with the principle of non-discrimination in paragraphs 127 to 154 thereof (see footnote 72 to this Opinion).

88 — Lenaerts, K., Arts, D. and Maselis, I., op. cit. (see footnote 22), p. 463, paragraph 16-017.

89 — Order of 23 May 2007 in Case C-99/07 P *Smanor and Others* v *Commission*, paragraphs 34 to 36.

90 — Order in Case C-488/01 P *Martinez* v *Parliament* [2003] ECR I-13355, paragraphs 39 to 41.

184. With regard to the merits of the argument based on the principle of non-discrimination, I would point out that discrimination consists in the application of different rules to comparable situations or the application of the same rule to different situations. [91]

185. The appellants maintain that the method applied by the French authorities was discriminatory. They claim that Orange and SFR, as first-call applicants, and Bouygues Télécom, as the second-call applicant, were not in the same situation.

186. It is therefore necessary to examine whether Orange and SFR, on the one hand, and Bouygues Télécom, on the other, were in the same legal and factual situation. As already mentioned above, [92] it is not sufficient to demonstrate discrimination to refer to the differences between two groups. Since the legal source of the principle of non-discrimination in question is Article 11(2) of Directive 97/13, the relevant question is whether the circumstances alleged by the appellants were relevant in relation to the objectives of that directive and the Community framework. [93]

187. I would point out that the partial waiver of the French State's claims on Orange and SFR was required by the Community framework. [94] In the context of this branch of the ground of appeal, it is therefore necessary only to examine whether the French authorities' method of proceeding — that is to say, the fact that they refrained from relaunching the entire procedure *ab initio* — was discriminatory. [95]

188. The appellants claim that such a method of proceeding was contrary to the principle of inviolability and that this principle required the French authorities to apply a different regime to first-call applicants and second-call applicants. The principle of the inviolability of the terms of the first call for applications placed Orange and SFR in a different legal position from that of Bouygues Télécom.

189. In this context, I note first that — as the Court of First Instance held in the judgment under appeal — neither Directive 97/13 nor Decision No 128/1999 contains the principle of inviolability. [96] On the contrary, the Community framework contains, in my view, elements which run counter to that principle.

91 — See the case-law cited in paragraph 129 of the judgment under appeal, namely Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30, and Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 16.

92 — See point 123 of this Opinion.

93 — See point 123 of this Opinion.

94 — See points 104 to 128 of this Opinion.

95 — As I have already mentioned above (see footnote 72 to this Opinion), the Court of First Instance should have examined compliance with the principle of non-discrimination as part of its examination of the existence of a selective advantage. However, the appellants have not contested this part of the judgment.

96 — See paragraph 135 of the judgment under appeal.

190. In the judgment under appeal, the Court of First Instance based its reasoning on the argument that Article 8(4) of Directive 97/13 envisages the possibility that the terms may be amended. As Article 8(1) of Directive 97/13 states, the conditions referred to in that provision are those listed in points 2 and 4 of the Annex to Directive 97/13. Although the amount of the fees is not specified under those points, I note that point 4.9 of the annex states that the list of conditions is to be without prejudice to any other legal conditions which are not specific to the telecommunications sector. Article 8(1) of Directive 97/13, on the other hand, provides that the conditions are to relate only to the situations justifying the grant of such a licence, as defined in Article 7 of Directive 97/13. I note that the conditions listed in that provision do not refer explicitly to the amount of the fees. In view of those provisions, I consider that there is room for doubt as to the merits of the Court of First Instance's argument based on Article 8(4) of Directive 97/13.

191. None the less, that does not affect the conclusion reached by the Court of First Instance regarding the inapplicability of the principle of inviolability. Even if Article 8(4) of Directive 97/13 does not refer to the amount of the fee, I think that it is possible to infer from the provisions of Directive 97/13 that subsequent amendment of the fees must be possible.

