



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 4 February 2016¹

Case C-211/15 P

**Orange SA, formerly France Télécom,
v**

European Commission

(Appeal — Aid implemented by the French Republic in favour of France Télécom relating to the reform of the arrangements for financing the pensions of civil servants working for France Télécom — Reduction in the compensation payable to the State by France Télécom — Decision declaring the aid compatible with the internal market on certain conditions — Existence of an advantage — Relevant reference framework — Whether ‘structural disadvantage’ to be taken into account)

1. By the present appeal, Orange SA (‘Orange’), formerly France Télécom, seeks to have the judgment of the General Court of 26 February 2015 in *Orange v Commission*² set aside, the court having, in that judgment, dismissed Orange’s claim for the annulment of Commission Decision 2012/540/EU of 20 December 2011 on State aid C 25/08 (ex NN 23/08) — reform of the arrangements for financing the retirement pensions of civil servants working for France Télécom implemented by the French Republic in favour of France Télécom.³

2. Among the questions raised by the appeal, the Court is particularly called on to determine whether the General Court was right to affirm the decision at issue with regard to the existence of an economic advantage in favour of France Télécom. It will, in particular, be necessary to consider whether the ‘reference framework’ selected by the European Commission, for the purposes of identifying such an advantage, was, in relation to the so-called ‘compensation’ measures at issue, which were adopted in the specific context of the reform of the arrangements for financing the pensions of civil servants formerly working for France Télécom, correctly defined.

3. To my mind, the matter offers a particular opportunity to make clear that, except in situations meeting the criteria identified in *Altmark Trans and Regierungspräsidium Magdeburg*,⁴ the fact that a State measure has the objective of releasing an undertaking from a supposed structural or competitive disadvantage does not enable it to escape classification as State aid within the meaning of Article 107(1) TFEU.

1 — Original language: French.

2 — T-385/12, EU:T:2015:117, ‘the judgment under appeal’.

3 — OJ 2012 L 279, p. 1, ‘the decision under appeal’.

4 — C-280/00, EU:C:2003:415.

I – Background to the dispute

4. The facts at the origin of the proceedings, as they appear from the judgment under appeal, may be described as follows:

- ¹ The measures to which this matter relates consist in changes introduced in 1996 to the scheme of [contributions] borne by the applicant, Orange, then called France Télécom, with regard to the payment of the retirement pensions of its staff members with civil servant status.
- 2 That scheme, which had been established at the time of the foundation, in 1990, of France Télécom as an undertaking distinct from the State administration, by Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service (JORF of 8 July 1990, p. 8069, “the 1990 Law”), was modified by Law No 96-660 of 26 July 1996 on the national company France Télécom (JORF of 26 July 1996, p. 11398, “the 1996 Law”). The new scheme was introduced at a time when France Télécom was set up as a public limited company, listed on the stock exchange and had an increasing share of its capital opened up to private investment, and also when the markets in which it operated, in France and in other Member States of the European Union, were fully opened up to competition.
- 3 As to responsibilities concerning the financing of social security benefits for staff members with civil servant status, the 1996 Law changed the amount which Article 30 of the 1990 Law required France Télécom to pay to the Public Treasury in return for the payment and servicing of the pensions of its civil servants effected by the State (“the contested measure”).
- 4 The 1990 Law provided that France Télécom was required to pay to the Public Treasury, in return for the payment and servicing of the pensions granted to its civil servants, the amount of the deduction made from the salary of the civil servant, the level of which was fixed by Article L. 61 of the Civilian and Military Retirement Pensions Code, and an additional contribution sufficient to fund, in full, the pensions that had been and were to be granted to their retired civil servants.
- 5 France Télécom also participated in the so-called “compensation” and “over-compensation” schemes, which provided for transfers in order to ensure equilibrium with the pension schemes for civil servants of other public entities.
- 6 The 1996 Law changed the compensation payable under Article 30 of the 1990 Law as follows. First, France Télécom was required to pay the amount deducted from the salary of the civil servants, this amount remaining the same as under the 1990 Law. Secondly, it was subjected to an “employer’s contribution in full discharge of liabilities”, which replaced the previous employer’s contribution. This new contribution was based on a “competitively fair rate” which, in turn, was based on equalisation of the levels of wage-related mandatory social security contributions and tax payments between France Télécom and the other undertakings in the telecommunications sector subject to the ordinary social security arrangements, in respect of risks which are common to ordinary employees and civil servants, and excluding risks which are not common to ordinary employees and civil servants (in particular, unemployment and the claims of employees in the event of the undertaking going into administration or liquidation). Thirdly, France Télécom was subjected to an “exceptional flat-rate contribution”, the amount of which was fixed by the Finance Law for 1997 (Law No 96-1181 of 31 December 1996, JORF of 31 December 1996, p. 19490) at FRF 37.5 billion (equivalent to EUR 5.7 billion). This contribution included the amount of the annual provisions (EUR 3.6 billion) that France Télécom had set aside, up to 1996, against the cost of the future civil servant pensions which were anticipated at that time, as well as an additional amount (EUR 2.1 billion).
- 7 The 1996 Law also excluded France Télécom from the scope of the compensation and over-compensation schemes.

...

- 9 By letter of 20 May 2008, the Commission informed the French Republic of its decision to initiate the procedure laid down in Article 108(2) TFEU (“the decision to initiate the investigation procedure”) in respect of the aid at issue. The French Republic submitted its observations on 18 July 2008.

...

