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JUDGMENT OF THE COURT (Grand Chamber)

19 March 2013 (*)

(Appeals — State aid — Financial measures in favour of France Télécom — Shareholder loan proposal — Public declarations by a member of the French Government — Decision declaring the aid incompatible with the common market and not ordering its recovery — Concept of State aid — Concept of economic advantage — Concept of commitment of State resources)

In Joined Cases C-399/10 P and C-401/10 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 4 and 3 August 2010 respectively,

Bouygues SA, established in Paris (France),

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

represented by C. Baldon, J. Blouet-Gaillard, J. Vogel, F. Sureau and D. Theophile, avocats,
appellants,

the other parties to the proceedings being:

European Commission, represented by C. Giolito, D. Grespan and S. Thomas, acting as Agents,
with an address for service in Luxembourg,

defendant at first instance,

French Republic, represented by G. de Bergues and J. Gstalter, acting as Agents,

applicant at first instance,

supported by:

Federal Republic of Germany, represented by T. Henze and J. Möller, acting as Agents, and U. Soltész, Rechtsanwalt,

intervener in the appeal,

France Télécom SA, established in Paris, represented initially by S. Hautbourg, S. Quesson and L. Olza Moreno, avocats, and subsequently by S. Hautbourg and S. Quesson, avocats,

Association française des opérateurs de réseaux et services de télécommunications (AFORS Télécom), established in Paris,

applicants at first instance,

and

European Commission, represented by C. Giolito, D. Grespan and S. Thomas, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

French Republic, represented by G. de Bergues and J. Gstalter, acting as Agents,

applicant at first instance,

supported by:

Federal Republic of Germany, represented by T. Henze and J. Möller, acting as Agents, and U. Soltész, Rechtsanwalt,

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Bouygues Télécom SA, established in Boulogne-Billancourt,

represented by C. Baldon, J. Blouet-Gaillard, J. Vogel, F. Sureau and D. Theophile, avocats,

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Association française des opérateurs de réseaux et services de télécommunications (AFORS Télécom), established in Paris,

applicants at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič, J. Malenovský, Presidents of Chambers, U. Lõhmus, E. Levits, J.-C. Bonichot, A. Arabadjiev (Rapporteur), J.-J. Kasel and M. Safjan, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2012,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2012,

gives the following

Judgment

1 By their appeals, Bouygues SA and Bouygues Télécom SA (together, 'the Bouygues companies') and the European Commission ask the Court to set aside the judgment of the General Court of the European Union in Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others v Commission* [2010] ECR II-2099 ('the judgment under appeal') annulling 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 contested decision'), and declaring that there was no need to adjudicate on the applications for annulment of Article 2 of the contested decision.

Background to the dispute

General background to the case

2 France Télécom SA ('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 being divided between the public (32.25%), France Télécom itself (8.26%) and employees of the company (3.04%).

3 In 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.

4 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.

5 In light of FT's financial situation, the French Minister for Economic Affairs, Finance and Industry, in an interview published on 12 July 2002 in the daily newspaper Les Echos ('the declaration of 12 July 2002'), stated, in essence, that if FT were to face any financing problems, the French State would take whatever decisions were necessary to overcome them.

6 On the same date, S & P downgraded FT's rating for long term credit notes to the lowest investment grade, stating that this grade was maintained only as a result of the French State's comments regarding FT.

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

8 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.

9 In a press release of 13 September 2002 on FT's financial situation, the French authorities stated, in essence, that the French State would contribute to the strengthening of FT's capital base and would, if necessary, take steps to prevent FT from being faced with any financing difficulties.

10 On the same day, Moody's changed the outlook of FT's debt from negative to stable owing to the French State's confirmation of its commitment to support FT.

11 On 2 October 2002, a new chief executive officer was appointed to FT. The press release announcing that appointment, in essence, repeated the statement in the press release of 13 September 2002 referred to in paragraph 9 above.

12 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 FT's balance sheet by strengthening its capital base to the amount of EUR 15 billion.

