Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 October 2016*

(Appeal — Competition — State aid — Aid granted by the French Republic to France Télécom — Reform of the arrangements for financing the retirement pensions of civil servants working for France Télécom — Reduction of the compensation to be paid to the State by France Télécom — Decision declaring the aid compatible with the internal market under certain conditions — Definition of aid — Definition of economic advantage — Selective nature — Adverse effect on competition — Distortion of the facts — No statement of reasons — Substitution of grounds)

In Case C-211/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 May 2015,

Orange, formerly France Télécom, established in Paris (France), represented by S. Hautbourg and S. Cochard-Quesson, avocats,

appellant,

the other party to the proceedings being:

European Commission, represented by B. Stromsky and L. Flynn, acting as Agents,

defendant at first instance,

THE COURT (First Chamber),

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

Advocate General: N. Wahl,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 3 December 2015,

after hearing the Opinion of the Advocate General at the sitting on 4 February 2016,

gives the following

* Language of the case: French.

Judgment

1 By its appeal, Orange seeks to have set aside the judgment of the General Court of the European Union of 26 February 2015, *Orange* v *Commission* (T-385/12, not published, 'the judgment under appeal', EU:T:2015:117), by which that court dismissed its application for 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 (OJ 2012 L 279, p. 1) ('the decision at issue').

Background to the dispute

2 The background to the dispute is summarised as follows in paragraphs 1 to 19 of the judgment under appeal:

'1. The measures covered by the present case are the 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 French 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 fulfill 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 flat-rate 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"), equaled 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.

…"'

Procedure before the General Court and the judgment under appeal

3 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.

4 In support of its action, Orange put forward four pleas in law, the first alleging errors of law, manifest errors of assessment and infringement of the obligation to state reasons, in so far as the Commission took the view that the measure at issue constituted State aid within the meaning of Article 107(1) TFEU.

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

Forms of order sought by the parties

6 Orange claims that the Court should:

— set aside the judgment under appeal and annul the decision at issue;

— in the alternative, set aside the judgment under appeal and refer the case back to the General Court;

— order the Commission to pay the costs.

7 The Commission contends that the Court should:

— dismiss the appeal; and

— order Orange to pay the costs.

The request to reopen the oral procedure

8 After judgment was delivered by the General Court on 14 July 2016 in *Germany* v *Commission* (T-143/12, EU:T:2016:406), Orange requested, by document lodged at the Registry of the Court of Justice on 26 July 2016, that the oral stage of the procedure be reopened.

9 In support of that request, Orange maintains, in essence, that the conclusion reached by the General Court in the judgment under appeal concerning the existence of a selective economic advantage is irreconcilable with the conclusion reached in the judgment of 14 July 2016 and that the legal considerations relating to that judgment were directly relevant to the assessment of the first and second grounds of appeal in the present case.

10 In that regard, it must be recalled that, under Article 83 of the Court's Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court (judgment of 22 June 2016, *DK Recycling und Roheisen* v *Commission*, C-540/14 P, EU:C:2016:469, paragraph 28).

11 That is not the position in the present case. The Court, after hearing the Advocate General, considers that it has all the information necessary to give a ruling and that the case does not have to be examined in the light of a new fact which is of such a nature as to be a decisive factor for its decision or of an argument which has not been debated before it.

12 In the light of the foregoing, the Court considers that there is no need to order that the oral part of the procedure be reopened.

The appeal

First ground of appeal, alleging that the General Court erred in law in its assessment as to whether the contested measure was to be classified as State aid

First part of the first ground of appeal, alleging that the General Court erred in law in its assessment regarding the existence of an advantage

– Arguments of the parties

13 In the first place, Orange submits that the General Court erred in law by holding, in paragraphs 42 and 43 of the judgment under appeal, that the allegedly compensatory nature of the contested measure did not preclude it being categorised as State aid on the ground that it is only in so far as a State measure must be regarded as compensation for services provided in fulfillment of public service obligations, in accordance with the criteria established by the Court in the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), that such a measure falls outside Article 107(1) TFEU.

14 Contrary to the view taken by the General Court, the Court of Justice did not rule out the possibility, in paragraph 97 of the judgment of 9 June 2011, *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), that the compensatory nature of measures other than those connected with services provided in performance of public service obligations might preclude their categorisation as State aid.

