Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

30 November 2016*

(Appeal — State aid — Financial measures for France Télécom — Shareholder loan offer — Public statements by representatives of the French State — Decision declaring the aid incompatible with the common market — Definition of 'aid' — Concept of 'economic advantage' — Prudent private investor criterion — Obligation of the General Court to state reasons — Limits of judicial review — Distortion of the decision at issue)

In Case C-486/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 14 September 2015,

European Commission, represented by C. Giolito, B. Stromsky, D. Grespan and T. Rusche, acting as Agents,

applicant,

the other parties to the proceedings being:

French Republic, represented by G. de Bergues and D. Colas and by J. Bousin, acting as Agents,

applicant in Case T-425/04 RENV,

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

applicant in Case T-444/04 RENV,

Federal Republic of Germany,

intervener in Case T-425/04 RENV,

THE COURT (Sixth Chamber),

composed of E. Regan, President of the Chamber, J.-C. Bonichot and A. Arabadjiev (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: French.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 2 July 2015, *France and Orange* v Commission (T-425/04 RENV and T-444/04 RENV, EU:T:2015:450) ('the judgment under appeal'), by which it annulled Article 1 of Commission Decision 2006/621/EC of 2 August 2004 on the State Aid implemented by France for France Télécom (OJ 2006 L 257, p. 11) ('the decision at issue').

Background to the dispute

2 The background to the dispute has been set out in paragraphs 1 to 98 of the judgment under appeal. The essential elements thereof for the purposes of ruling on the present appeal are the following:

General context of the case

3 France Télécom, subsequently Orange ('FT'), an operator and supplier of telecommunications networks and services, was formed in 1991 as a legal person governed by public law, and since 31 December 1996 has had the status of a public limited company. Since October 1997, FT has been listed on the stock exchange. In 2002 the French State's participation in FT's capital was 56.45%, the remainder of the shares being divided between the public (32.25%), France Télécom itself (8.26%) and employees of the company (3.04%).

4 During the first quarter of 2002, FT published its accounts for 2001, which showed a net debt of EUR 63.5 billion and a loss of EUR 8.3 billion.

5 In the period from March to June 2002, the credit rating agencies Moody's and Standard & Poor's ('S & P') downgraded FT's rating and also downgraded its prospects to negative. In particular, on 24 June 2002 Moody's downgraded FT's rating for long- and short-term credit notes to the lowest investment grade. At the same time, FT's share prices fell significantly.

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

'We are the majority shareholder, with 55% of the capital … The State shareholder will behave like a prudent investor and would take appropriate steps if [FT] were to face any difficulties … I repeat, if [FT] were to face any financing problems, which is not the case today, the [French] State would take whatever decisions were necessary to overcome them. You are reviving the rumour of a capital increase … No, certainly not! I am simply saying that we shall take appropriate measures when the time comes. If it is necessary …'

7 On that same date, S & P published a press release which read as follows:

'FT could face certain difficulties [in] refinancing its debt obligations coming due in 2003. Nevertheless, the [French] State's indication underpins [FT]'s investment-grade credit quality … The French State — which owns 55% of [FT] — has made clear to [S & P] that it will behave as an aware investor and would take appropriate steps if [FT] were to face any difficulties. [FT's] [long-term] rating cut to BBB — …'

8 On 12 September 2002, the French authorities announced that they had accepted the resignation of FT's chief executive officer.

9 On 13 September 2002, FT published its half-yearly accounts, which confirmed that, as at 30 June 2002, FT's consolidated own funds became negative to the amount of EUR 440 million, and that its net debt reached EUR 69.69 billion, including EUR 48.9 billion of bond debt falling due for repayment during the period from 2003 to 2005. According to the same half-yearly accounts, FT's turnover showed an increase of 10% compared with the same period in 2001, an operating result before amortisation amounting to EUR 6.87 billion, that is, an increase of 13.3% in historical data and 9.8% in pro forma data, and operating earnings of EUR 3.18 billion, up 15% in pro forma data. Earnings after interest (EUR 1.75 billion) but before taxes, minority shareholdings and interests, exclusive of extraordinary items, were EUR 718 million against EUR 271 million as at 30 June 2001. The operating free cash flow amounted to EUR 3.6 billion, up 15% on the first six months of 2001.

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

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

11 That same day, Moody's changed the outlook of FT's debt from negative to stable in a press release stating inter alia:

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

12 On 2 October 2002, a new chief executive officer was appointed to FT. The press release announcing that appointment read as follows:

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

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

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

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

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

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

'The Minister for Economic Affairs … confirms the [French] State's support for the action plan approved by [FT]'s board of directors on 4 December [2002]. (1) The [FT] group is a coherent industrial entity with a remarkable track record. However, [FT] is now faced with an unbalanced financial structure and a need for capital and refinancing in the medium term. This state of affairs is due to the failure of past investments, which were carried out badly at the height of the financial "bubble" and, more generally, to the market downturn. The impossibility for [FT] to finance its growth otherwise than through debt has made the situation worse. (2) The [French] State, as majority shareholder, has asked the new management to restore [FT]'s financial equilibrium while maintaining the group's integrity … (3) In the light of the action plan drawn up by management and the investment return prospects, the [French] State will participate in the EUR 15 billion strengthening of [FT]'s capital base in proportion to its share in the capital, giving an investment of EUR 9 billion. The [French] State shareholder thus intends to act like a prudent investor. It will be for [FT] to work out the detailed arrangements and precise timetable for the strengthening of its capital base. The [French] Government wants the utmost account to be taken during the operation of the situation of individual shareholders and of employees with shares in [FT]. To enable [FT] to launch a market operation at the most opportune moment, the [French] State is prepared to make an upfront prepayment towards the strengthening of the capital base in the form of a temporary shareholder loan, remunerated at market rates, placed at [FT]'s disposal. (4) The [French] State's entire shareholding in [FT] will be transferred to ERAP … The latter will borrow on the financial markets in order to finance the [French] State's share in the strengthening of [FT]'s capital base.'