- 12 On 20 December 2011, the Commission adopted the [decision at issue], which declares the aid at issue to be compatible with the internal market on certain conditions.
- 13 In the [decision at issue], the Commission concluded that the contested measure constituted State aid within the meaning of Article 107(1) TFEU.
- 14 In relation particularly to the assessment of economic advantage, the Commission established that the contested measure conferred an economic advantage on France Télécom, in that it imposed a new and substantial burden on the State in relation to the payment and servicing of the pensions granted to the civil servants of France Télécom, while reducing the compensation payable by France Télécom.
- 15 In this regard, the Commission, first, in recital 105 of the [decision at issue], calculated the amount of the aid in question as the annual difference between the contribution in full discharge of liabilities paid by France Télécom pursuant to the 1996 Law and the costs that it would have paid pursuant to the 1990 Law, and, secondly, in recital 113 of the [decision at issue], indicated its view that the payment of the exceptional flat-rate contribution had reduced the amount of aid from which France Télécom benefited.
- 16 The Commission also established that the contested measure was selective in that it concerned only France Télécom, and that it distorted or threatened to distort competition, as the balance sheet of France Télécom was relieved of liabilities and costs, which enabled it to develop on the markets for telecommunications which were gradually opened to competition, in France and in other Member States.
- 17 The Commission proceeded to assess the compatibility of the contested measure with the internal market, within the meaning of Article 107(3)(c) TFEU, concluding that it did not comply with the principle of proportionality, in that it did not allow a level playing field. According to the Commission, the compensation paid by France Télécom to the State was not equal to all the social security costs to which the budgets of its competitors were subject.
- 18 Accordingly, the Commission established that, in order to fulfil the criterion of common interest under Article 107(3) TFEU, for the aid at issue to be compatible with the internal market it was necessary for the employer’s contribution in full discharge of liabilities payable by France Télécom to be calculated and levied so as to equalise the levels of all the wage-based mandatory social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector covered by the ordinary social security arrangements, taking into account not only the risks common to ordinary employees and civil servants, but also the non-common risks. This contribution was to be levied on France Télécom from the day on which the amount of the exceptional contribution, capitalised at the discount rate resulting from the application of the Commission notice on the method for setting the reference and discount rates (OJ 1996 C 232, p. 10, “the notice on reference rates”), equalled the amount of the contributions and costs that France Télécom would have been required to pay under Article 30 of the 1990 Law.

19 The operative part of the [decision at issue] is worded as follows:

“Article 1

The State aid resulting from the reduction of the compensation to be paid to the State for the payment and servicing of the pensions granted, pursuant to the Civilian and Military Retirement Pensions Code, to the civil servants of France Télécom pursuant to [the 1996 Law] amending the [1990 Law] shall be compatible with the internal market on the conditions provided for in Article 2.

Article 2

The employer’s contribution in full discharge of liabilities, payable by France Télécom under Article 30, point (c) of [the 1990 Law], shall be calculated and levied so as to equalise the levels of all the wage-based social security contributions and tax payments between France Télécom and the other undertakings of the telecommunications sector covered by the ordinary social security arrangements.

To fulfil this condition, no later than within seven months of the notification of the present decision, the French Republic:

- (a) shall amend Article 30 of [the 1990 Law] and the regulatory or other texts adopted to implement it so that the bases for calculating and levying the employer’s contribution in full discharge of liabilities, payable by France Télécom, are not confined solely to the risks common to ordinary employees and civil servants, but also include the non-common risks;
- (b) shall levy on France Télécom, from the day on which the amounts of the exceptional contribution introduced by [the 1996 Law] capitalised at the discount rate resulting from the application of the [notice on reference rates] applicable in this case equal the amount of the contributions and costs that France Télécom would have continued to pay under Article 30 of [the 1990 Law] in its initial wording, an employer’s contribution with full discharge of liabilities calculated according to the terms specified in point (a), taking into account the risks that are common and not common to ordinary employees and civil servants.’

II – Procedure before the General Court and the judgment under appeal

5. By application lodged at the Registry of the General Court on 22 August 2012, Orange brought an action for the annulment of the decision at issue.

6. In support of its action, Orange raised four pleas in law. The first was based on errors of law and assessment, as well as failure to comply with the duty to state reasons, in connection with the Commission’s finding that the contested measure constituted State aid within the meaning of Article 107(1) TFEU. The second plea in law, raised in the alternative, was based on errors of law and assessment in the examination of the compatibility of the contested measure with the internal market. The third plea in law, also raised in the alternative, was based on an error of assessment and a failure to comply with the duty to state reasons in relation to the assessment of the period during which the aid defined by the decision at issue was neutralised by the exceptional flat-rate contribution. The fourth plea in law was based on breach of procedural rights.

7. By the judgment under appeal, the General Court dismissed the action in its entirety and ordered Orange to pay the costs.

8. The decision at issue was also the subject of an action lodged at the Registry of the General Court on 2 March 2012 by the French Republic, Case T-135/12. The judgment given in that case,⁵ which also dismissed the action and ordered the French Republic to pay the costs was, by contrast, not the subject of an appeal.

III – Forms of order sought and procedure before the Court

9. Orange claims that the Court should:

- set aside the judgment under appeal;
- rule definitively on the substance of the matter and uphold the claims it presented at first instance;
- in the alternative, refer the case back to the General Court;
- order the Commission to pay the entirety of the costs.

10. The Commission claims that the Court should:

- dismiss the appeal;
- order the applicant to pay the costs.

11. The parties set out their positions in writing and presented oral argument at the hearing on 3 December 2015.

IV – Analysis of the appeal

12. In support of its appeal, the applicant raises three grounds, based respectively on errors of law made by the General Court in its assessment of whether there had been State aid within the meaning of Article 107(1) TFEU, the compatibility of the contested measure with the internal market, and the period during which the aid defined in the decision at issue was neutralised by the exceptional flat-rate contribution.

13. As there are subtleties in the questions raised under the first ground, I will focus my analysis on those questions; the other grounds raised do not seem to me to pose any particular difficulty.

A – Preliminary observations as to the context in which the contested measures were drafted and as to their nature

14. As I indicated in the introduction to this Opinion, the present case relates to very specific national measures of compensation, enacted in the context of the reform of the status of France Télécom, following its privatisation.

15. In the interests of addressing the questions before the Court effectively, I consider it useful to reiterate certain matters, and to give some further detail as to the nature of the contested measures and the context in which they were drawn up.

⁵ — Judgment in *France v Commission* (T-135/12, EU:T:2015:116).