15 In the second place, Orange contends that the General Court's assessment is at odds with the judgment of 23 March 2006, *Enirisorse* (C-237/04, EU:C:2006:197), in which the Court of Justice held that a derogation from general Italian law did not fall within the definition of State aid, on the ground that a law which merely prevents an undertaking's budget being burdened with a charge which, in a normal situation, would not have existed, does not confer an advantage on that undertaking for the purpose of Article 107(1) TFEU.

16 First, contrary to what the General Court stated in paragraphs 39 to 41 of the judgment under appeal, there is nothing in the judgment of 23 March 2006, *Enirisorse* (C-237/04, EU:C:2006:197), to suggest that the applicability of that case-law is confined to what are referred to as 'dual derogation' arrangements, that is to say arrangements whereby, in order to prevent the budget of the beneficiary of the measure being burdened with a charge which, in a normal situation, would not have existed, provision is made for a derogation intended to neutralise a previous derogation from the general system in place.

17 Second, Orange contends that the 1990 Law imposed an obligation on France Télécom to which its competitors were not subject, thus creating an abnormal burden within the meaning of the case-law cited above, for which the 1996 Law provided a remedy.

18 In the third place, Orange states that, in paragraph 41 of the judgment under appeal, the General Court took as its reference framework, for the purpose of determining whether the 1996 Law conferred an advantage, the original scheme applicable to France Télécom civil servants under the 1990 Law.

19 Orange submits that the objective of the 1996 Law was to place France Télécom in a situation governed by general law as regards the arrangements for financing the retirement pensions of civil servants working for France Télécom and that, in the light of that objective, the relevant reference framework was that applicable to competing undertakings in respect of employers' contributions to the retirement pensions of their staff.

20 Therefore, according to Orange, the General Court erred in law by endorsing the Commission's choice of reference framework.

21 The Commission disputes Orange's arguments.

– Findings of the Court

22 It should be noted at the outset that, by the second and third arguments of the first part of the first ground of appeal, as summarised in paragraphs 15 to 20 above, Orange contends that the French State did not confer any economic advantage on it when it adopted the 1996 Law. By the first argument of the first part, summarised in paragraphs 13 and 14 above, that company maintains that, even if that law had conferred such an advantage, it would simply have compensated for the structural disadvantage to which it was subject under the arrangements introduced by the 1990 Law by comparison with its competitors, so that such an advantage could not justify a finding of State aid.

23 As regards the arguments alleging that it did not enjoy an economic advantage, Orange submitted before the General Court that it was apparent from the judgment of 23 March 2006, *Enirisorse* (C-237/04, EU:C:2006:197), that a law which merely prevents an undertaking's budget being burdened with a charge which, in a normal situation, would not have existed, does not confer an advantage on that undertaking for the purpose of Article 107(1) TFEU.

24 Moreover, Orange argued before the General Court that the Commission's choice of reference framework for the purpose of determining whether it enjoyed an economic advantage, that is the scheme applicable to France Télécom under the 1990 Law, as opposed to the scheme applicable to competing undertakings, was incorrect in law and vitiated by manifest errors of assessment.

25 In paragraphs 38 to 41 of the judgment under appeal, the General Court dismissed the argument based on the judgment of 23 March 2006 *Enirisorse* (C-237/04, EU:C:2006:197), taking the view that that case-law was applicable only in cases involving 'dual derogation' arrangements, that is to say arrangements whereby, in order to prevent the budget of the beneficiary of the measure being burdened with a charge which, in a normal situation, would not have existed, provision is made for a derogation intended to neutralise a previous derogation from the general system in place, which was not the case here.

26 That assessment is not vitiated by the errors of law alleged by Orange in the second argument of the first part of the first ground of appeal.

27 It should be noted in that regard that, in paragraphs 46 to 48 of the judgment of 23 March 2016, *Enirisorse* (C-237/04, EU:C:2006:197), the Court held that national legislation which offers an advantage neither to shareholders of a company nor to the company itself, in so far as it merely prevents its budget being burdened with a charge which, in a normal situation, would not have existed and therefore simply regulates an exceptional right and without seeking to reduce a charge which that company would normally have had to bear cannot be regarded as an advantage within the meaning of Article 107(1) TFEU.