192. As I have already mentioned above, [97] the Member States are required to award a maximum number of licences and to invite applications for additional licences where they find that the award of an additional licence is possible. [98] Article 11(2) of Directive 97/13 provides that the amount of the charges must take account of the need to foster the development of innovative services and competition. I therefore conclude that a Member State can be required — as was the position in the present case — to revise the fees downwards where it is necessary to do so to attract additional applicants. In such cases, it will have to determine whether the principle of non-discrimination [99] and the obligation to guarantee conditions of fair competition [100] require the fees for existing licences to be amended. No provision of Directive 97/13 requires the relaunch *ab initio* of the award procedure where an additional licence is granted. Thus, the general scheme of Directive 97/13 provides, at least implicitly, for amendment of the fees for existing licences.

193. The appellants' argument based on the inviolability of the award terms must therefore be rejected. Since the Community framework does not contain the principle of inviolability, I consider that the fact that Orange and SFR, on the one hand, and Bouygues Télécom, on the other, were applicants in two successive calls for applications

97 — See paragraph 121 of this Opinion.

98 — See Article 10(4) of Directive 97/13.
99 — See Article 10(3) of Directive 97/13.
100 — See Article 10(3) EC.

did not place them in a different legal situation for the purposes of the principle of non-discrimination referred to in Article 11(2) of Directive 97/13.

194. In any event, I believe that the application of the principle of inviolability presupposes licence terms which are by nature sufficiently inalterable. As it is, in the present case, the French authorities had promised to amend the terms of the licences awarded to Orange and SFR before the award was made and even before the deadline for their right to withdraw their bid. [101] Even if a 'principle of inviolability' were applicable, I do not believe that the terms of the licences awarded to Orange and SFR, which contained a reservation relating to amendment, [102] are sufficiently inalterable.

195. In conclusion, I consider that, in view of the objectives of the Community framework, Orange and SFR, on the one hand, and Bouygues Télécom, on the other, were not in a different legal situation. In consequence, the method applied by the French authorities was not contrary to the principle of non-discrimination under Article 11(2) of Directive 97/13.

196. Finally, the appellants' argument that compliance with the objectives of the Community framework for the award of UMTS licences is not referred to in Article 87(2) EC must be rejected. What is involved here is an examination of the question whether there is a selective advantage for the purposes of Article 87(1) EC and not whether the aid is compatible with the common market under Article 87(2) EC.

197. I therefore propose that the third branch of the fourth ground of appeal be rejected.

6. The single nature of the procedure (first branch of the third ground of appeal)

198. By the first branch of the third ground of appeal, the appellants allege an error in the legal assessment of the facts as regards the finding that there was only one procedure.

199. The Commission and Orange contend that this branch of the ground of appeal is inadmissible. Admittedly, the question whether the two calls for applications must be regarded as a single procedure or as two separate procedures may appear, prima facie, to be a question going to the facts. None the less, I believe that behind that factual aspect there is a question of law. As I have already

101 — See points 132 to 137 of this Opinion.
102 — See point 137 of this Opinion.

mentioned above, [103] an error in the legal characterisation of the facts is an error in the application of a legal rule to the facts. There can be a breach of law not only where a legal rule is misinterpreted but also where a given set of facts is wrongly categorised in law.

200. Since the legal rule in question is the principle of non-discrimination referred to in Article 11(3) of Directive 97/13, which prohibits the application of different rules to comparable situations or the application of the same rule to different situations, I believe that the question whether there is a single procedure or two separate procedures must in fact be interpreted as seeking to ascertain whether Orange and SFR, as applicants in response to the first call for applications, and Bouygues Télécom, as the applicant in response to the second call for applications, could be regarded as being in the same situation for the purposes of the principle of non-discrimination under Article 11(3) of Directive 97/13. That question is a question of law and is therefore admissible.