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

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

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

15 On 17 December 2002, S & P indicated that since July 2002 the French State's support had been one of the key factors in maintaining FT's investment-grade rating, and that its announcement concerning the shareholder loan and the commitment to subscribe in proportion to its shareholding to a EUR 15 billion recapitalisation operation confirmed that support.

16 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.

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

18 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. That operation was terminated on 11 April 2003.

19 FT ended the 2002 financial year with a loss of EUR 21 billion and a net financial debt of EUR 68 billion. Its accounts for 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.

The administrative procedure and the contested decision

20 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.

21 On 22 January 2003, the Bouygues companies, two companies governed by French law, of which Bouygues Télécom SA is active on the French market for mobile telephony, submitted a complaint to the Commission concerning, in particular, two cases of aid allegedly granted by the French State to FT, as a result of, first, the public declarations made by the French authorities in favour of FT from July 2002 ('the declarations from July 2002') and, secondly, the announcement of 4 December 2002 of the shareholder loan offer in the amount of EUR 9 billion.

22 On 12 March 2003, the Commission's decision to open the formal investigation procedure provided for in Article 88(2) EC, specifically with regard to the financial measures put in place by the French State in favour of FT ('the decision to open the formal investigation procedure') was published in the *Official Journal of the European Union* (OJ 2003 C 57, p. 5).

23 On 3 August 2004, the Commission notified the French authorities of the contested decision. Article 1 of that decision provides that '[p]laced in the context of the declarations made 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'. Under Article 2 of that decision, '[t]he aid referred to in Article 1 does not have to be recovered'.

24 In paragraphs 17 to 26 of that decision, the Commission found that, from June 2002 onwards, FT's financial situation was characterised by serious structural problems and an unbalanced balance sheet. It can be seen from paragraph 37 of the decision that, at the time of the declaration of 12 July 2002, S & P and Moody's were about to downgrade the rating of FT's debt to junk-bond level.

25 In paragraph 39 of the contested decision, the Commission thus concluded that, in July 2002, FT was facing a crisis of confidence threatening to hinder the planned refinancing and to create risks for its liquidity in 2003. It stated, in particular in paragraphs 212 and 222 of the decision, that, in light of the press releases by the French authorities on 13 September 2002 and 2 October 2002, the rating agencies Moody's and S & P had changed their assessment of the management of FT's debt and noted an increase in market confidence.

26 In paragraphs 185 to 187 of the contested decision, the Commission noted that the measures taken in December 2002, which were the subject-matter of the notification, were preceded, in particular, by the declarations from July 2002, and it found that these declarations had an impact on the perception which the markets and the economic operators had of FT's situation in December 2002. It took the view that those declarations and the measures notified could therefore be examined as a whole.

27 In paragraphs 188, 189 and 203 to 219 of the decision, the Commission stated that, in its view, the declaration of 12 July 2002 certainly had an effect on the markets and conferred an economic advantage on FT. However, following its analysis of numerous legal arguments, the Commission took the view that it did not have sufficient information to enable it to demonstrate that

that declaration was, at least potentially, of such a character as to commit State resources.

28 By contrast, in paragraphs 194 to 196 of that decision, the Commission considered that the shareholder loan offer conferred an advantage on FT and potentially committed State resources. First, the loan would have enabled FT to increase its means of financing and to reassure the market as to its capacity to meet its maturities. Secondly, a potential additional burden on State resources had been created by the announcement of the provision of the shareholder loan, coupled with the fulfilment of the preconditions for that provision, by the impression given to the market that the loan had actually been provided and, lastly, by the dispatch of the loan offer.

29 In paragraphs 197 to 201 of its decision, the Commission also took the view that, in the competitive telecommunications sector, advantages such as those which benefited FT distort or threaten to distort competition to a particularly appreciable extent, and are likely to affect trade between Member States.

30 In paragraphs 203 to 256 of the contested decision, the Commission considered that, in light of the impact on the market, in particular the declarations from July 2002, the measures notified satisfied neither the test of the prudent private investor in a market economy, nor those relating to aid for rescuing or restructuring firms in difficulty. Therefore, it concluded that the measures referred to constituted State aid incompatible with the common market.