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

17 On 20 December 2002, ERAP sent FT an initialled and signed draft shareholder loan contract ('the shareholder loan offer'). FT did not sign that draft contract and the shareholder loan was never implemented.

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

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

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

21 FT ended the 2002 financial year with a loss of approximately EUR 21 billion and a net financial debt of approximately EUR 68 billion. The accounts for 2002 published by FT on 5 March 2003 showed a rise of 8.4% in turnover, of 21.1% in the operating result before amortisation and of 30.9% in the operating result. On 14 April 2003, the French State held 58.9% of FT's capital, of which 28.6% through ERAP.

Administrative procedure and the decision at issue

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

23 On 22 January 2003, Bouygues SA and Bouygues Télécom SA (together 'the Bouygues companies'), two companies governed by French law, the latter of which is active on the French market for mobile telephony, submitted a complaint to the Commission concerning certain aids granted by the French State to FT in connection with the refinancing of FT. That complaint related, in particular, firstly, to the announcement of an investment by the French State to the amount of EUR 9 billion and, secondly, to the public declarations of 12 July, 13 September and 2 October 2002 ('the declarations from July 2002').

24 By letter of 31 January 2003, the Commission informed the French Republic of its decision to open the formal investigation procedure provided for in Article 88(2) EC with regard to inter alia the financial measures implemented by the French State in favour of FT ('the opening decision') (OJ 2003 C 57, p. 5). Therein the Commission invited interested parties to submit their comments on the measures in question.

25 On 3 August 2004 the Commission notified the French authorities of the decision at issue.

26 In recital 185 of the decision at issue, under Section 6, entitled 'Object of the present Decision', the Commission indicated inter alia that the notified measures could not be analysed 'without having regard to the declarations of the [French] Government of July to December 2002'. By those declarations, the French authorities manifested their willingness to take appropriate steps to resolve FT's financial difficulties. The shareholder loan offer was the concretisation of their intentions expressed previously.

27 In recital 186 of the decision at issue, the Commission observed as follows:

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

28 In recital 187 of the decision at issue, the Commission observed that it was possible to view the successive declarations and measures of the French authorities from July 2002 onwards as forming a 'set which took concrete shape in the December [2002]'.

29 Next, in recitals 188 to 191 of the decision at issue, the Commission stated the following:

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

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

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

(191) In this connection, the "private investor in a market economy" test cannot be used to justify this December [2002] intervention as the French authorities claim, inasmuch as economic operators' conduct in December was clearly influenced by the prior actions and declarations of the Government since July [2002]. While it may be doubted that [the declaration of 12 July 2002 was] sufficiently concrete to constitute aid in [itself], there is scarcely any doubt that such [a declaration was] more than sufficient to "contaminate" the markets' perception and to influence economic operators' subsequent conduct. If such is the case, this conduct on the part of economic operators cannot be taken as a neutral point of comparison from which to judge the [French] State's conduct. The presumption based on the "private investor in a market economy" test cannot therefore take as [a] point of departure the market situation as it was in December [2002] but ought logically to be based on a market situation uncontaminated by the impact of the prior declarations.'

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

shareholder loan proposal (recitals 203 to 230 of the decision at issue). The content of those declarations and their effect on the market indicate that the French State had decided in July 2002 that it would support FT (recital 203 of the decision at issue).

31 Relying inter alia on the report of 28 April 2004, which referred to an abnormal and not negligible increase in the value of FT's shares and bonds following the declaration of 12 July 2002, on S & P's press release of the same date and on the Deutsche Bank report of 22 July 2002, the Commission concluded that 'the market regarded these declarations as a credible strategy of commitment by the [French] State to support FT' (recitals 220 and 221 of the decision at issue).

32 The Commission added, in recital 222 of the decision at issue, that those declarations had had very important effects on the market. They had helped to restore confidence on financial markets and had been decisive in maintaining FT's investment-grade rating. A downgrading of that rating would have made the shareholder loan offer more unlikely and certainly much more costly.

33 According to the Commission, 'the fact that the measures notified in December [2002], viewed separately, may create the illusion of perfectly rational transactions does not alter the fact that the behaviour of economic operators in December was clearly influenced by the actions and declarations made by the [French] State beforehand, notably from July 2002, signalling the [French] State's intention to mitigate [FT]'s financing problems' (recital 225 of the decision at issue). In that sense, the French authorities' decision to act upfront of FT's recapitalisation by granting a credit line constituted a concretisation of their declarations (recital 226 of the decision at issue).

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

35 However, 'it would appear' that, if the investment decisions in question are examined in the context of the situation prior to July 2002, they do not satisfy the prudent private investor criterion (recital 228 of the decision at issue). At that time, FT was operating in a difficult economic context and had lost the confidence of the markets, and the French authorities had not yet taken any steps to improve FT's operations and results, commissioned any in-depth audit, appointed a new management team or even prepared a recovery plan for the company. In those circumstances, it is 'improbable that a private investor would, from July 2002, have made declarations similar to those made by the French Government, likely as they were, from a purely economic point of view, … seriously [to] place his credibility and reputation on the line and, from a legal point of view, … even [to] oblige him from that date to support [FT] financially come what may'. In so doing, such an investor would have assumed a very considerable risk vis-à-vis FT, without being indemnified or compensated. Even a reference shareholder in possession of the same information as that which the French authorities had at their disposal at the time would not have made a declaration of support for FT in July 2002 without first carrying out a thorough audit of FT's financial situation and taking any measures necessary for its recovery in order to be able to assess the scale of the risk and the remuneration prospects involved in such a step. In any event, such a reference shareholder would have needed the

financial markets' help in putting right FT's situation. However, those markets 'did not at that time seem prepared to invest in or grant much in the way of credit to [FT]' (recital 229 of the decision at issue).