201. With regard to the substance of this question, I would recall that it is not sufficient, in order to demonstrate discrimination, to refer to the differences between two groups. The circumstances must be relevant in the light of the objectives of the Community framework. [104] In the light of the arguments mentioned in the examination of the third branch of the fourth ground of appeal — to which I refer [105] — the fact that Orange and SFR were applicants in response to the first call for applications and Bouygues Télécom was an applicant in response to the second call for applications did not place them in a different situation for the purposes of Article 11(3) of Directive 97/13.

202. I therefore propose that the first branch of the third ground of appeal be rejected.

7. Interim conclusion

203. In conclusion, I propose that the third and fourth grounds of appeal be rejected in their entirety, with the grounds stated by the Court of First Instance partly replaced.

B — *Second ground of appeal*

204. In the proceedings at first instance, Bouygues and Bouygues Télécom claimed that the complaint that they had submitted to the Commission raised serious difficulties and that the Commission should therefore have

103 — See point 97 of this Opinion.
104 — See points 123 and 184 of this Opinion.
105 — See points 180 to 197 of this Opinion.

initiated the formal investigation procedure under Article 88(3) EC. [106]

205. In paragraphs 86 to 93 of the judgment under appeal, the Court of First Instance addressed that plea. It held that the formal investigation stage under Article 88(3) EC becomes essential whenever the Commission has serious difficulties in determining whether aid exists. [107] It then examined whether the applicants' arguments against the contested decision had raised a serious difficulty. [108] As part of that examination, the Court of First Instance first of all assessed the merits of the applicants' complaints concerning the finding that there was no selective advantage, going on to hold that the Commission's assessment in that respect did not constitute a serious difficulty. [109] The Court of First Instance then analysed whether the French authorities had complied with the principle of non-discrimination. It held that this examination had not raised any serious difficulty. [110]

206. The appellants maintain that by acting thus the Commission had confused the assessment of a serious difficulty with that of the merits of the decision.

207. First of all, it should be borne in mind that according to case-law the Commission can limit the analysis of the State measure to the preliminary procedure unless it is in a position to reach the firm view, following an initial examination, that the measure cannot be categorised as aid within the meaning of Article 87(1) EC or is, in any event, compatible with the common market. [111] If, on the other hand, the initial examination does not enable it to overcome all the difficulties raised, it is required to initiate the formal investigation procedure. [112]

208. The notion of serious difficulties is an objective one. Whether or not such difficulties exist requires investigation of both the circumstances under which the State measure was adopted and the content of that measure. [113] It is therefore for the Commission to decide, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the State measure require the initiation of the formal investigation procedure. [114] Whilst its powers are circumscribed as far as initiating the formal investigation procedure is concerned, the Commis-

106 — See paragraph 87 of the judgment under appeal.
107 — See paragraphs 89 to 91 of the judgment under appeal.
108 — See paragraph 93 of the judgment under appeal.
109 — See paragraph 126 of the judgment under appeal.
110 — See paragraph 155 of the judgment under appeal.

111 — Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 38 and 39; Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 329; Case T-27/02 *Kronofrance* v *Commission* [2004] ECR II-4177, paragraph 52; Case T-73/89 *Barbi* v *Commission* [1990] ECR II-619, paragraph 42. For an in-depth analysis of the relationship between the preliminary stage and the formal investigation procedure, see points 17 to 19 of the Opinion of Advocate General Tesauro in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, and points 37 and 38 of the Opinion of Advocate General Van Gerven in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203.
112 — Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 166; Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 58; and Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 42.
113 — *Prayon-Rupel* v *Commission*, cited in footnote 112 above, paragraph 47.
114 — *Prayon-Rupel* v *Commission*, cited in footnote 112 above, paragraph 43.

sion nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties. [115]

209. Although the Court of Justice has not yet conclusively defined which circumstances may indicate the existence of a serious difficulty, [116] I note that the following three types of sign have been identified by the case-law.