31 However, considering that the impact of this aid could not be evaluated with precision, and that the overall analysis of the elements of that aid, apart from the shareholder loan offer, in light of their compatibility with the rules on State aid was new, the Commission took the view, in paragraphs 257 to 264 of the contested decision, that respect for the rights of the defence and the principle of the protection of legitimate expectations stood in the way of recovery of the aid.

The procedure before the General Court and the judgment under appeal

32 By their actions before the General Court, the French Republic, FT and the Bouygues companies sought annulment of the contested decision, and the Association française des opérateurs de réseaux et services de télécommunications ('AFORS Télécom') sought partial annulment of that decision.

33 In support of their application for annulment of Article 1 of the contested decision, the French Republic and FT raised inter alia a second plea, alleging errors in law in the application of the concept of State aid within the meaning of Article 87(1) EC to the measures notified, and a third plea, alleging manifest errors in the assessment of the content and/or the alleged effects of the declarations from July 2002.

34 In support of their application for annulment of Article 1 of the contested decision, in that the Commission refused to characterise the declarations from July 2002, considered in isolation or together, as State aid, the Bouygues companies relied on a first plea, alleging breach of Article 87(1) EC, and a second plea, alleging inconsistency and a failure to state adequate reasons, contrary to Article 253 EC.

35 In the judgment under appeal, the General Court examined those pleas together in so far as they concern the concept of State aid.

36 In paragraphs 126 to 133 of that judgment, the General Court rejected the Commission's arguments that the Bouygues companies' application for annulment of Article 1 of the contested decision, in that the Commission refused to characterise the declarations from July 2002 as State aid, was inadmissible for lack of interest in bringing proceedings because the companies

challenged exclusively the reasoning of the contested decision and could not draw additional benefit from the finding that the declarations from July 2002 also constituted State aid.

37 On the merits of the application, the General Court observed in paragraph 215 of the judgment under appeal that, in order for a measure to be characterised as State aid within the meaning of Article 87(1) EC, it must involve an advantage, which may take various forms, and must derive directly or indirectly from State resources.

38 In paragraph 262 of that judgment, the General Court stated that there is a requirement for a connection between the advantage identified and the commitment of State resources, so that the advantage in question must be closely linked to a corresponding charge included in the State budget or to the creation, on the basis of legally binding obligations entered into by the State, of a sufficiently real economic risk to that budget.

39 In paragraph 231 of the judgment under appeal, the General Court defined the concept of advantage as implying that the State measure must have the consequence of an improvement in the economic and/or financial position of the beneficiary.

40 In the present case, the General Court held in paragraph 259 of the judgment under appeal that the Commission had demonstrated that, as a whole, the declarations from July 2002, including the announcement of 4 December 2002, involved the conferment of an advantage on FT as referred to in Article 87(1) EC.

41 However, in paragraph 257 of the judgment, the General Court found that the Commission had not demonstrated the existence of an additional and separate advantage derived from the shareholder loan offer, the dispatch of which on 20 December 2002 was not made public, given that the declarations from July 2002, in particular the announcement of 4 December 2002, had given FT the opportunity to refinance its debts to the amount of EUR 9 billion under the conditions prevailing at that time on the bond market.

42 The General Court then addressed the issue of whether the advantage identified by the Commission derived from State resources.

43 In that regard, in paragraphs 269 to 289 of the judgment under appeal, the General Court found that the declarations from July 2002 could not be regarded as a guarantee or interpreted as exposing the resources of the French State to a risk that constituted a transfer of State resources, and rejected the Bouygues companies' application for annulment of Article 1 of the contested decision in that the Commission refused to characterise the declarations from July 2002 as State aid.

44 As to the announcement of 4 December 2002, the General Court held, in paragraph 293 of the judgment under appeal, that neither the Commission nor the Bouygues companies had maintained that that announcement, in itself, contained a sufficiently precise, firm and unconditional commitment supporting a finding of the existence of a transfer of State resources within the meaning of Article 87(1) EC. Moreover, in paragraphs 294 to 298 of the judgment, the General Court held that the Commission had not demonstrated that the announcement of 4 December 2002 involved a transfer of State resources.