36 Thus, according to the Commission, 'it is unlikely that a prudent private investor in the same position as the French State would, in the light of [FT]'s economic situation and the unavailability of any clear, comprehensive information thereon, have made any declarations of support for [FT] in July 2002'. It was even less likely that a prudent private investor 'would have granted a shareholder loan, taking on himself alone a very substantial financial risk' (recital 229 of the decision at issue).

37 The Commission concluded from all the above that 'the [criterion] of the prudent private investor in a market economy [was] not satisfied' and that, 'consequently, the advantage conferred on [FT] by the … shareholder loan [offer] — examined in the light of the prior declarations and interventions of the French authorities — constitute[d] State aid, even if the scale of the advantage [was] difficult to calculate' (recital 230 of the decision at issue).

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

Previous judicial proceedings

39 By applications lodged at the General Court Registry on 13 October 2004 (Case T-425/04), 5 November 2004 (Case T-444/04) and 9 November 2004 (Case T-450/04) respectively, the French Republic, FT and the Bouygues companies each brought an action seeking annulment of the decision at issue in its entirety. By application lodged at the General Court Registry on 12 November 2004 (Case T-456/04), the Association française des opérateurs de réseaux et services de télécommunications (AFORS Télécom) brought an action seeking annulment of Article 2 of that decision.

40 By judgment of 21 May 2010, *France* v *Commission* (T-425/04, T-444/04, T-450/04 and T-456/04, EU:T:2010:216), the General Court annulled Article 1 of the decision at issue and declared that there was no need to adjudicate on the claims for annulment of Article 2 of that decision.

41 In particular, the General Court held, in paragraph 298 of that judgment, that the Commission had not demonstrated that the announcement of 4 December 2002 involved a transfer of State resources.

42 As to the shareholder loan offer, the General Court found, in paragraph 299 of that judgment, that, in so far as the Commission had not established satisfactorily an advantage deriving from the offer, it was not, a fortiori, possible for the Court to find the existence of any transfer of State resources linked to that advantage.

43 By applications lodged at the Registry of the Court of Justice on 4 and 3 August 2010 respectively, the Bouygues companies (Case C-399/10 P) and the Commission (Case C-401/10 P) appealed against the judgment of 21 May 2010, *France* v *Commission* (T-425/04, T-444/04, T-450/04 and T-456/04, EU:T:2010:216).

44 By judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others* (C-399/10 P and C-401/10 P, EU:C:2013:175) ('*Bouygues*'), the Court of Justice set aside the judgment of 21 May 2010, *France* v *Commission* (T-425/04, T-444/04, T-450/04 and T-456/04, EU:T:2010:216), and referred Cases T-425/04, T-444/04 and T-450/04 back to the General Court for judgment on the pleas raised and the claims made before it on which the Court of Justice had not given a ruling, whilst reserving costs.

45 First of all, in paragraph 76 of *Bouygues*, the Court of Justice held that, in the decision at issue, the Commission had not adopted a position on the argument put forward by the Bouygues companies in their complaint of 22 January 2003, to the effect that the declarations from July 2002 in themselves constituted State aid. In particular, in paragraphs 73 to 75 of that judgment, it observed that those declarations had been taken into consideration only in so far as they were objectively relevant to the assessment of the shareholder loan offer and that the Commission had examined them only in so far as they formed the basis for that aid measure.

46 Accordingly, in paragraph 77 of *Bouygues*, the Court of Justice held that the General Court had erred in law in holding, in paragraphs 128 and 131 of the judgment of 21 May 2010, *France* v *Commission* (T-425/04, T-444/04, T-450/04 and T-456/04, EU:T:2010:216), that Article 1 of the decision at issue contained the Commission's refusal to characterise the declarations from July 2002 as State aid. The Commission's failure to express a view on the characterisation of these declarations, in themselves, as State aid, following the complaint by the Bouygues companies, clearly could not be regarded per se as a decision rejecting their claims.

47 Next, the Court of Justice held, in paragraphs 103 and 104 of *Bouygues*, that as State interventions take various forms and must be assessed in relation to their effects, the possibility cannot be ruled out that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. That could be the case in particular where consecutive interventions, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely linked to each other that they are inseparable from one another.

48 The Court of Justice went on to conclude, in paragraph 105 of *Bouygues*, that, having found that it was necessary to identify a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget, closely linked and corresponding to, or having as a counterpart, a specific advantage deriving either from the announcement of 4 December 2002 or from the shareholder loan offer, the General Court erred in law by applying a test that immediately excludes those State interventions, depending on their links with one another and their effects, from being regarded as a single intervention.

49 Lastly, the Court of Justice considered that it had the necessary information to give final judgment, first, on the application for annulment of Article 1 of the decision at issue, in that the Commission had refused to characterise the declarations from July 2002 as State aid in Case T-450/04, and, secondly, on the second part of the second plea and the third plea raised by the French Republic and by FT in support of their actions in Cases T-425/04 and T-444/04 in so far as that part and that plea were directed against the finding made in the decision at issue of an advantage conferred on FT by the French State.