16. Under the 1990 Law, France Télécom was constituted as a public operator with legal personality, whereas, together with La Poste, it had previously formed a directorate-general of the French Ministry of Post and Telecommunications.

17. Notwithstanding this change of status, it continued to recruit individuals with civil servant status until 1997.

18. Continuing the previous budgetary practice in relation to the financing of pensions of former civil servants of France Télécom, Article 30 of the 1990 Law provided, first, that the payment and servicing of pensions granted to civil servants of France Télécom would be effected by the State, and, secondly, that, in return, France Télécom was required to pay to the Public Treasury, not only the amount deducted from the salaries of its civil servant staff, but also an ‘additional contribution’, enabling the pensions that had been and were to be awarded to its retired civil servants to be funded in full.

19. The additional ‘employer’s’ contribution which France Télécom was obliged to pay was set on the basis of the difference between the total amount of pension payments made by the French State and the portion paid by active civil servants out of their salaries.

20. In other words, France Télécom was required to assume the entirety of the cost of the pensions of its retired civil servants (including former civil servants of the Ministry of Post and Telecommunications), after deduction of the retention made from the salaries of its active civil servant staff.

21. It is notable that, in fact, France Télécom entered the pension expenditure in its accounts on the basis of contributions paid. On account of the certainty that this expenditure would increase, given the foreseeable trend in retirement pensions to be paid to its former civil servants, France Télécom also entered in its accounts an annual provision designed to spread the estimated effect of future increases in payments over a 30-year period. The amount of the provision thus set aside up to 1996 was around EUR 3.6 billion.⁶

22. By the 1996 Law, France Télécom was constituted as a limited company under French law. While France Télécom ceased recruiting civil servants as from 1997, its existing body of civil servants continued to work for it, retaining their civil service status and protections, including conditions of employment identical to those of civil servants of the State.

23. The amount resulting from deductions made from the salaries of active civil servants of France Télécom reduced as they departed for retirement, while those departures simultaneously increased the expenditure relating to such retirements, dictating that the additional contribution would constantly increase (until the mortality rate of retirees surpassed the rate of retirement).

24. It was in those circumstances that the French legislature decided to alter the arrangements for financing the pensions of civil servants of France Télécom.

25. Under the 1996 Law, that company is now required to pay only a contribution in full discharge of liabilities equalising the wage-based social security costs as between France Télécom and the other undertakings in the telecommunications sector, in respect of those risks which are common to ordinary employees and civil servants of the State. This means that the financial burden on France Télécom is limited to the payment of a contribution, while the costs associated with paying the

⁶ — See recital 19 of the decision at issue.

pensions of its former civil servants are borne by the State. It also means that France Télécom is not required to pay certain contributions which are paid by its competitors to insure against risks that are not common to ordinary employees and civil servants, particularly unemployment and employee claims in the event of the undertaking going into administration or liquidation.

26. Finally, it should be observed that the reform of the financing of France Télécom pensions took place in the context of increased liberalisation of the telecommunication markets, and its effects were therefore felt, potentially, in a market which was opening up progressively to competition. Hence the Commission observed, in recital 49 of the decision at issue, that the ‘the desire to promote the expansion of France Télécom on the European markets outside France is the backdrop to the 1996 Law and the opening [up] of the undertaking to private capital, as shown in declarations during the discussion of the draft’.

B – The first ground, based on errors of law in assessing the conditions which were required to be met in order for the contested measure to be classified as State aid within the meaning of Article 107(1) TFEU

27. By its first ground, the applicant challenges the classification of the contested measure as State aid in several respects, which partly overlap. I note in particular that the issue of identifying an economic advantage for the purposes of Article 107(1) TFEU, which is the subject matter of the first part of the first ground, is intimately linked to that of whether the contested measure is selective, to which the second part of that ground relates, and that these issues could conceivably have been examined together.

28. In spite of that observation, it seems to me to be preferable, in the interests of readability, to deal with the first ground by following, as far as possible, the structure of the argument put forward by the applicant.

1. As to the first part, based on errors of law made by the General Court in assessing whether an advantage existed

a) Applicant’s argument

29. Orange asserts, essentially, that the General Court made several errors of law in assessing whether there was an advantage to France Télécom for the purposes of Article 107(1) TFEU. According to Orange, the contested measure, that is, the reduction effected by the 1996 Law in the pension contributions which France Télécom was required to pay, was intended to compensate for what it describes as a ‘structural disadvantage’. This disadvantage is said to arise from the 1990 Law, which imposed significant costs relating to the financing of the pensions of its former civil servant staff in comparison to the costs borne by competing economic operators. It is thus argued that the contested measure did not have the effect of placing France Télécom in a more advantageous competitive position than competing undertakings.

30. Its argument has a threefold structure.

31. First, it asserts that the General Court was wrong to hold, in paragraphs 42 and 43 of the judgment under appeal, that the compensatory nature of the contested measure does not prevent it being classified as State aid, the sole exception being those cases where the State intervention at issue must be regarded as compensation for services provided by undertakings responsible for services of general economic interest in order to comply with public service obligations, in accordance with the

principles established by the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*.⁷ In this regard, it submits that certain judgments of the Court of Justice⁸ and the General Court⁹ were wrongly interpreted in the judgment under appeal.

32. Second, Orange considers that its position, based on the existence of a structural disadvantage, is solidly supported by the judgment in *Enirisorse*,¹⁰ contrary to what the General Court held in paragraphs 39 to 41 of the judgment under appeal.