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

46 In paragraphs 302 to 309 of the judgment under appeal, the General Court then examined whether the Commission could nevertheless find, on the basis of an overall examination of the declarations from July 2002, in conjunction with the announcement of 4 December 2002 and the shareholder loan offer, the existence of an economic advantage deriving from State resources.

47 In that regard, it found, first, in paragraph 304 of the judgment that, as the declarations from July 2002 did not contain the anticipation of specific financial support on the lines of that which took concrete form in December 2002, the announcement of 4 December 2002 amounted to a significant break in the series of events which led to the refinancing of FT.

48 Secondly, the General Court held, in paragraph 309 of the judgment under appeal, that even though it was permissible for the Commission to take account of all the events which preceded the announcement of 4 December 2002 in order to characterise the advantage resulting from restoring the confidence of the financial markets and improving the terms of FT's refinancing, that advantage '[was] not offset by a corresponding reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget. In particular, that advantage [was] separate from that which the shareholder loan [offer] ... [was] likely to involve and which the contested decision failed to establish satisfactorily'.

49 Consequently, the General Court found, in paragraph 310 of the judgment under appeal, that the Commission had failed to apply the concept of State aid within the meaning of Article 87(1) EC by finding that the shareholder loan offer, when placed in the context of the declarations from July 2002, involved the conferment of an advantage on FT which resulted from a transfer of State resources, and annulled Article 1 of the contested decision.

Procedure before the Court of Justice

50 By document lodged at the Registry of the Court of Justice on 20 December 2010, the Federal Republic of Germany applied to intervene in Cases C-399/10 P and C-401/10 P in support of the form of order sought by the French Republic.

51 By orders of 28 February 2011, the President of the Court of Justice granted leave to the Federal Republic of Germany to intervene in Cases C-399/10 P and C-401/10 P.

52 By order of 8 September 2011, the President joined the two cases for the purposes of the oral procedure and judgment.

Forms of order sought by the parties

53 The Bouygues companies contend that the Court of Justice should:

- set aside the judgment under appeal;
- rule on the merits of the case and annul Article 1 of the contested decision, in that it does not characterise as State aid the declarations from July 2002, and Article 2 of that decision, in that it does not require the French Republic to recover the aid established as having been granted to FT;
- in the alternative, should the Court consider that the state of the proceedings does not permit final judgment to be given, refer the case back to the General Court; and

– order the Commission, FT, the French Republic and the Federal Republic of Germany to pay the costs.

54 The Commission contends that the Court of Justice should:

– set aside the judgment under appeal in so far as it annulled Article 1 of the contested decision and ordered the Commission to bear its own costs and to pay those incurred by the French Republic and by FT;

– refer the case back to the General Court for reconsideration; and

– reserve the costs.

55 FT contends that the Court of Justice should:

– dismiss the appeals;

– failing that, refer the case back to the General Court;

– in the event that the Court of Justice should set aside the judgment under appeal without referring the case back to the General Court, grant the form of order sought at first instance, in full or in part; and

– order the Bouygues companies and the Commission to pay the costs.

56 The French Republic contends that the Court of Justice should:

– dismiss the appeals;

– failing that, refer the case back to the General Court;

– in the event that the Court of Justice should refuse to refer the case back to the General Court, grant the form of order sought at first instance, in full or in part; and

– order the Bouygues companies and the Commission to pay the costs.

57 The Federal Republic of Germany is intervening in support of the form of order sought by the French Republic and contends, further, that the Court of Justice should order the Bouygues companies and the Commission to pay its costs.

The appeals

58 The Bouygues companies put forward two grounds in support of their appeal.

59 In that regard, it should be recalled that the Bouygues companies, first, brought an action before the General Court seeking annulment of Article 1 of the contested decision, in that the Commission refused to characterise the declarations from July 2002 as State aid, and annulment of Article 2 of that decision (Case T-450/04), and, secondly, intervened in support of the form of order sought by the Commission in the action brought by FT seeking annulment of that decision (Case T-444/04).