50 Regarding the first claim, in paragraph 118 of *Bouygues*, the Court of Justice held that the pleas in the application in Case T-450/04 seeking annulment of Article 1 of the decision at issue, in that the Commission refused to characterise the declarations from July 2002 as State aid, were ineffective.

51 Regarding the second claim, in paragraphs 129 to 131 of *Bouygues* the Court of Justice inferred from certain passages from recitals 194 and 196 of the decision at issue that the Commission had considered that the announcement of 4 December 2002 and the shareholder loan offer, taken together, conferred an advantage entailing the commitment of State resources within the meaning of Article 107(1) TFEU and that the Commission had been correct in examining the two measures together, as it was clear that they were inseparable from one another.

52 By contrast, in paragraphs 140 and 141 of *Bouygues*, the Court of Justice held that the state of the proceedings did not permit a decision by it in relation to the second and third pleas relied upon by the French Republic and by FT, in so far as those pleas were directed against the Commission's application of the prudent private investor criterion.

The procedure before the General Court and the judgment under appeal

53 Following delivery of the judgment in *Bouygues*, Cases T-425/04 RENV, T-444/04 RENV and T-450/04 RENV were reassigned to the Sixth Chamber, Extended Composition, of the General Court.

54 By letter of 22 July 2013, FT informed the General Court that it had changed its business name to Orange on 1 July 2013.

55 By orders of the President of the Sixth Chamber, Extended Composition, of the Court of 27 June 2014, the Bouygues companies were removed from Case T-444/04 RENV as interveners in support of the forms of order sought by the Commission and Case T-450/04 RENV was removed from the register of the General Court, since they had withdrawn their intervention and their appeal.

56 By order of the President of the Sixth Chamber, Extended Composition, of the Court of 15 July 2014, Cases T-425/04 RENV and T-444/04 RENV were joined for the purposes of the oral procedure and the judgment.

57 In Case T-425/04 RENV, the French Republic, supported by the Federal Republic of Germany, and in Case T-444/04 RENV, Orange, claimed that the Court should annul the decision at issue and order the Commission to pay the costs.

58 In those cases, the Commission contended that the Court should dismiss the action as unfounded and that the French Republic and Orange should be ordered to pay the costs. At the hearing on 24 September 2014, the Commission also contended that the action in Case T-444/04 RENV should be dismissed as inadmissible.

59 By the judgment under appeal, the General Court first of all rejected the plea of inadmissibility raised by the Commission in Case T-444/04 RENV on the ground that Orange continued to have a vested and present interest in the annulment of Article 1 of the decision at issue.

60 Next, it examined the claim for annulment of Article 1 of the decision at issue. In so doing, the General Court began by rejecting the first pleas put forward under that claim, alleging infringement of essential procedural requirements and of the rights of the defence. Then, it analysed jointly and upheld the second and third pleas put forward, alleging errors of law and manifest errors of assessment in relation to the application of the prudent private investor criterion, and went on to annul Article 1.

61 The General Court held that, in those circumstances, there was no need to adjudicate on the claims put forward by the French Republic and Orange for annulment of Article 2 of the decision at issue.

62 Lastly, in the light of those findings, the General Court ordered the Commission to bear its own costs and to pay eight tenths of the costs incurred by the French Republic and Orange.

Forms of order sought

63 The Commission claims, principally, that the Court should:

— set aside the judgment under appeal in so far as it annulled Article 1 of the decision at issue and ordered the Commission to bear its own costs and to pay eight tenths of the costs incurred by the French Republic and Orange in Cases T-425/04 and T-444/04;

— dismiss the actions brought by the French Republic and Orange in Cases T-425/04 and T-444/04; and

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

64 In the alternative, the Commission asks the Court of Justice to refer Cases T-425/04 and T-444/04 back to the General Court and to reserve costs.

65 Orange and, by way of principal claim, the French Republic, contend that the Court should dismiss the appeal and order the Commission to pay the costs.

66 In the alternative, should the Court of Justice set aside the judgment under appeal, the French Republic contends that Case T 425/04 RENV should be referred back to the General Court for judgment on the first part of the second plea in law and on the third and fourth pleas in law.

67 In the further alternative, the French Republic asks the Court of Justice to uphold the first part of the second plea in law and the third and fourth pleas in law and to order the Commission to pay the costs.

Consideration of the appeal

68 The Commission puts forward four grounds in support of its appeal: (i) infringement of the obligation to state reasons; (i) seven separate infringements of Article 107(1) TFEU; (iii) an exceeding of the limits of judicial review; and (iv) misinterpretation to the point of being a distortion of the decision at issue.

69 Orange disputes the admissibility of the first and second grounds of appeal.

Admissibility of the first and second grounds of appeal

Arguments of Orange

70 Orange submits that, under Article 1 of the decision at issue, firstly, the only interventions by the French State that could be regarded as a single intervention and categorised as State aid are the announcement of 4 December 2002 and the shareholder loan offer and, secondly, that the declarations from July 2002 are taken into account therein only as forming part of the overall context. The Commission's line of argument before both the General Court and the Court of Justice has been in a similar vein.

71 In particular, as evidenced by paragraph 259 of the judgment under appeal, even when questioned expressly and specifically on this point by the General Court, the Commission never went so far as to affirm that, like the announcement of 4 December 2002 and the shareholder loan offer, the declarations from July 2002 amounted to a single intervention categorised as State aid.