210. A first type of sign may emerge from the discussions between the Commission and the Member State concerned during the preliminary stage. [117]

211. In that context, I note that the Court of First Instance referred to written submissions before it in which the Commission mentioned exceptional complexity. [118] However, the Court of First Instance explained that those submissions did not concern the contested measure, but other measures which gave rise to the initiation of the formal investigation procedure. Accordingly, that sign did not indicate the existence of serious difficulties. I note that the appellants have not challenged that finding on the part of the Court of First Instance. [119]

212. A second type of sign may be given by the length of time which has elapsed during the preliminary investigation stage in the particular case.

213. If the time taken is much longer than the period normally required for a preliminary examination, it may be a sign of a serious difficulty. [120] In paragraphs 158 to 160 of the judgment under appeal, the Court of First Instance held that, in the light of its workload arising inter alia from the applicants' other complaints, the Commission had not taken an unreasonable amount of time. The Court of First Instance therefore found, at least implicitly, that the length of time which had elapsed did not suggest a serious difficulty. That analysis on the part of the Court of First Instance has likewise not been challenged by the appellants.

214. A third type of sign of serious difficulties is the assessments upon which the Commis-

115 — *Prayon-Rupel* v *Commission*, cited in footnote 112 above, paragraph 43.

116 — See point 43 of the Opinion of Advocate General Alber in Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175.

117 — See point 45 of the Opinion of Advocate General Van Gerven in *Matra* v *Commission*, cited in footnote 111 above, and Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraph 4.

118 — See paragraph 157 of the judgment under appeal.

119 — In their appeal, the appellants refer only to paragraphs 93, 94, 126 and 155 of the judgment under appeal.

120 — Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraphs 15 to 17; *SIC* v *Commission*, cited in footnote 117 above, paragraphs 102 to 107; *Prayon-Rupel* v *Commission*, cited in footnote 112 above, paragraphs 53 to 85; and Opinion of Advocate General Alber in *Portugal* v *Commission*, cited in footnote 116 above, point 43.

sion has relied in order to adopt a decision at the end of the preliminary stage. Those assessments may present difficulties such as to justify the initiation of the formal investigation procedure. [121]

215. Accordingly, in order to ascertain whether that is the position, it is necessary, in my view, first to identify the substantive assessments on which the Commission has relied in order then to verify whether the Commission had at its disposal the information necessary for the assessments on which it relied. [122]

216. In the light of the foregoing considerations, my view is rather that the Court of First Instance did not err in law by proceeding as it did in the present case. I consider instead that the method applied by the Court of First Instance was quite proper. Since it is for the Commission to select the reasons on which it bases a decision, it is first of all necessary to identify the assessments on which the Commission based its decision before assessing whether it had sufficient information available to it to make the relevant assessments.

217. With regard to the criticism that this finding was merely a formality, I do not consider that an extensive statement of grounds is necessary if the substantive analysis of the Commission's assessments discloses that the Commission had at its disposal all the necessary information.

218. In conclusion, I consider that the Court of First Instance took account of the three typical signs of serious difficulty and that these gave no indication of the existence of a serious difficulty. As regards the third sign raised by Bouygues and Bouygues Télécom, I consider that the method applied by the Court of First Instance did not lead its judgment to be vitiated by an error of law.

219. Furthermore, the appellants claim that the Court of First Instance partially repudiated the contested decision by seeking to substitute its own findings for complex assessments. In their view, that shows that a formal investigation procedure was necessary.

220. In this context, I note first that it is not the fact that the necessary assessments are complex which requires the initiation of a formal investigation procedure. [123] The initiation of a formal investigation procedure is necessary only if the Commission encounters serious difficulties with regard to the assessments on which it is basing its decision. It is therefore only where the Commission has been unable to overcome those difficulties

121 — *Cook* v *Commission*, cited in footnote 111 above, paragraph 31; *SIC* v *Commission*, cited in footnote 117 above, paragraphs 74 to 85; *Prayon-Rupel* v *Commission*, cited in footnote 112 above, paragraphs 86 to 107; Opinion of Advocate General Alber in *Portugal* v *Commission*, cited in footnote 116 above, points 45 to 51.