33. Third, and last, Orange maintains that the General Court erred in its definition, in paragraph 41 of the judgment under appeal, of the reference framework; that is, the standard situation which enables the normally applicable situation to be determined. It is said that, in the present case, the appropriate point of reference was the arrangements applicable to competing undertakings in respect of contributions to the financing of the pensions of their staff, and not those resulting from the situation in which France Télécom would have been if the 1990 Law was still in force.

b) Assessment

34. Before dealing in more detail with the various aspects of the arguments put forward by the applicant — which ultimately relate to the same issue — it should be observed that, under well-established case-law, the measures regarded as aid include those which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect.¹¹ The Court has, in particular, clearly stated that the costs linked to remuneration of employees naturally place a burden on the budgets of undertakings, irrespective of whether or not those costs stem from legal obligations or collective agreements.¹²

35. According to equally well-established case-law, the concept of advantage that is intrinsic to the classification of a measure as State aid is an objective one, irrespective of the motives of the persons responsible for the measure in question. Accordingly, the nature of the objectives pursued by State measures and their grounds of justification have no bearing whatsoever on whether such measures are to be classified as State aid. Article 107(1) makes no distinction according to the causes or aims of the State measures, but characterises them on the basis of their effects.¹³

36. Remarkably, the applicant has not explicitly challenged, in this part,¹⁴ the starting point of the General Court's assessment, as set out in paragraph 37 of the judgment under appeal. That paragraph states that 'in the circumstances, it is common ground that, by reducing the social security costs imposed by the 1990 Law, the 1996 Law improved the legal situation of France Télécom in comparison to the previous arrangements and thus, in principle, generated an advantage for France Télécom'.

7 — C-280/00, EU:C:2003:415.

8 — Judgment in *Comitato 'Venezia vuole vivere' and Others v Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 90 to 92).

9 — Judgment in *British Telecommunications and BT Pension Scheme Trustees v Commission* (T-226/09 and T-230/09, EU:T:2013:466, paragraph 71).

10 — C-237/04, EU:C:2006:197.

11 — Judgments in *France Télécom v Commission* (C-81/10 P, EU:C:2011:811, paragraph 16 and the case-law cited) and *Eventech* (C-518/13, EU:C:2015:9, paragraph 33 and the case-law cited).

12 — *Belgium v Commission* (C-5/01, EU:C:2002:754, paragraph 39).

13 — *France Télécom v Commission* (C-81/10 P, EU:C:2011:811, paragraph 17 and the case-law cited) and *BVVG* (C-39/14, EU:C:2015:470, paragraph 52 and the case-law cited).

14 — On the other hand, under the third part of the first ground, it criticises the General Court for limiting itself to observing that the 1996 Law had improved its financial situation 'without analysing the actual or potential effect on the market in question'.

37. The question nevertheless arises in this case of whether the General Court erred in any way with regard to the methodology of identifying an advantage, in endorsing the approach taken by the Commission in the decision at issue. Despite the relatively technical nature of the measures at issue, the selection of the relevant point of reference, which proves to be crucial in identifying the economic advantage which France Télécom is said to have enjoyed, and thus in classifying those measures as State aid within the meaning of Article 107(1) TFEU, is a matter that should, by its nature, be reviewed on an appeal.¹⁵

38. In this regard, I would point out that the Commission selected, as the ‘normal arrangements’, that is, the reference arrangements from which the contested measure adopted in 1996 departed, those which had applied to the pensions of France Télécom civil servants since its privatisation in 1990. This selection was upheld by the General Court in paragraphs 37 and following of the judgment under appeal.

39. It does not seem to me to call for criticism.

40. First, in relation to the argument based on the judgment in *Enirisorse*,¹⁶ while it is true that, in accordance with that judgment, a measure which merely prevents the budget of the beneficiary of the measure being burdened with a charge which, in a normal situation, would not have existed, cannot be classified as State aid, it remains necessary to establish that the contested measure relates to a previous State measure and that it is intended to eliminate the effects of that measure. That judgment is not intended to establish any kind of doctrine of structural disadvantage, but relates, as the General Court rightly stated, to the very particular situation of arrangements which derogate twice over from the general law.

41. It is important to emphasise that the judgment in *Enirisorse* (C-237/04, EU:C:2006:197) related to a very particular State measure concerning a general rule of civil law, which only permitted shareholders to withdraw from a company with redemption of their shares in certain exhaustively listed cases. By derogation from that general rule, the Italian legislature had provided that the shareholders of Sotacarbo, and only Sotacarbo, could withdraw in certain circumstances with redemption of their shares. This derogating option was amended by a law enacted some years later, which provided that, upon the exercise by shareholders of Sotacarbo (which included Enirisorse) of their right to withdraw, the redemption value of their shares would no longer be paid. The purpose of this second measure was precisely to eliminate the advantage that those shareholders would have enjoyed under the arrangements referred to above, by requiring them, in order to take advantage of the exception and exercise the option to withdraw, to relinquish all claims over the assets of the company and to pay up the unpaid balance on their shares. The measure thus prevented the derogating arrangements from burdening the company’s budget with a charge, namely the cost of redemption of the shares held by shareholding companies, which was not provided for by the arrangements to which it would normally be subject.

42. In that case, the Court’s approach — which was pragmatic — rested on the fact that the contested measure was intimately linked to the derogating arrangements which had previously applied. The measure, which was limited to neutralising the advantage previously conferred on Enirisorse in the form of an exceptional right to withdraw, thus did not have the effect of conferring an economic advantage on Sotacarbo.¹⁷

43. That is not the position in the present case.

15 — This is so notwithstanding that certain parts of Orange’s argument seem to relate either to reiterating arguments already put before the General Court, or to the assessment and classification of facts made by the General Court.

16 — C-237/04, EU:C:2006:197, paragraphs 43 to 49.

17 — Opinion of Advocate General Poiares Maduro in *Enirisorse* (C-237/04, EU:C:2006:21, point 32).

44. Under the 1990 Law, France Télécom was liable to a specific charge which was clearly distinct from that imposed by the ordinary arrangements under the general law relating to pensions, but which could not be regarded as derogating from the general law, as the contributions relating to civil servant pensions had not, previously, been subject to the ordinary arrangements for pension contributions. The system for financing civil servant pensions arises out of arrangements which are legally distinct and clearly separate from those applicable to ordinary employees, such as the employees of France Télécom's competitors.