72 In those circumstances, Orange considers that the first and second grounds of appeal must be held to be inadmissible, as in those grounds the Commission is putting forward new arguments criticising the General Court for failing to rule on the question whether those declarations had to be regarded as forming part of a single intervention.

Findings of the Court

73 As is apparent from both the observations of the French Government and paragraph 255 of the judgment under appeal, before the General Court the Commission argued that the declarations from July 2002 had to be regarded as forming part of a single intervention in support of FT, and that the General Court addressed that line of argument specifically in paragraphs 256 to 261 of its judgment.

74 In those circumstances, the plea of inadmissibility raised by Orange, alleging that a new line of argument has been put forward on appeal, must be rejected.

The first ground of appeal: infringement of the obligation to state reasons

Arguments of the Commission

75 The Commission begins by arguing that the General Court disregarded the principles established by *Bouygues*, failed to address adequately the arguments put forward by it when the case was referred back to the General Court and, lastly, that its reasoning is vitiated by contradictions.

76 When the General Court referred, in paragraphs 185 to 196 of the judgment under appeal, to the case-law it considered relevant in the light of the prudent private investor criterion, it did not refer to *Bouygues* and thus failed to examine the question whether that judgment had provided clarifications as to the scope of that criterion.

77 Next, the Commission adds that, in its observations after the case had been referred back to the General Court, it had explained how the declarations from July 2002 objectively formed part of the analytical context of the shareholder loan offer and were chronologically, economically and functionally linked to it, with the result that, together with that offer, they formed a single intervention. Although, in paragraphs 255 to 258 of the judgment under appeal, the General Court did analyse certain aspects of the concept of single intervention, it merely addressed semantic issues so as to avoid a genuine examination of the Commission's argument.

78 Lastly, the Commission argues that the General Court contradicted itself by stating, in paragraphs 219 and 222 of the judgment under appeal, that in order to establish whether or not the French State had adopted the conduct of a prudent private investor operating in a market economy, it was necessary to place oneself in the context of December 2002, during which the financial support measures were taken, thereby ruling out of that context the declarations from July 2002 whilst holding, in paragraphs 227 and 228 of that judgment, that, in order to assess the economic rationality of the French State's conduct, the Commission could take account of all the factors characterising that context, including such declarations.

Findings of the Court

79 It should be borne in mind that the obligation laid down in Article 296 TFEU to state adequate reasons is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 146 and the case-law cited).

80 According to the settled case-law of the Court, the duty incumbent upon the General Court under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to understand the grounds of the General Court's judgment and provides the Court of Justice with sufficient information to exercise its powers of review on appeal (judgment of 8 March 2016, *Greece* v *Commission*, C-431/14 P, EU:C:2016:145, paragraph 38).

81 In the present case, it is clear that the reasoning set out in paragraphs 185 to 196, 219, 222, 227, 228 and 255 to 258 of the judgment under appeal enables the persons concerned, and the Commission in particular, to understand the grounds of the General Court's judgment and provides the Court of Justice with sufficient information to exercise its powers of review in the present appeal.

82 As rightly pointed out by the French Government and Orange, neither the fact that the General Court did not refer to *Bouygues* in its review of the case-law in paragraphs 185 to 196 of the judgment under appeal, nor the fact that it rejected the Commission's arguments following a detailed examination set out in paragraphs 255 to 258 of that judgment, constitute in themselves a failure to provide an adequate statement of reasons.

83 Moreover, the Commission's argument that there is a contradiction between, on the one hand, paragraphs 219 to 222 of the judgment under appeal and, on the other, paragraphs 227 and 228 thereof, is based on a misreading of those paragraphs. The General Court merely observed in those paragraphs that the Commission could not take account only of the declarations from July 2002, to the exclusion of other factors relevant to the analysis.

84 In the light of the foregoing considerations, the first ground of appeal must be rejected as completely unfounded.

The third ground of appeal: exceeding of the limits of judicial review

Arguments of the Commission

85 By the third ground of appeal, which should be examined second, the Commission submits that the prudent private investor criterion involves a complex economic assessment in which it must be recognised as having broad discretion. Consequently, in this field, the judicial review should, as a rule, be limited to ascertaining whether there is a manifest error in the assessment of the facts. In particular, when conducting such a review, the Courts of the European Union must not substitute their own economic assessment for that of the Commission.

86 Yet, in the Commission's submission, in stating in paragraphs 235 and 236 of the judgment under appeal that the market perception of the declarations from July 2002 was not relevant to the case before it, the General Court substituted its own analysis for the Commission's, whereas it ought to have confined itself to examining whether recitals 210, 217 and 229 of the decision at issue were vitiated by a manifest error of assessment.

Findings of the Court

87 According to the Court's settled case-law, State aid, as defined in the FEU Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the EU Courts must in principle, having regard both to the specific features of the case before them and to the technical or

complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (judgment of 21 June 2012, *BNP Paribas and BNL* v *Commission*, C-452/10 P, EU:C:2012:366, paragraph 100).

88 The Court of Justice has nevertheless held that judicial review is limited with regard to whether a measure comes within the scope of Article 107(1) TFEU, in a case where the appraisals by the Commission are technical or complex in nature (judgment of 21 June 2012, *BNP Paribas and BNL* v *Commission*, C-452/10 P, EU:C:2012:366, paragraph 103).

89 Where, in order to determine whether a measure comes within the scope of Article 107(1) TFEU, the Commission must apply the prudent private investor criterion in a market economy, as a rule, the application of that test requires the Commission to make a complex economic assessment (see, to that effect, judgment of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 68).