28 It should be noted, as observed by the Advocate General in point 42 of his Opinion, that a particular feature of the situation which gave rise to the judgment of 23 March 2006, *Enirisorse* (C-237/04, EU:C:2006:197), was that it concerned a national measure which had the effect of neutralising the effects of a system which derogated from the general system in place.

29 In the present case, the General Court found, in its assessment of the facts in paragraph 41 of the judgment under appeal, against which there is no appeal, that the arrangements for the retirement pensions of France Télécom civil servants were legally distinct and clearly separate from the arrangements applicable to ordinary employees. It inferred from this that the latter arrangements were not the arrangements normally applicable to France Télécom civil servants, so that the 1996 Law had not removed an abnormal burden borne by the budget of that undertaking or reverted to the normal arrangements.

30 In those circumstances, the General Court did not err in law in finding, in paragraph 41 of the judgment under appeal, that 'it [was] not possible to conclude, as [did] the applicant, that the measure at issue was intended to prevent France Télécom being subject to a charge which, in a normal situation, should not be borne by its budget within the meaning of the judgment [of 23 March 2006, *Enirisorse* (C-237/04, EU:C:2006:197)]'.

31 As a consequence, the second argument of the first part of the first ground of appeal must be rejected as unfounded.

32 With regard to the third argument of the first part of the first ground of appeal, concerning the choice of reference framework, it should be noted that the General Court held, in paragraph 37 of the judgment under appeal, that by reducing the social security contributions introduced by the 1990 Law, the 1996 Law conferred, in principle, an advantage on France Télécom.

33 Moreover, as noted in paragraph 29 above, the General Court held in paragraph 41 of the judgment under appeal that the arrangements for the retirement pensions of civil servants derive from a regime that is legally distinct and clearly separate from the regime applicable to ordinary employees, such as the employees of France Télécom's competitors, and that the 1990 Law did not introduce derogating arrangements, as the contributions to the pensions of civil servants had not previously been subject to the ordinary arrangements for pension contributions.

34 The General Court thus dismissed Orange's argument that, for the purpose of determining whether or not France Télécom enjoyed an economic advantage, the Commission had used an incorrect reference framework.

35 By the third argument of the first part of the first ground of appeal, as summarised in paragraphs 18 to 20 above, Orange does not dispute, as the Commission was correct to observe, the assessment set out in paragraph 37 of the judgment under appeal and simply takes issue with the General Court for failing to take into account, in identifying the correct reference framework, the French State's objectives when it adopted the 1996 Law.

36 Orange maintains, in essence, that the objective of the 1996 Law was to restore the general law conditions as regards the arrangements for financing the retirement pensions of civil servants working for France Télécom and thus place the company in the same situation as that of its competitors. Accordingly, and in the light of the objectives of the 1996 Law, the 'standard' situation to be adopted for the purpose of determining whether that law had the effect of eliminating a normal or an abnormal cost would be that of a private operator.

37 Accordingly, Orange's line of argument does not enable the Court to ascertain whether, when it rejected that company's objection that the Commission had chosen the incorrect reference framework, the General Court committed other errors of law than the error based on failure to take account of the French State's objectives.

38 In that regard, it is the Court's established case-law that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (judgment of 9 June 2011, *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 94 and the case-law cited).

39 It follows that the third argument of the first part of the first ground of appeal must be rejected as manifestly unfounded.

40 As regards the first argument of the first part of the first ground of appeal, concerning compensation for a structural disadvantage, Orange relied at first instance on the judgments of the General Court of 16 March 2004, *Danske Busvognmænd* v *Commission* (T-157/01, EU:T:2004:76), and of 28 November 2008, *Hotel Cipriani and Others* v *Commission* (T-254/00, T-270/00 and T-277/00, EU:T:2008:537), in support of its claim that an advantage eliminating additional burdens which were imposed by derogating arrangements and were not borne by competing undertakings does not constitute State aid. Indeed, according to Orange, compensation for a structural disadvantage may preclude the categorisation of a measure as State aid in certain specific situations, not merely in cases involving services of general public interest.

41 The General Court rejected that argument in paragraphs 42 and 43 of the judgment under appeal, stating that, even on the assumption that it were established, the compensatory nature of the costs reduction granted in the present case would not make it possible to preclude the categorisation of that measure as State aid.