122 — See the Court of First Instance's method of proceeding in Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission* [2004] ECR II-1.

123 — *BUPA and Others*, cited in footnote 111 above, paragraph 333.

during the preliminary investigation stage that a formal investigation is necessary.

221. Secondly, the appellants claim that the Court of First Instance repudiated the Commission's statement of reasons and substituted its own. If that claim were well founded, it would constitute in itself an error of law which could lead the judgment under appeal to be set aside. The Court of First Instance does not have jurisdiction to substitute its own grounds for the Commission's statement of reasons. [124] It is therefore necessary to examine the merits of this claim.

222. First, with regard to the appellants' criticism that the Court of First Instance called in question the Commission's statement of reasons concerning the economic value of the licences, I note that this criticism concerns the arguments put forward by the Commission at the hearing. [125] The Commission's decision, however, was based on the uncertain nature of the licences, [126] on the inevitability of the measures taken by the French authorities as a result of the nature and general scheme of the system of the Community framework, [127] and on the argument that the licences should not have been granted at market prices. [128] The doubts raised with regard to the arguments concerning the economic value of the licences do not therefore affect the statement of reasons for the contested decision.

223. Secondly, the appellants argue that, in paragraphs 113 to 121 of the judgment under appeal, the Court of First Instance substituted its own assessment of the absence of a selective advantage owing to the earlier nature of the claims for the Commission's assessment. In that context, I consider the reasoning of the Court of First Instance in paragraphs 113 to 121 to be erroneous. However, according to the alternative grounds stated by the Court of First Instance in paragraphs 123 to 125 of the judgment under appeal and the Commission's statement of reasons in the contested decision, [129] the absence of a selective advantage is based on the argument that the application of the same terms to all operators was inevitable under the rules of the Community framework.

224. Thirdly, with regard to the difference in the risks assumed by Orange and SFR as applicants in response to the first call for applications as compared with Bouygues Télécom — described in paragraphs 131 and 132 of the judgment under appeal — this is a line of argument adopted by the Court of First Instance in the alternative, the decisive argument being the inevitability of the partial waiver and the application of identical terms in accordance with the general scheme of the Community framework.

124 — Lenaerts, K., Arts, D. and Maselis, I., op. cit. (see footnote 22), p. 456, paragraph 16-005.

125 — As the Court of First Instance ruled explicitly in paragraph 105 of the judgment under appeal, it contested the arguments put forward by the Commission at the hearing. It did not refer to the statement of reasons for the contested decision.

126 — See paragraph 27 of the contested decision.

127 — See paragraph 28 of the contested decision.

128 — See paragraph 29 of the contested decision.

129 — See paragraph 28 of the contested decision.

225. Lastly, with regard to the analysis of the various options open to the French authorities, I note that the Commission had taken account of those options, inter alia, in paragraphs 11, 12, 22, 23 and 26 to 28 of the contested decision and that, accordingly, the Court of First Instance did not substitute its own grounds for the Commission's statement of reasons.

226. It follows from the foregoing considerations that the criticism concerning the substitution of grounds is unfounded. The appellants cannot therefore rely on that argument in support of their claim that the Commission had encountered serious difficulties.

227. I therefore propose that the second ground of appeal be rejected as unfounded.

C — *First ground of appeal*

228. The appellants maintain that the Court of First Instance failed to comply with its obligation to state reasons.

229. It should be noted that the grounds for a judgment of the Court of First Instance must show clearly and unequivocally the reasoning so as to inform the persons concerned of the justification for the judgment and to enable the competent court to exercise its powers of review. [130]

230. The appellants criticise, first, the fact that the Court of First Instance relied on the exception based on the nature and general scheme of the system without adequately describing the general scheme of the system. Its description of the system was not sufficiently detailed and was contradictory.