90 In the present case, as correctly pointed out by the French Government and Orange, the General Court's reasons criticised by the Commission do not relate to the application of the prudent private investor criterion per se, but rather the moment in which the Commission ought to have placed itself to make that assessment and, therefore, the evidence it had to take into account in that regard.

91 They further point out that, even if the review to be conducted by the General Court on that point had to be limited, as alleged by the Commission, that fact does not mean that the General Court must refrain from reviewing the Commission's legal classification of information of an economic nature. Although the General Court must not substitute its own economic assessment for that of the Commission, it is apparent from now well-settled case-law that not only must the EU judicature establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 46).

92 In paragraphs 235 to 248 of the judgment under appeal, the General Court did just that: conducted a review of the Commission's assessment of the evidence on which the Commission relied to find that it was appropriate to apply the prudent private investor criterion in July 2002 and not December 2002. It found in that regard that there had been a selective taking into account of the available evidence and that that evidence was not such as to substantiate the conclusions drawn therefrom by the Commission. It therefore held that the Commission's assessment was vitiated by a manifest error.

93 Thus, in the light of the case-law referred to in paragraph 91 above and contrary to the Commission's assertions, in making that assessment the General Court did not exceed the limits of the judicial review that it was bound to carry out.

94 It follows that the third ground of appeal must be rejected as unfounded.

The fourth ground of appeal: misinterpretation to the point of being a distortion of the decision at issue and distortion of the facts

Arguments of the Commission

95 By the fourth ground of appeal, which should be examined third, the Commission submits that the General Court distorted the decision at issue in finding, in paragraphs 246 to 248 of the judgment under appeal, that a mere expectation on the part of the market could not create any legal obligation

to act and that the Commission had not demonstrated that non-compliance by the French State with any statements in relation to FT was capable of jeopardising its reputation on the financial markets. Recital 217 of that decision shows just that, supported by evidence.

96 The Commission further submits that the General Court also distorted the facts by holding that a prudent private investor could have made statements similar to the declarations from July 2002, whereas, until early December 2002, neither the French Government nor FT had a recovery plan or an estimate of the capital required. The Commission in effect argues that if a State has no information about the financial return on its operation, it cannot purport to act as a prudent private investor.

Findings of the Court

97 It follows from the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts (judgments of 6 April 2006, *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraph 51, and of 29 March 2011, *ThyssenKrupp Nirosta* v *Commission*, C-352/09 P, EU:C:2011:191, paragraph 179).

98 Therefore, the appraisal of the facts by the General Court does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (judgments of 18 May 2006, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, C-397/03 P, EU:C:2006:328, paragraph 85, and of 29 March 2011, *ThyssenKrupp Nirosta* v *Commission*, C-352/09 P, EU:C:2011:191, paragraph 180).

99 Where an appellant alleges distortion of the evidence by the General Court, he must, pursuant to Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 168(1)(d) of its Rules of Procedure, indicate precisely the evidence alleged to have been distorted and show the errors of appraisal which, in his view, led to such distortion (judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 16 and the case-law cited). In addition, according to the Court of Justice's settled case-law, that distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and the evidence (judgment of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 59 and the case-law cited).

100 In the present case, first of all, it is apparent from paragraph 246 of the judgment under appeal that the General Court took into account recital 217 of the decision at issue, as rightly pointed out by the French Government.

101 Next, it was observed in paragraph 92 above that, in paragraphs 235 to 248 of the judgment under appeal, the General Court examined the Commission's assessment of the evidence on which the Commission based itself to find that it was appropriate to apply the prudent private investor criterion to the context of July 2002 and not December 2002, that it took the view that that assessment was based on a selective consideration of the available evidence and that that evidence did not substantiate the conclusions drawn therefrom by the Commission.

102 Lastly, it is clear that, by its argument, the Commission does not specify which evidence was distorted by the General Court; rather, it challenges the General Court's assessment of the facts, according to which the conclusions in the decision at issue were not substantiated to the requisite legal standard by the evidence relied on in support thereof.

103 Thus, in the light of the foregoing considerations, the Commission cannot criticise the General Court for having distorted the decision at issue and the evidence.

104 The fourth ground of appeal must therefore be rejected as unfounded.

The second ground of appeal: infringements of Article 107(1) TFEU

Arguments of the Commission

105 By its second ground of appeal, the Commission submits that, in isolating the declarations from July 2002 from the announcement of 4 December 2002 and from the shareholder loan offer, the General Court separated the market reassurance provided by those declarations, on the one hand, from the increase in means of financing, on the other, thereby adopting a point-by-point approach based on seven distinct errors of law giving rise to seven infringements of Article 107(1) TFEU. Its line of argument is broken down into seven parts.

106 By the first part, the Commission submits that the General Court erred in law, in paragraphs 219 to 248 of the judgment under appeal, in identifying a precise moment at which the prudent private investor criterion was to be applied. In the Commission's submission, that approach comes up against paragraph 103 of *Bouygues*, according to which the possibility cannot be ruled out that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention.

107 In fact, the Court of Justice not only held that several non-simultaneous events may be assessed together, it also acknowledged that it is not necessary for each of those events to comprise both the conferring of an advantage and a transfer of State resources. It suffices that one of those factors be present as a result of one of those events or a combination thereof.

108 Therefore, it is not necessary that the prudent private investor criterion be isolated at a precise moment in time or that the presence of an advantage resulting from State resources be a prerequisite for the application of that criterion, as the General Court held, incorrectly, in paragraphs 202, 203 and 226 of the judgment under appeal.