42 The General Court stated in that regard that it is apparent from the case-law of the Court of Justice, in particular paragraphs 90 to 92 of the judgment of 9 June 2011, *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), that it is only in so far as a State measure must be regarded as compensation for the services provided by undertakings entrusted with performing a service in the general public interest in order to discharge public service obligations in accordance with the criteria established in the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), that such a measure falls outside Article 107(1) TFEU.

43 Those findings are not vitiated by any of the error of law alleged by Orange in its first argument in the first part of the first plea in law.

44 Indeed, it is clear that, to date, the only situation recognised by the Court's case-law in which the finding that an economic advantage has been granted does not lead to the measure at issue being categorised as State aid within the meaning of Article 107(1) TFEU is that in which a State measure represents the compensation for the services provided by undertakings entrusted with performing a service in the general public interest in order to discharge public service obligations, in accordance with the criteria established in the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415).

45 The General Court was therefore entitled to take the view that Orange could not derive valid arguments from the judgments of the General Court cited in paragraph 40 above in order to establish that compensation for a structural disadvantage may preclude a measure being categorised as State aid.

46 It follows that the first argument of the first part of the first ground of appeal must be rejected as unfounded.

47 In the light of the foregoing, the first part of the first ground of appeal must be rejected.

The second part of the first ground of appeal, alleging that the General Court erred in law in its assessment of the selective nature of the contested measure

– Arguments of the parties

48 Orange submits that the General Court erred in law in finding, in paragraphs 52 and 53 of the judgment under appeal, that the contested measure is selective because it concerns only Orange.

49 According to Orange, an individual measure is selective only if it favours a specific undertaking in comparison with others which are in a comparable legal and factual situation. Orange cites, in that connection, the judgments of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 40), and of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 28).

50 Given that, if a measure is selective, that involves an unequal distribution of advantages as between undertakings in a comparable factual and legal situation, it is not possible to carry out an assessment without comparing the operators in such a situation.

51 As the Commission concluded that there were no other undertakings that came within the reference framework defined by it, Orange submits that the General Court was not entitled simply to presume that the selectivity criterion was met in view of the ad hoc nature of the contested measure.

52 The Commission disputes Orange's arguments.

– Findings of the Court

53 The General Court stated in paragraphs 52 and 53 of the judgment under appeal that the 1996 Law affected only France Télécom and that, as a result, it was selective. According to the General Court, the test requiring a comparison of the beneficiary with other operators in a comparable factual and legal situation in the light of the aim pursued by the measure in question is based on, and justified by, the assessment of whether measures of potentially general application are selective and that test is therefore irrelevant where, as in the present case, it would amount to assessing the selective nature of an ad hoc measure which concerns just one undertaking and is intended to modify certain competitive constraints which are specific to the undertaking.

54 As those findings are, as observed by the Advocate General in points 66 to 72 of his Opinion, consistent with the Court's case-law in this field (see, to that effect, judgment of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 60), they are not vitiated by any error of law and, as a result, the second part of the first ground of appeal must be rejected as unfounded.

The third part of the first ground of appeal, alleging that the General Court erred in law in its assessment of whether competition was affected

– Arguments of the parties

55 Orange claims that the General Court erred in law and failed in its duty to state reasons in holding, in paragraphs 63 and 64 of the judgment under appeal, that the requirement that competition be affected was satisfied as 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 that company had itself acknowledged that that measure had been indispensable in enabling Orange to play a part in the development of competition.

56 According to Orange, while those two factors might establish that, by ensuring merit-based competition, the contested measure had a positive impact on competition, they are not sufficient to justify the General Court's conclusion that that measure was indeed such as to distort or threaten to distort competition.

57 If the General Court had carried out a thorough review of the assessments made by the Commission in reaching the conclusion that the requirement that competition be affected was satisfied, it may have concluded that the existence of such an anticompetitive effect had not been properly established, since the reference framework established included Orange alone, and that the Commission had acknowledged that the measure at issue was necessary in order to ensure merit-based competition in a market which was being opened up to competition.