60 By the judgment under appeal, the General Court first declared admissible but unfounded the application by the Bouygues companies for annulment of Article 1 of the contested decision, in that the Commission refused to characterise the declarations from July 2002 as State aid (Case T-

450/04), then declared admissible and well-founded FT's application seeking annulment in full of Article 1 of that decision (Case T-444/04), and finally held that under these circumstances there was no longer any need to adjudicate on the application inter alia by the Bouygues companies for annulment of Article 2 of that decision.

61 Thus the Bouygues companies' first ground of appeal relates to the General Court's findings in Case T-450/04 and alleges errors committed by the General Court in rejecting their arguments seeking to establish that the Commission had erred in law by failing to characterise the declarations from July 2002 as State aid.

62 The second ground of appeal relates to the General Court's findings in Case T-444/04 and alleges errors committed by the General Court when it annulled the contested decision, in that it characterised as State aid the announcement of 4 December 2002 and the shareholder loan offer taken together. This ground may be subdivided into two parts, the first alleging an error in law over the necessary link between the advantage conferred and the commitment of State resources, and the second alleging an error in law relating to the issue of whether the shareholder loan offer conferred an advantage on FT.

63 The Commission puts forward three grounds in support of its appeal, the first of which alleges contradictory reasoning in the judgment under appeal.

64 The second ground of appeal alleges errors in law made by the General Court when it annulled the contested decision, in that it characterised as State aid the announcement of 4 December 2002 and the shareholder loan offer taken together. This ground may be subdivided into four parts, the first alleging an error in law relating to the necessary link between the advantage conferred and the commitment of State resources, the second alleging an error in law relating to a commitment of State resources as a result of the announcement of 4 December 2002 and the shareholder loan offer taken together, the third alleging an error in law relating to the examination of an advantage for FT resulting from the failure to take account of the Commission's application of the test of the prudent private investor, and the fourth alleging disregard for the discretion which the Commission enjoys when it carries out complex economic analyses.

65 The third ground of appeal alleges an erroneous interpretation and a distortion of the contested decision.

66 It is appropriate first to examine the Bouygues companies' first ground of appeal relating to characterising the declarations from July 2002 as State aid, and secondly the first part of the Bouygues companies' second ground of appeal together with the first part of the Commission's second ground of appeal alleging errors in law relating to characterising the announcement of 4 December 2002 and the shareholder loan offer taken together as State aid.

The Bouygues companies' first ground of appeal relating to characterising the declarations from July 2002 as State aid

67 The Bouygues companies' first ground of appeal alleges an overly restrictive interpretation of the concept of State aid, a distortion of French law and an error in the legal characterisation of the facts, allegedly committed by the General Court when it rejected their arguments seeking to show that the Commission had erred in law by refusing to characterise the declarations from July 2002 as State aid.

68 In that regard, it should be recalled that, in Case T-450/04, the Bouygues companies sought, inter alia, annulment of Article 1 of the contested decision in as much as it implicitly rejected their arguments, put forward both in their complaint lodged with the Commission on 22

January 2003 and in the course of the administrative procedure, that the declarations from July 2002, in themselves, constituted State aid.

69 It was pointed out in paragraphs 36 and 43 above, and it is clear from paragraphs 133 and 325 of the judgment under appeal that the General Court declared that application to be admissible but unfounded.

70 In that regard, it must be stated, first, that it follows particularly from the detailed description of the measures referred to, which appears in recitals 39 to 57 of the decision to open the formal investigation procedure, that that decision solely concerns the measures notified, and that therefore the Commission did not, through that decision, invite the interested parties to submit observations on whether the declarations from July 2002 constituted, in themselves, State aid.

71 Under the terms of Articles 4(4), 6(1) and 13(1) 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), such a decision and such an invitation are necessary in order both to determine the subject matter of the administrative procedure and to ensure that the Commission is as fully informed as possible.