109 The Commission stated, inter alia in recitals 222 and 225 of the decision at issue, that the declarations from July 2002 had played a role in maintaining FT's investment-grade rating influence and had been decisive, inter alia, for the measures of December 2002. There was an ongoing process of support for FT that commenced in July 2002 and culminated in December 2002.

110 By the second part, the Commission submits that, in holding, in paragraph 205 of the judgment under appeal, that the prudent private investor criterion should be applied only to the announcement of 4 December 2002 and the shareholder loan offer, taken together, the General Court disregarded both the close link between the advantage identified and the application of that criterion and the case-law highlighted in *Bouygues*.

111 In fact, since the prudent private investor criterion serves to disqualify a measure which, prima facie, constitutes an advantage, the scope of both the material and temporal examination of the measures making up the advantage should coincide with the scope to which the criterion applies. Therefore, if the effects of the advantage are spread over a given period, the criterion should not be applied only to part of that period.

112 In the present case, in paragraphs 132 to 139 of *Bouygues*, the Court of Justice identified the advantage conferred on FT as comprising two parts: the increase in FT's means of financing and the reassurance given to the markets as to its ability to meet its maturities, the latter arising from the declarations from July 2002.

113 By the third part, the Commission considers that, in perceiving, in paragraphs 227 to 232 and 255 to 261 of the judgment under appeal, a semantic difference between the State measures examined and the contextual factors, the General Court infringed the principle that the issue of whether there is State aid must be determined in relation to its effects, not its form or semantics. In the Commission's submission, there is a mere semantic difference between the examination of a State measure in the context of another State measure with which it is inextricably linked and the examination of the two measures together.

114 In the present case, the declarations from July 2002 and the shareholder loan offer are inextricably linked, since in December 2002 the state of the market was distorted by those declarations, without which the offer would not have materialised or produced its effects.

115 Moreover, an incorrect interpretation of the decision at issue, of the Commission's written pleadings and of *Bouygues* forms the basis of the General Court's statements to the effect that there is nothing in those documents to indicate that the declarations from July 2002 and the shareholder loan offer constituted a single intervention and that the Court of Justice held that those declarations were not the subject matter of the Commission's decision.

116 By the fourth part, the Commission considers that the General Court attached decisive importance to the specification of the exact details of the French State's support provided to FT, thereby neglecting the effects of the declarations from July 2002, which were however of vital importance. The Commission observes in that regard that it was not necessary that the measures examined be of the same nature in order to be considered inextricably linked. In paragraphs 132 to 136 of *Bouygues*, the Court of Justice referred to those declarations and their effects in holding that there was an advantage linked to the shareholder loan offer, which shows that they had to be taken into account in the scope of the analysis.

117 Under the fifth part, the Commission observes that, in paragraphs 103 and 104 of *Bouygues*, the Court of Justice held that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention where those interventions, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely linked to each other that they are inseparable from one another.

118 It also points out that, in paragraphs 132 to 136 of that judgment, the Court of Justice suggested that the declarations from July 2002 objectively formed part of the analytical context of the shareholder loan offer.

119 The Commission further submits that the criteria laid down by the Court of Justice in paragraphs 103 and 104 of *Bouygues* were met in the present case, given the close and inextricable links existing between those declarations and that offer. As can be inferred from those paragraphs, all of those consecutive interventions had to be regarded as forming the same, single intervention.

120 The Commission further states that, in recitals 203 to 230 of the decision at issue, it applied the prudent private investor criterion to the entire FT rescue operation, in particular as from the beginning of that process, namely the declaration of 12 July 2002, which influenced the rest of that process. The Commission adds that, in recitals 215 to 218 of the decision at issue, it had established that the declarations from July 2002 had given rise to an economic and legal risk liable to jeopardise the resources of the French State.

121 By the sixth part, the Commission submits that, in paragraphs 230 to 232 and 249 to 254 of the judgment under appeal, the General Court held, incorrectly, that in December 2002 a break occurred in the series of State measures at issue, by virtue of having placed itself in the incorrect logic consisting in isolating the assessment of the prudent private investor criterion to a specific moment in time, namely 4 December 2002, and by having relied on facts that did not support there being such a break and that were influenced by the declarations from July 2002.

122 Given the decisive influence of the declarations from July 2002, even an autonomous decision by private operators would not have been sufficient to break the link between those declarations and the shareholder loan offer.

123 Moreover, the General Court's finding, in paragraphs 249 to 254 of the judgment under appeal, that there was a significant break in December 2002 because the initial commitment announced materalised, contradicts entirely both the finding of fact made by the General Court in paragraphs 212 to 215 of that judgment, to the effect that the declarations from July 2002 had conferred an advantage on FT that had lasted until 17 December 2002, and the definitive findings of fact made by the Court of Justice and set out in paragraph 133 of *Bouygues*.

124 By the seventh part, the Commission observes that, in paragraphs 246 and 247 of the judgment under appeal, the General Court considered that, even taking into account the entire sequence of the interventions by the French State in the period from July to December 2002, all the stages of that process could have been completed in a similar manner by a prudent private operator in a market economy, who ensures that all the necessary conditions are satisfied before entering into an irrevocable commitment to invest. According to the General Court, the French State therefore intended to influence those markets by staking its reputation in order to restore market confidence and, in particular, it sought to secure the maintenance of FT's rating with the aim of preparing for its solid refinancing at less cost at a later stage.

125 In so reasoning, according to the Commission, the General Court disregarded the reputational risk attached to a declaration that is not honoured and the specific situation of a State that makes such a declaration. In fact, the less those declarations are followed up by effects, the less weight operators will tend to attach to declarations of support to public undertakings from the State concerned. The Commission adds that, although in recital 219 of the decision at issue it did not find that there was aid solely on the basis of the declarations from July 2002, that does not mean that it had doubts about the harm to the reputation of the French State resulting from non-compliance with its declarations.