58 The Commission disputes Orange's arguments.

– Findings of the Court

59 In paragraphs 63 and 64 of the judgment under appeal, the General Court rejected Orange's arguments summarised in paragraph 57 above by stating, first of all, that the financial resources released by the measure at issue were capable of being used to promote the development of France Télécom's activities on markets which had been newly opened up to competition in France and in other Member States.

60 Next, the General Court observed that Orange had itself acknowledged that the contested measure had had a significant impact on competition in that it had been indispensable in enabling it to play a part in the development of competition.

61 Lastly, the General Court considered that the question whether the contested measure was necessary to enable France Télécom to deal with its alleged competitive disadvantage was relevant, not to the requirement that competition be distorted, but to the requirement that there should be an advantage, and that this had been examined in connection with the first part of the first plea in law at first instance.

62 Accordingly, first, as the Advocate General observed in point 75 of his Opinion, the judgment under appeal clearly sets out the reasons why the General Court endorsed the Commission's assessment regarding the distortion of competition test.

63 As the reasoning adopted therefore enabled, as required by the Court's established case law, the interested parties to know the grounds upon which the General Court relied and provided the Court with sufficient material for it to exercise its powers of review on appeal, the complaint alleging that the judgment under appeal fails to state adequate reasons must be rejected.

64 Second, it should be recalled that the Commission is required, not to establish that aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether the aid is liable to affect such trade and distort competition (judgment of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 13 and the case-law cited).

65 In that regard, the fact that an economic sector has been the subject of liberalisation at EU level may serve to determine that the aid in question has a real or potential effect on competition and affects trade between Member States (judgment of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 53 and the case-law cited).

66 With regard to the requirement that competition should be distorted, it must be borne in mind in that regard that, in principle, aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition (judgment of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 54 and the case-law cited).

67 In the present case, the General Court found, in paragraph 61 of the judgment under appeal, that it is apparent from recitals 114 to 116 of the decision at issue that the 1996 Law made and makes available to Orange greater financial resources to operate on the markets on which it is active, that the telecommunications services market on which Orange operated and operates throughout France and in other Member States was gradually opened up to competition and that those two factors enabled it to develop more easily on the markets of other Member States newly opened up to competition.

68 Bearing in mind those findings, which are not challenged by Orange, the General Court was entitled, without erring in law, to endorse the Commission's assessment that the contested measure was liable to distort competition.

69 In the light of the foregoing considerations, the third part of the first ground of appeal and, therefore, that ground in its entirety must be rejected.

The second ground of appeal, alleging that the General Court erred in law in its assessment as to whether the contested measure was compatible with the internal market

First part of the second ground of appeal, alleging that the General Court distorted the facts and failed to have regard to its duty to state reasons in its assessment of the purpose of the exceptional flat-rate contribution

– Arguments of the parties

70 Orange contends that the General Court distorted the facts before it and failed to have regard to its duty to state reasons when it held, in paragraphs 93 and 94 of the judgment under appeal, that the wording of the 1996 Law did not militate against the Commission's 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 liabilities could not be compensated for by that contribution.

71 Orange maintains that, contrary to the General Court's assertion, the exceptional flat-rate contribution was a social security cost for Orange as Article 30 of the 1996 Law provided that it was to be paid 'in return for the payment and servicing by the State of the pensions granted to its civil servant staff'.

72 The Commission disputes Orange's arguments.

– Findings of the Court

73 The General Court stated, in paragraphs 93 and 94 of the judgment under appeal, that the wording of the 1996 Law did not militate against the Commission's interpretation that the exceptional flat-rate contribution was not a social security cost like the employer's contribution in full discharge of liabilities, but pursued other objectives, deducing from this that the Commission had not erred in law or exceeded the bounds of its discretion by taking the view that the fact that the non-common risks had not been taken into account in the employer's contribution in full discharge of liabilities could not be compensated for by the flat-rate exceptional contribution.

74 That assessment is based on the finding in paragraph 92 of that judgment that 'it is apparent from a reading of subparagraph (c) in conjunction with subparagraph (d) of Article 30 of the 1990 Law, as amended by the 1996 Law, that the employer's contribution in full discharge of liabilities was designed "to equalise the levels of wage-based social security contributions and tax payments" between France Télécom and its competitors, whereas those provisions were silent as to the purpose of the exceptional flat-rate contribution'.