72 Therefore, as the Commission did not adopt any additional decision that would have extended the subject matter of the administrative procedure culminating in the contested decision to the issue of whether the declarations from July 2002 constituted, in themselves, State aid, it follows that the Commission did not, by its decision to open the formal investigation procedure, address that element of the complaint lodged with it by the Bouygues companies on 22 January 2003.

73 Next, it follows from paragraph 185 of the contested decision that the subject matter of the decision concerned the shareholder loan which was notified to the Commission, and that the declarations from July 2002 were taken into consideration only in as much as they were objectively relevant to the assessment of that loan. Thus the Commission examined those declarations only in so far as they formed the basis for that measure.

74 In addition the Commission pointed out in paragraphs 188, 189, 218 and 219 of the contested decision that it did not have at its disposal sufficient evidence to enable it to express a view on the issue of whether those declarations constituted, in themselves, State aid.

75 Finally, it follows from Article 1 of the contested decision that the decision limits itself to characterising the shareholder loan as State aid which is incompatible with the common market, and that it refers to the declarations from 2002 only as forming the context of that aid.

76 In those circumstances, it is quite clear that the contested decision does not deal with the Bouygues companies' complaint in so far as they argued that the declarations from July 2002 constituted, in themselves, State aid.

77 It follows that the General Court erred in law, in paragraphs 128 and 131 of the judgment under appeal, by holding that Article 1 of the contested decision contains 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 cannot be regarded per se as a decision rejecting their claims.

78 The General Court thus made an assessment of questions on which the Commission had not yet stated its position and confused different administrative and judicial procedural stages,

which is incompatible with the system of the division of powers between the Commission and the Court of Justice and of the remedies laid down by the Treaty and with the requirements of the sound administration of justice (see, to that effect, Case C-60/81 *IBM v Commission* [1981] ECR 2639, paragraph 20).

79 On that basis, the first ground of appeal relating to errors in law supposedly committed by the General Court in its assessment of the lawfulness of the Commission's alleged refusal to characterise the declarations from July 2002 as State aid is ineffective.

The first part of the Bouygues companies' second ground of appeal and the first part of the Commission's second ground of appeal, alleging errors in law relating to characterising the announcement of 4 December 2002 and the shareholder loan offer, taken together, as State aid

Arguments of the parties

80 The Bouygues companies and the Commission contend, first, that, for the purposes of establishing the existence of State aid, the General Court wrongly required a connection, a close link, an equivalence and a correspondence between the advantage identified and the commitment of State resources. It follows from case-law that that link can be indirect and that such equivalence or correspondence is not required.

81 Secondly, they claim that the way in which the General Court viewed that link disregarded the principle 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. According to the Bouygues companies, where there has been a succession of measures forming part of the same intervention strategy in favour of an undertaking, as in this case, the connecting link between the advantage and the use of State resources must be assessed globally, taking into account the State's intervention as a continuous whole.

82 The Commission states that measures that are closely interlinked and which, viewed in isolation, could escape State aid control, even though they have a significant distorting effect on competition, must be examined together. Therefore, the Commission contends, the shareholder loan constitutes State aid when it is viewed in the context created by the declarations from July 2002.

83 FT and the French Republic maintain, first, that the concept of State aid requires a sufficiently close connecting link between an advantage for an undertaking and a financial burden on the State. They point out that, according to case-law, a financial burden on the profits of undertakings leading to a reduction in the State's tax revenue would not create such a link, whereas the State's renunciation of tax revenue which it otherwise would have received would create such a link, if an indirect advantage has been conferred on certain undertakings.

84 Moreover, the French Republic considers that the commitment of State resources should be the origin and not the consequence of the advantage. The Commission, however, reversed this reasoning.

85 The Federal Republic of Germany adds that the present case concerns ‘secondary effects’ of the declarations from July 2002 which are not liable to involve a burden on the State’s budget. Furthermore, if an advantage not leading to any burden on the State’s budget is liable to distort competition, this does not mean that such a measure is subject to State aid control. The broad interpretation of the criterion for the commitment of State resources favoured by the Commission and the Bouygues companies would subject a large number of declarations, such as those of the Member States at the time of the 2008 financial crisis, to State aid control.