126 In those circumstances, the Commission submits that the General Court erred in law in requiring that the transfer of State resources occur at the same time the advantage was conferred and in considering that there is a reputational risk only where State resources are committed.

127 The Commission further observes that declarations involving a State commitment carry the feature of engaging not only the credibility of the State as shareholder, but also the State as public authority, even where it purports to speak as a State shareholder, as compliance with declarations is also a matter of political credibility.

128 Lastly, according to the Commission, the General Court failed to provide grounds to the requisite legal standard for its reasons set out in paragraph 247 of the judgment under appeal, where it held that a State shareholder should be compared with a global economic player. It is not possible to apply the prudent private investor criterion to the State acting as a global player unless specific circumstances so justify.

Findings of the Court

129 By the arguments it puts forward under the seven parts of the second ground of appeal, the Commission seeks, in essence, to establish that the General Court erred in law as to the determination of the moment in which it had to place itself to assess the prudent private investor criterion. In the Commission's submission, that moment was in July 2002 and not, as the General Court incorrectly held, December 2002.

130 In the first place, in so far as the Commission argues, under the second to fifth parts, that the advantage identified by *Bouygues* extends to the declarations from July 2002, it should be noted that that argument comes up against the Court of Justice's own interpretation of the decision at issue, set out in paragraphs 70 to 75 and 126 to 129 of *Bouygues*.

131 In those paragraphs, the Court of Justice held that the advantage identified by that decision arose solely from the announcement of 4 December 2002, together with the shareholder loan offer. Conversely, it is implicitly but necessarily apparent from paragraphs 132, 134, 136 and 139 of that judgment that the Court of Justice did not intend to extend that advantage to the declarations from July 2002, as they only form part of the context of the aid measure thus identified.

132 Accordingly, as the Commission's argument is based on an incorrect reading of *Bouygues* and does not reflect the very content of the decision at issue, it must be rejected as ineffective *ab initio* (see, to that effect, *Bouygues*, paragraph 79).

133 In the second place, regarding the argument put forward under the first part, suffice it to note that it, too, is based on an incorrect reading of the judgment under appeal, the General Court having held, in paragraphs 219 to 222, that the prudent private investor criterion had to be applied to 'the period during which the financial support measures were taken' and therefore, in the present case, 'to the announcement of 4 December 2002 coupled with the shareholder loan offer'.

134 Therefore, the General Court referred to the two events forming, in accordance with the case-law highlighted in *Bouygues*, the advantage in question, and, contrary to the Commission's contentions, in no way ruled out the possibility of its being necessary to conduct the required assessment in relation to a period rather than a specific moment in time.

135 It follows that the first part must be rejected as unfounded.

136 The sixth part must also be rejected, since it is based on the same incorrect reading of the judgment under appeal and because it shows that the Commission is merely challenging the General Court's assessment of the facts as regards the question whether or not the factual circumstances prevailing between the months of July 2002 and December 2002 showed a break in the series of State measures.

137 In the third place, it is clear that the argument put forward by the Commission under the seventh part is inadmissible, as it seeks to question the General Court's factual assessment that it could not be ruled out that, between the months of July and December 2002, a private investor might have displayed behaviour similar to that displayed by the French State.

138 In the fourth place, in so far as the Commission's argument, taken as a whole, must be construed as meaning that, in its submission, there is an inextricable link between the aid measure granted and contextual factors surrounding that aid measure, that link means that, even though those factors may be distinct from the aid measure, its compliance in the light of the prudent private investor criterion had to be assessed at the time when those factors occurred, not when the measure was adopted, the following remarks are apposite.

139 First of all, it is apparent from the judgment of 5 June 2012, *Commission* v *EDF* (C-124/10 P, EU:C:2012:318, paragraph 85) that factors arising after the measure at issue is adopted cannot be taken into account for the assessment of the prudent private investor criterion.

140 Next, it is apparent from that same judgment that that assessment must be made in relation to the information that was available at the time when the decision to make the investment was taken (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 105).

141 In that regard, the Court of Justice observed that the time when the decision to make the investment was taken and the time when the measure was granted will not necessarily be the same, as the decision could be taken well before the measure is granted (see, to that effect, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 105).

142 In the present case, following a sovereign assessment of the facts, the General Court held, in paragraphs 222 to 232 of the judgment under appeal, that the shareholder loan offer came only in December 2002; in paragraphs 234 to 245 of that judgment, that the French Government had made no firm commitment in July 2002; and, in paragraphs 249 to 254, that the decision to provide FT with financial support through the shareholder loan offer had been taken not in July 2002 but in early December 2002.

143 In those circumstances, as rightly held by the General Court in paragraph 230 of the judgment under appeal, deciding in advance in July 2002 the time when the prudent private investor criterion fell to be assessed would have necessarily excluded from that assessment relevant factors that occurred between July 2002 and December 2002.

144 It is clear that such an outcome would have been contrary to the Court of Justice's settled case-law, referred to in paragraph 91 above, according to which it is for the Commission to take account of all relevant factors for its assessment.

145 It follows that the second ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

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

Costs

147 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.

148 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.

149 Since the Commission has been unsuccessful and Orange and the French Government have applied for costs, the Commission must be ordered to pay the costs.

On those grounds, the Court (Sixth Chamber) hereby

1. Dismisses the appeal;

2. Orders the European Commission to pay the costs.

[Signatures]