45. In particular, it does not appear that contributions relating to the costs of pensions of civil servants of the State were subject to the ordinary arrangements for pension contributions, which could justify the conclusion that it was those arrangements which would normally be applicable in this case. Contrary to Orange's claim, the contested measure is not intended to prevent France Télécom being subjected to a charge with which, in a normal situation, its budget would not be burdened. In the present case, it cannot reasonably be maintained that the arrangements applicable from 1996 served to redress the fact that France Télécom had borne additional burdens as a result of a specific scheme not applying to competing undertakings subject to the general law under normal market conditions.

46. Undoubtedly, it is well established that the classification of State aid within the meaning of Article 107(1) TFEU includes measures granted through State resources which place the beneficiary undertaking in *a more favourable financial situation than that of its competitors* or which must be regarded as an *economic advantage which the beneficiary undertaking would not have obtained in normal market conditions*.¹⁸

47. The reference to *normal market conditions* and/or *the situation of competitors* seems to me to be meaningful only where a comparative examination is desirable, having regard to the specific measure at issue, being a measure which cannot, in itself, be analysed as a 'positive service' or as a measure equivalent to such a service. In other words, this case-law cannot be considered to be operative in circumstances where the ad hoc nature of the measure at issue is clearly apparent — as it is in the present case, having regard to the change of status of France Télécom. Furthermore, I perceive there to be a certain inconsistency in claiming, on the one hand, that France Télécom is subject to a structural disadvantage arising from the 1990 Law — which places it, in a certain sense, in a very particular situation — and, on the other hand, that it is appropriate to assess whether an economic advantage exists in the light of 'normal market conditions'.

48. Second, Orange's argument based more generally on the fact that the contested measure was intended to release it from a structural disadvantage or handicap is no more convincing.

49. The Court has made clear that the fact that a Member State is seeking to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid.¹⁹

50. This case-law follows directly from the rule that it is not appropriate, for the purposes of classifying a measure as State aid, to have regard to the causes or objectives of that measure, as only its effects are relevant. Thus, in my opinion, the fact that a State authority is seeking to compensate, by enacting specific measures, for the imposition of specific costs which arise from a change in the status of a given entity, but which are not related to the discharge of public service obligations in the circumstances defined in *Altmark Trans and Regierungspräsidium Magdeburg*,²⁰ cannot alter the fact

18 — See, to this effect, judgments in *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 83 and the case-law cited) and *France v Commission* (C-559/12 P, EU:C:2014:217, paragraph 94 and the case-law cited).

19 — See judgment in *Comitato 'Venezia vuole vivere' and Others v Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 95 and the case-law cited), invalidating in this respect the case-by-case approach recommended by the General Court in the judgment in *Hotel Cipriani and Others v Commission* (T-254/00, T-270/00 and T-277/00, EU:T:2008:537).

20 — C-280/00, EU:C:2003:415.

that those measures confer an economic advantage such as to be classified as State aid within the meaning of Article 107(1) TFEU. While it cannot be denied that the General Court has departed from this rule on certain occasions, the cases in question²¹ remain, as far as I am aware, isolated²² and in any event, have not been confirmed by the Court.²³

51. The Court also finds unquestionable support in the fact that compensation for structural disadvantages can, where relevant, be taken into account in considering whether a given measure of State aid is compatible with the common market, in accordance with Article 107(3) TFEU, such as a measure taking the form of regional²⁴ or environmental²⁵ aid.

52. In any event and as I have noted above, in relation to the background to the contested measure, I am not at all convinced that France Télécom was, strictly speaking, subject to a structural or competitive disadvantage brought about by the enactment of the 1990 Law, which the 1996 Law was intended to remedy.

53. The effect of the 1990 Law, it seems to me, was to put financing arrangements in place which were absolutely specific to the pensions of former civil servants of France Télécom. Under those arrangements, the State ultimately remains solely responsible for paying the retirement pensions of civil servants.

54. What the 1990 Law was intended to govern was the compensation required to be paid by France Télécom in return for the provision of civil servants of the State. It is not clear that this compensation, in itself, was disadvantageous for France Télécom.

55. As the Commission observed in recital 104 of the decision at issue, an observation which the applicant did not seriously challenge at first instance, the burden from which France Télécom was released was neither new, since the 1990 Law adopted the previous budgetary practice, nor unforeseeable, since the undertaking set aside provisions for this purpose, nor did it derogate from ordinary social security arrangements, since these do not apply to the compensation paid by France Télécom.

56. The fact that the financial burden imposed on France Télécom by the 1990 Law has subsequently been felt to be disadvantageous, or even exorbitant, because of the decreasing number of serving and contributing civil servants it employs, has no bearing on whether a structural advantage exists. This situation is the result of the legislature choosing to retain a certain number of civil servants at France Télécom, with the attendant advantages and disadvantages, notwithstanding its change of status.

57. Third, I must emphasise, further to what I have said above as to the proper interpretation of the judgment in *Enirisorse* (C-237/04, EU:C:2006:197), that the chosen reference framework, that is, the ‘normal situation’ for comparison with the situation resulting from the measure at issue, cannot be assimilated to the ‘arrangements applicable to competing undertakings of France Télécom in respect of employer pension contributions under the ordinary social security arrangements’. The issue of

21 — Judgments in *Danske Busvognmænd v Commission* (T-157/01, EU:T:2004:76, paragraph 196 et seq.) and *Hotel Cipriani and Others v Commission* (T-254/00, T-270/00 and T-277/00, EU:T:2008:537, paragraph 86 et seq.).

22 — As the more recent judgments of the General Court would suggest (see, in particular, judgment in *British Telecommunications and BT Pension Scheme Trustees v Commission*, T-226/09 and T-230/09, EU:T:2013:466, paragraph 71, and order in *Stahlwerk Bous v Commission*, T-172/14 R, EU:T:2014:558, paragraph 59).

23 — See judgment in *Comitato ‘Venezia vuole vivere’ and Others v Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 92 and 94 to 96).

24 — See especially, in the so-called Azores case, judgment in *Portugal v Commission* (C-88/03, EU:C:2006:511, paragraph 77).