86 Next, according to FT and the French Republic, the General Court did not require that the advantage should correspond to the amount of the resources deployed by the State. Instead, it required only a correlation between the advantage and the financial burden on the State’s budget, in the sense that the advantage must derive from that burden. The General Court also accepted that a commitment of State resources can result in a sufficiently real economic risk of burdens on that budget, but rightly sought to identify legally binding obligations.

87 Finally, FT maintains that the principle that Article 107(1) TFEU defines measures of State intervention in relation to their effects does not exempt the Commission from identifying precisely the advantage which an undertaking has benefited from or from examining whether it derives from State resources. Thus the Commission could not, on the basis of an overall examination, attribute to the declarations from July 2002 the State resources potentially committed by a different and subsequent measure, namely the dispatch of the shareholder loan offer.

88 In addition, the French Republic points out that the General Court, in paragraphs 301 to 310 of the judgment under appeal, carried out an overall analysis of the declarations from July 2002 and the shareholder loan offer, and takes the view that it rightly held that there was no connecting link between the advantages identified and a commitment of State resources.

Findings of the Court

89 The Bouygues companies and the Commission, in essence, criticise the General Court for erring in law by requiring, for the purposes of establishing the existence of State aid, a close connecting link between, on the one hand, an advantage that would have to be identified separately for the announcement of 4 December 2002 and for the shareholder loan offer and, on the other, a commitment of State resources equivalent and corresponding to one or other of the advantages thus identified.

90 It was pointed out in paragraphs 40 and 41 above that the General Court held that the conferment of an advantage on FT was demonstrated for the announcement of 4 December 2002, but that an additional and separate advantage derived from the shareholder loan was not established.

91 In paragraph 262 of the judgment under appeal, the General Court held that the advantage identified ‘must derive from a transfer of State resources’ and that this ‘requirement of a connection between the advantage identified and the commitment of State resources presupposes, in principle, that the advantage in question is closely linked to a corresponding charge included in the State budget or to the creation, on the basis of legally binding obligations entered into by the State, of a sufficiently real economic risk to that budget’.

92 In paragraphs 293 to 298 of the judgment under appeal, the General Court carried out an individual examination of the announcement of 4 December 2002. In particular, in paragraphs 293 to 295 of that judgment, it took the view that it was not its task to ascertain whether this announcement involved a transfer of State resources, since neither the Commission nor the

Bouygues companies had raised such an argument or provided any relevant and conclusive evidence.

93 In paragraphs 296 of the judgment under appeal, the General Court added that in 'any event, a transfer of State resources resulting from [that] announcement ... could correspond only to an advantage residing in the opening of the EUR 9 billion credit line expressly envisaged in that announcement' and that 'that advantage is separate from that deriving from the declarations from July 2002, as found in' the contested decision.

94 In paragraph 297 of the judgment under appeal, the General Court stated that the 'connection between the advantage identified and the transfer of State resources presupposes that the advantage in question corresponds to an equivalent charge included in the State budget ... However, that does not apply in this case as regards the relationship between the advantage ... which results from the declarations from July 2002 ... and the alleged transfer of public resources consisting in the opening of a EUR 9 billion credit line, as envisaged in the announcement on 4 December 2002'.

95 As to the shareholder loan offer, the General Court found, in paragraph 299 of the judgment under appeal, 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.

96 Finally, in so far as the Commission based its finding of the existence of State aid on an overall examination of the declarations from July 2002, in conjunction with the shareholder loan offer, the General Court held, in paragraph 307 of the judgment under appeal, that the Commission cannot 'free itself from its duty to identify a specific advantage involving a corresponding transfer of State resources' and, in paragraph 309 of that judgment, that, even though it was permissible for the Commission to take account of all the events which preceded the announcement [of] 4 December 2002 in order to characterise the advantage, consisting [in] restoring the confidence of the financial markets and improving the terms of FT's refinancing, that advantage 'is not offset by a corresponding reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget. In particular, that advantage is separate from that which the shareholder loan [offer] ... is likely to involve and which the contested decision failed to establish satisfactorily.'