75 Accordingly, first, as the Advocate General observed in point 86 of his Opinion, the judgment under appeal sets out clearly the reasons why the General Court rejected Orange's claims.

76 As the reasons given therefore enabled, in accordance with the Court's established case-law, the interested parties to know the grounds upon which the General Court relied and provided the Court with sufficient material for it to exercise its powers of review on appeal, the complaint alleging that the judgment under appeal failed to give adequate reasons must be rejected.

77 Second, as the Advocate General observed in point 85 of his Opinion, the argument summarised in paragraph 71 above cannot invalidate the finding set out in paragraph 92 of the judgment under appeal. Accordingly, it is clear that the distortion alleged is not manifestly apparent from the documents before the Court, and that, by its arguments, Orange is in fact asking the Court to carry out a fresh assessment of the facts and evidence, which falls outside the Court's jurisdiction.

78 It follows that the argument alleging that the 1996 Law was distorted must be rejected as manifestly unfounded.

79 The first part of the second ground of appeal must therefore be rejected as unfounded.

The second part of the second ground of appeal, alleging that the General Court failed to have regard to its duty to state reasons in its assessment of the 'La Poste precedent'

– Arguments of the parties

80 By the second part of the second ground of appeal, Orange contends that the General Court failed to have regard to its duty 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 incorrect. 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 France Télécom differently from that of civil servants working for La Poste.

81 The Commission disputes Orange's arguments.

– Findings of the Court

82 As the Advocate General noted in points 90 to 93 of his Opinion, the observations made by the General Court in paragraphs 99 to 101 of the judgment under appeal were made purely for the sake of completeness. Therefore, the arguments put forward by Orange in the appeal are ineffective as, even if they were well founded, they could not result in the judgment under appeal being set aside.

83 It follows that the second part of the second ground of appeal and, therefore, that ground in its entirety must be dismissed as wholly unfounded.

The third ground of appeal, alleging that the General Court erred in law in its assessment of the period during which the aid was neutralised by the exceptional flat-rate contribution

Arguments of the parties

84 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], in spite of the fact that, in recital 119 of that decision, the Commission merely concluded that that aid consisted in the reduction of the compensation in the form of the employer's contribution, with no mention of the compensation and over-compensation charges.

85 Orange adds that compensation and over-compensation charges are normally borne by pension funds alone, not directly by undertakings. The General Court was not entitled to conclude that the arrangements introduced by the 1990 Law consisted of normal costs and that the 1996 Law therefore relieved the undertaking of costs normally borne by its budget.

86 The Commission disputes Orange's arguments.

Findings of the Court

87 The General Court stated, in paragraph 107 of the judgment under appeal, 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'.

88 Nevertheless, the General Court observed, in paragraph 108 of that judgment, that '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'.

89 That finding was based on the following considerations, to be found in paragraphs 104 to 106 of the judgment under appeal:

'104 In the present case, it should be noted that State aid is defined in Article 1 of the [decision at issue] as 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]".

105 In recital 105 of the [decision at issue], the Commission explains that the amount of aid in question may be calculated as "the annual difference between the contribution in full discharge of liabilities paid by France Télécom to the State and the costs that it would have paid pursuant to the 1990 Law, indicated in Table No 1, if these had remained unchanged, after deducting the total flat-rate contribution paid in 1997". It is apparent from Table No 1 in recital 18 of the [decision at issue] that the compensation and over-compensation charges are included in the charges paid by the applicant to the State between 1991 and 1996.

106 The Commission therefore indicated that the compensation and over-compensation charges were included in the calculation of the contribution paid pursuant to the 1990 Law and that the State aid was defined and calculated as the reduction in that contribution made by the 1996 Law.'

90 Thus, it is clear that, following that line of reasoning, the General Court did not substitute its own grounds for those in the decision at issue but simply interpreted that decision in the light of its actual content. Furthermore, contrary to what is claimed by Orange, that interpretation faithfully reflects the inconsistencies in that decision without distorting them.

91 Accordingly, the third ground of appeal must be rejected as unfounded.

92 Having regard to all the foregoing considerations, the appeal must be dismissed.

Costs

93 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs.

94 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

95 Since Orange has been unsuccessful and the Commission has applied for costs, Orange must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders Orange to pay the costs.

[Signatures]