25 — See judgment in *Commission v Netherlands* (C-279/08 P, EU:C:2011:551, paragraph 75 and the case-law cited).

whether an economic advantage exists cannot be analysed in terms of the burden borne by competitors of France Télécom in respect of contributions under the ordinary arrangements, for the simple reason that the burden borne by France Télécom with regard to financing the pensions of its former civil servant staff has no connection with the ordinary arrangements.

58. The 1990 Law was adopted as a continuation of the system for financing pensions which had been in force up to then. The 1996 Law, by contrast, profoundly changed the financial burden which France Télécom was required to bear by reason of the choice to retain civil servants in its service.

59. Finally, it is necessary to examine, with regard to the Court's obligation to consider any potentially contradictory reasoning in the decision at issue, whether there is a contradiction between, on the one hand, recital 97 of the decision at issue (which states that 'making available State-trained civil servants to France Télécom with no compensation for pensions paid or to be paid would confer a clear advantage on the latter') and recital 102 of that same decision (which indicates that 'to assess the situation of France Télécom, the reference situation is that of a public or private undertaking employing civil servant staff who have retained their status') and the reference to a competitively fair rate which was made in considering whether the aid was compatible for the purposes of Article 107(3)(c) TFEU.

60. In this regard it is noted that, in recital 97 of the decision at issue, the Commission was dealing with the argument that France Télécom had been subjected to a structural disadvantage by reason of the 1990 Law.

61. As to recital 102 of that decision, this was intended to align it with the particular situation of La Poste, which concerned a measure very similar to the present case. The Commission particularly emphasised in this recital that 'the retirement scheme for the civil servants of France Télécom before the 1996 reform were the same as those of the comparable scheme applied to La Poste at the same time'.

62. As to the reference to a competitively fair rate that was made in considering whether the aid was compatible, this proceeds, as the Commission quite rightly explained at the hearing, from the fact that the reference date to be used in identifying the advantage constitutive of aid within the meaning of Article 107(1) TFEU is different in this case from that which is relevant in examining whether the aid is compatible under Article 107(3)(c). The advantage must be identified on the basis of the effects produced from the date of adoption of the contested measure. By contrast, the examination of whether a measure of aid is compatible has an eminently prospective character and requires one to place oneself in a situation of optimal liberalisation of the telecommunications markets and disappearance of the advantages and constraints which face certain historical operators as a result of the existence of former State monopolies.

63. Accordingly, I am of the opinion that the decision at issue is free of contradictions on this point and that the first limb of the first ground should therefore be rejected.

2. The second part, based on errors of law made by the General Court in assessing whether the contested measure was selective

64. Orange considers that the General Court erred in law in holding, in paragraphs 52 and 53 of the judgment under appeal, that the contested measure was selective because it related to Orange alone. It takes the view that an individual State measure is selective only if it favours a given undertaking in comparison to other undertakings in a comparable factual and legal situation. Orange considers that, in the circumstances, it was not sufficient for the General Court simply to presume that the requirement of selectivity was met on the basis of the entirely ad hoc nature of the contested measure.

65. I am firmly of the opinion that this part must be rejected.

66. As I recently stated in *Commission v MOL*,²⁶ it is meaningful to examine the requirement of selectivity under Article 107(1) TFEU only when the measure at issue is a State measure of general application.

67. The selectivity requirement plays a role which differs depending on whether the measure in question is envisaged as individual aid or as a general scheme of aid. In the assessment of an individual measure, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is ‘specific’ and, therefore, the conclusion that it is also selective. By contrast, in the context of the examination of a general scheme, selectivity provides a means of identifying whether the presumed advantage, although directed at economic operators in general, is, in fact and in the light of the objective criteria which it selects, of benefit only to certain types of undertakings or groups of undertakings.²⁷

68. The Court has thus stated that, where individual aid is at issue, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective²⁸ — regardless, it seems to me, of whether there are operators on the relevant markets which are in a comparable factual and legal situation.

69. The measure at issue in the present case, which consists in the reduction of costs relating exclusively to the pensions of civil servants of France Télécom, resulting from the mechanism established by the 1996 Law, is undeniably individual in nature. In such a context it would be meaningless to carry out the examination which Orange advocates, as to whether the measure at issue is selective.

70. The case-law relied on by the applicant, which relates to legislative measures of general application, is of no assistance to it in this regard.

71. In relation, first, to *3M Italia*,²⁹ it should be pointed out that it was a national tax provision³⁰ that was at issue before the Italian courts, particularly from the perspective of the law relating to State aid. Having been asked for guidance as to whether and to what extent the State measure at issue fulfilled the selectivity requirement laid down by Article 107(1) TFEU, the Court ruled that, in assessing whether a measure, which it expressly regarded as ‘general’,³¹ was selective in nature, it was necessary to examine whether, within the context of a particular legal system, that measure constituted an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation. Far from supporting Orange’s position, this statement confirms the proposition that it is only meaningful to examine whether a measure is selective when dealing with a general measure which effects a differentiation between undertakings that does not result ‘from the nature or scheme of the system of which [it forms] part’.³²

26 — See my Opinion in *Commission v MOL* (C-15/14 P, EU:C:2015:32, point 47). See judgment in *Commission v MOL* (C-15/14 P, EU:C:2015:362, paragraph 60).

27 — See my Opinion in *Commission v MOL* (C-15/14 P, EU:C:2015:32, points 50 to 52).

28 — See judgment in *Commission v MOL* (C-15/14 P, EU:C:2015:362, paragraph 60).

29 — C-417/10, EU:C:2012:184.

30 — Namely Article 3(2bis)(b) of Decree-Law No 40/2010 (GURI No 71 of 26 March 2010), converted, with amendments, into Law No 73/2010 (GURI No 120 of 25 May 2010).

31 — See paragraph 39 of the judgment.

32 — See paragraphs 40 to 43 of the judgment.