231. Although I consider that explicit reasons must be stated for any exception based on the nature and general scheme of the system, I do not believe that the appellants' criticism is well founded in the present case.

232. The Court of First Instance described the relevant elements of the Community framework and the resultant obligations on the French authorities. [131] Since the Community framework pursues several objectives (such as the search for four operators to ensure sufficient competition, [132] compliance

130 — Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 24; Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 53; Case C-446/00 P *Cubero Vermurie* v *Commission* [2001] ECR I-10315, paragraph 20; Lenaerts, K., Arts, D. and Maselis, I., op. cit. (see footnote 22), p. 457, paragraph 16-008.

131 — See inter alia the description of the Community framework in paragraphs 2 to 8 of the judgment under appeal and in paragraphs 108 to 112, 123 to 125 and 134 to 148 thereof.

132 — See inter alia paragraph 134 of the judgment under appeal.

with the principle of non-discrimination [133] and the principle of free competition, [134] and compliance with the deadline of 1 January 2002), [135] the fact that the Court of First Instance referred to various objectives of this system does not make its reasoning contradictory.

233. Secondly, the appellants maintain that the Court of First Instance failed to provide adequate details of the causal link between the nature and general scheme of the system and the partial waiver of the claims on Orange and SFR.

234. In that context, I consider that in order to explain the inevitability of the partial waiver of the claims on Orange and SFR as a result of the nature and general scheme of the Community framework, it was not necessary to refer to all the elements of the Community framework. In that context, it was sufficient to refer to the principles of equal treatment as between operators for the calculation of fees and to the need to develop effective competition. [136]

235. Thirdly, although the appellants do not explicitly criticise the fact that the Court of First Instance did not provide sufficient details of the causal link between the nature and general scheme of the system and the earlier award of the licences to Orange and SFR, I shall also address that complaint for the sake of completeness.

236. It is true that the Court of First Instance did not explain in paragraphs 123 to 125 of the judgment under appeal why the earlier award was inevitable. [137] None the less, the Court of First Instance did provide that explanation in paragraphs 139 to 142 of the judgment under appeal, where it referred to the French authorities' obligation to comply with the deadline of 1 January 2002. It was therefore possible for the appellants to know the reason why the earlier award of the licences was inevitable and it is possible for the Court of Justice to exercise its powers of review. Consequently, the fact that the Court of First Instance did not mention the reason for the inevitability in paragraphs 123 to 125 of the judgment under appeal does not constitute a substantive breach of its obligation to state reasons.

237. In my opinion, the first ground of appeal is therefore unfounded. In consequence, I propose that it be rejected.

133 — See inter alia paragraph 108 of the judgment under appeal

134 — See inter alia paragraphs 108 and 134 of the judgment under appeal.

135 — See inter alia paragraphs 141 and 142 of the judgment under appeal.

136 — See points 106, 107 and 118 to 124 of this Opinion.

137 — As mentioned above (see point 157 of this Opinion), the Court of First Instance limited itself, on these points, to explaining why the application of identical terms in respect of the licences of Orange, SFR and Bouygues Télécom was inevitable.

D — *Conclusion*

238. In my view, all the grounds of appeal fall to be rejected. The appeal should therefore be dismissed in its entirety.

VII — Costs

239. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first subparagraph of Article 69(4) of the Rules of Procedure provides that Member States which intervene in the proceedings are to bear their own costs.

240. Since the Commission, the French Government, Orange and SFR have applied for costs and Bouygues and Bouygues Télécom have been unsuccessful, Bouygues and Bouygues Télécom must be ordered to pay the costs.

241. The French Republic must be ordered to bear its own costs.

VIII — Conclusion

242. On those grounds, I propose that the Court should:

(1) dismiss the appeal;

(2) order the appellants to pay the costs;

(3) order the French Republic to bear its own costs.