72. Similarly, in *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235), what was at issue were privileges granted to the banking organisation Agrotiki Trapeza tis Ellados AE ('ATE'), under Law 4332/1929,³³ namely exemption from certain charges, such as the right unilaterally to register a mortgage over immovable property belonging to farmers or other persons engaged in similar agricultural activities, the right to seek enforcement with an ordinary private document and exemption from fees and duties during the registration of that mortgage and that enforcement. Against that background, in dealing with a reference for a preliminary ruling seeking to establish whether the national measure could be classified as State aid within the meaning of Article 87(1) EC (now Article 107(1) TFEU), the Court went no further than to state that 'the file submitted to the Court does not disclose whether other banks benefit from such an exemption, which would indicate that that measure is selective'.

3. The third part, based on errors of law made by the General Court in its assessment of whether competition was affected

73. Orange asserts that the General Court erred in law and failed in its duty to give reasons when it held, in paragraphs 63 and 64 of the judgment under appeal, that the requirement of affecting competition was satisfied, on the basis that the financial resources which were freed by the measure at issue were capable of being used to promote the development of Orange's activities on markets which had been newly opened up to competition, and that it had acknowledged that that measure had been indispensable in enabling Orange to play a part in the development of competition. It maintains in particular that the General Court should, having concluded its examination of the Commission's assessments, have held that the existence of an anti-competitive effect had not validly been established, since the reference framework which had been defined included Orange alone, and that the Commission ought itself to have acknowledged that the measure at issue was necessary in order to ensure competition on the merits in a market which was being opened up to competition.

74. In my opinion this final part of the first ground must also be rejected.

75. As to the complaint based on a failure to give reasons, in my view the judgment under appeal clearly set out the General Court's reasons for upholding the Commission's assessment of the requirement relating to distortion of competition. In accordance with the requirements apparent from the well-established case-law in this area,³⁴ the reasoning adopted enabled the persons concerned to know why the measures in question were taken and provided the Court of Justice with sufficient material for it to exercise its powers of review.

76. Moreover, I do not consider that the observations made by the General Court were erroneous. In particular, the fact — which was acknowledged by Orange — that the financial resources freed by the measure, amounting to over EUR 13 billion at 1996 values, were capable of promoting the development of the applicant's activities indicates precisely that it had an impact, at least potentially, on competition, regardless of what objective that measure aimed to pursue, be it an objective of common interest or not.

77. In the light of all of the foregoing considerations, I suggest that the first ground of this appeal should be rejected.

33 — FEK A' 283.

34 — See, among numerous cases, judgments in *ArcelorMittal Luxembourg v Commission* and *Commission v ArcelorMittal Luxembourg and Others* (C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 78); *Land Burgenland and Others v Commission* (C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 81); and *France v Commission* (C-559/12 P, EU:C:2014:217, paragraph 88).

C – The second ground, based on errors of law made by the General Court in its assessment of whether the contested measure was compatible with the internal market

1. The first part, based on distortion of the facts and breach of the obligation to state reasons on the part of the General Court in its assessment of the purpose of the exceptional flat-rate contribution

78. Orange considers that the General Court distorted the facts before it and breached its obligation to state reasons when it held, in paragraphs 93 and 94 of the judgment under appeal, that the wording of Article 30 of the 1990 Law, which was amended by Article 6 of the 1996 Law, did not militate against the interpretation that the exceptional flat-rate contribution was not a social security cost, but pursued other objectives, and that, accordingly, the Commission had not erred in law in taking the view that the fact that the non-common risks were not taken into account in the employer's contribution in full discharge of liability could not be compensated for by that contribution.

79. In my view this branch of the applicant's argument cannot succeed.

80. In this regard, it should be observed that carrying out a review of a distortion of facts — which, as an exception to the principle that it is not for the Court, on an appeal, to review the facts, must be interpreted narrowly — involves, in these circumstances, determining whether it appears manifestly from the documents that the General Court misapprehended the import of the 1996 Law.³⁵

81. More specifically, it is necessary to determine whether the matters set out in paragraphs 92 and 93 of the judgment under appeal, relating to the nature of the contributions at issue, described in Article 6 of the 1996 Law, are manifestly erroneous.

82. This does not seem to me to be the case.

83. As is apparent from the material in the file, Article 30 of the 1990 Law, which was amended by Article 6 of the 1996 Law, requires France Télécom to pay to the Public Treasury, in return for the payment and servicing by the State of the pensions granted, first, an 'employer's contribution in full discharge of liabilities, ... [the rate of which] shall be calculated in such a way as to equalise the levels of wage-related social security contributions and tax payments between France Télécom and the other companies in the telecommunications sector under the ordinary social security arrangements' (see point (c) of that provision). Secondly, point (d) of that provision imposes 'an exceptional flat-rate contribution, ... the arrangements for payment [of which] shall be established by Finance Law'.

84. In upholding, in paragraphs 92 to 94 of the judgment under appeal, the Commission's conclusion that, unlike the exceptional flat-rate contribution, the employer's contribution did not have the objective of achieving a competitively fair rate and that, accordingly, the exceptional flat-rate contribution could not be compensating for the fact that the non-common risks were not taken into account in the employer's contribution in full discharge of liabilities, the General Court did not distort the facts in any way, nor, it seems to me, did it make an error of law which ought to be censured on this appeal.

85. Contrary to the applicant's position, paragraph 93 of the judgment under appeal does not solely address the question of whether or not the exceptional flat-rate contribution provided for by Article 30 of the 1996 Law constitutes 'a social security cost' for Orange, but is concerned with determining whether that contribution was, like the employer's contribution in full discharge of

35 — For a relatively recent illustration of the nature of the review carried out by the Court in relation to the scope of the national law at issue, see the approach taken in *France v Commission* (C-559/12 P, EU:C:2014:217, paragraphs 78 to 83).

liabilities, actually intended to ensure a competitively fair rate. The General Court was thus seeking to respond to an argument — one which, in fact, had been put forward by the applicant and was set out in paragraph 91 of the judgment under appeal — as to the link required to be established between the balance of the exceptional flat-rate contribution and the payment of the employer's contribution.

86. Furthermore, in my opinion the observations made by the General Court in paragraphs 92 to 94 of the judgment under appeal cannot be regarded as vitiated by a failure to state reasons. It appears that the General Court's response to the argument put forward by the applicant was sufficient in law. The observations in question are such as to enable the applicant to know why the General Court rejected that argument and to provide the Court of Justice with sufficient material for it to exercise its powers of review.³⁶

87. Finally, it seems to me that what the applicant is really seeking to put in issue, under the guise of an error of law on the part of the General Court, is the assessment of the facts carried out by the General Court. However, that assessment is not a question of law which is subject, as such, to review by the Court.³⁷

2. The second part, based on breach of the obligation to state reasons by the General Court in assessing the 'La Poste precedent'³⁸

88. Orange considers that the General Court breached its obligation to state reasons in that it went no further, in paragraphs 99 to 101 of the judgment under appeal, than to adopt the assessments of the Commission, and did not analyse the arguments put forward by Orange to demonstrate that those assessments were erroneous. Furthermore, it is said that the General Court did not examine the other arguments put forward by Orange with a view to demonstrating that the Commission was not justified in treating the reform of the pensions of civil servants working for Orange differently from that of civil servants working for La Poste.

89. In my opinion the argument put forward in this part should be declared ineffective, on the basis that it relates to grounds which, if invalidated, could not result in the judgment under appeal being set aside.³⁹

90. It must be noted that the observations made by the General Court in paragraphs 99 to 101 of the judgment under appeal, concerning the significance to be attached to Decision 2008/204, were made purely for the sake of completeness, as is clearly shown by the use, at the beginning of paragraph 99 of the judgment, of the expression 'in addition'.

91. In this regard, it should be stated that, by the second part of the second plea put before the General Court, the applicant asserted, essentially, that in refusing to apply the same reasoning to the present procedure as was applied in Decision 2008/204, which concerned a reform comparable to that implemented in respect of the applicant, the Commission had made several errors of assessment and had infringed the principles of non-discrimination and equal treatment.⁴⁰

36 — See the case-law cited in footnote 33.

37 — Judgment in *Alliance One International and Standard Commercial Tobacco v Commission* and *Commission v Alliance One International and Others* (C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 85 and the case-law cited).

38 — Commission Decision 2008/204/EC of 10 October 2007 on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste (OJ 2008 L 63, p. 16).

39 — See, to this effect, judgments in *Aéroports de Paris v Commission* (C-82/01 P, EU:C:2002:617, paragraphs 41 and 67 and the case-law cited); *Dansk Rørindustri and Others v Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 148 and the case-law cited); and *InnoLux v Commission* (C-231/14 P, EU:C:2015:451, paragraph 83).

40 — See paragraph 97 of the judgment under appeal.

92. In response to that argument, the General Court stated, as the Commission had emphasised, that it was solely by reference to Article 107(3)(c) TFEU that the legality of a Commission decision finding that aid did not meet the requirements of that derogation fell to be assessed, and not in comparison with an alleged previous practice.⁴¹

93. It was purely for the sake of completeness that the General Court pointed out that, in recitals 152 to 165 of the decision at issue, the Commission had refused to accept that, at the time of the respective reforms, La Poste and France Télécom were in a similar factual and legal situation.⁴² In relation, particularly, to the assessment of the exceptional flat-rate contribution in the two cases, which the applicant challenges in the present proceedings, the General Court noted that the Commission had asserted that the condition imposing the reallocation of the exceptional flat-rate contribution by La Poste was established after it had initiated the formal investigation procedure. That situation enabled it to assess that contribution with regard to a competitively fair rate, whereas in the case of France Télécom the exceptional flat-rate contribution had been imposed well before and outside the context of the procedure initiated by the Commission.⁴³

94. As the second part of the second ground should be declared ineffective, the second ground must be rejected as being in part unfounded and in part ineffective.

D – The third ground, based on errors made by the General Court in its assessment of the period during which the aid was neutralised by the exceptional flat-rate contribution

95. Orange maintains that the General Court distorted the facts and made a substitution of grounds in holding, in paragraphs 107 and 108 of the judgment under appeal, that the elimination of the compensation and over-compensation charges formed part of the aid defined in Article 1 of the decision at issue, when recital 119 of the decision at issue was limited to the conclusion that the aid at issue consisted in the reduction of the compensation consisting of the employer's contribution, with no mention of the compensation and over-compensation charges.

96. The argument developed by the applicant is intended to demonstrate that the General Court wrongly substituted grounds in relation to the precise definition of the aid at issue.

97. I do not find that line of argument at all convincing.

98. Undeniably, the General Court observed in paragraph 107 of the judgment under appeal that 'it is true that, regrettably, recital 119 of the [decision at issue], which contains the conclusion on the existence of aid within the meaning of Article 107(1) TFEU, was limited to stating that the aid consisted in the reduction of "the compensation consisting of the employer's contribution", without mentioning the compensation or over-compensation charges'.

99. Nonetheless, the General Court considered that, in spite of this lack of precision in the definition in the decision at issue, 'it is apparent both from the background to the [decision at issue] and from Article 1 of that decision that the aid consists, in the Commission's view, in the reduction of the compensation previously paid by the applicant, which necessarily includes all charges borne by the applicant before the contested measure came into force'.

41 — See paragraph 98 of the judgment under appeal.

42 — See paragraph 99 of the judgment under appeal.

43 — See paragraph 100 of the judgment under appeal.

100. With that consideration in mind, it being noted that the General Court expressly set out the definition of the aid contained in Article 1 of the decision at issue,⁴⁴ as well as statements made in recitals 18 (including table 1) and 105 of that decision,⁴⁵ in my view the General Court was right to conclude that the Commission had not failed in its duty to state reasons.⁴⁶

101. For all of the foregoing reasons, I take the view that this last ground should be rejected as being unfounded and, accordingly, that the appeal should be dismissed in its entirety.

V – Conclusion

102. In the light of the foregoing considerations, I suggest that the Court should:

- (1) dismiss the appeal;
- (2) order Orange SA to pay the costs.

⁴⁴ — See paragraph 104 of the judgment under appeal.

⁴⁵ — See paragraph 105 of the judgment under appeal.

⁴⁶ — See paragraph 109 of the judgment under appeal.