97 It follows that the General Court took the view that, for each State intervention measure, the Commission was obliged to examine individually whether it conferred a specific advantage through State resources. In addition, it found that only a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget, closely linked and corresponding to an advantage thus identified, would comply with the condition relating to financing through State resources, within the meaning of Article 107(1) TFEU.

98 In that respect, it should be pointed out that, under the terms of Article 107(1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States, is incompatible with the internal market.

99 On that basis, only advantages granted directly or indirectly through State resources or constituting an additional burden on the State are to be regarded as aid within the meaning of Article 107(1) TFEU. The very wording of this provision and the procedural rules laid down in Article 108 TFEU show that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question (see, to that effect, Joined Cases C-72/91

and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 19; Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 35; and Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58).

100 It should be noted that, according to settled case-law, it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 107(1) TFEU (see, to that effect, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14; Case C-6/97 *Italy v Commission* [1999] ECR I-2981, paragraph 16; and Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraph 36).

101 In particular, measures which, in various forms, mitigate the burdens normally included in the budget of an undertaking, and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered to be aid (see, to that effect, *Banco Exterior de España*, paragraph 13; Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 23; and Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 25).

102 It is settled case-law that Article 107(1) TFEU defines measures of State intervention in relation to their effects (Case C-124/10 P *Commission v EDF and Others* [2012] ECR, paragraph 77 and the case-law cited).

103 As State interventions take various forms and have to be assessed in relation to their effects, it cannot be excluded, as the Bouygues companies and the Commission rightly argued, that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention.

104 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 (see, to that effect, Case 72/79 *Commission v Italy* [1980] ECR 1411, paragraph 24).

105 It follows 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.

106 Next, according to the case-law of the Court, State intervention capable of both placing the undertakings which it applies to in a more favourable position than others and creating a sufficiently concrete risk of imposing an additional burden on the State in the future, may place a burden on the resources of the State (see, to that effect, *Ecotrade*, paragraph 41).

107 In particular, the Court of Justice has had occasion to state that advantages given in the form of a State guarantee can entail an additional burden on the State (see, to that effect, *Ecotrade*, paragraph 43, and Case C-275/10 *Residex Capital IV* [2011] ECR I-13043, paragraphs 39 to 42).

108 Furthermore, the Court has already held that, where, in economic terms, the alteration of the market conditions which gives rise to an advantage given indirectly to certain undertakings is the consequence of the public authorities' loss of revenue, even the fact that investors then take independent decisions does not mean that the connection between the loss of revenue and the advantage given to the undertakings in question has been eliminated (see, to that effect, *Germany*

v *Commission*, paragraphs 25 to 28).

109 Consequently, for the purposes of establishing the existence of State aid, the Commission must establish a sufficiently direct link between, on the one hand, the advantage given to the beneficiary and, on the other, a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget (see, to that effect, Case C-279/08 P *Commission v Netherlands* [2011] ECR I-7671, paragraph 111).

110 However, contrary to what the General Court found, it is not necessary that such a reduction, or even such a risk, should correspond or be equivalent to that advantage, or that the advantage has as its counterpoint such a reduction or such a risk, or that it is of the same nature as the commitment of State resources from which it derives.

111 It follows that the General Court erred in law, both in its review of the Commission's identification of the State intervention measure conferring State aid and in the examination of the links between the advantage identified and the commitment of State resources found by the Commission.

112 Finally, this finding is not called into question by the French Republic's argument that the General Court, in paragraphs 301 to 310 of judgment under appeal, carried out an overall examination of the link between the advantage and the commitment of State resources. It follows in particular from the summary in paragraph 96 above that the General Court carried out this examination having regard only to the erroneous criteria identified in paragraphs 105 and 110 above.

113 As the errors in law committed by the General Court are such as to vitiate the reasoning that led to the conclusion, in paragraph 310 of the judgment under appeal, that the Commission had failed to apply the concept of State aid, the Court must uphold the first part of the Bouygues companies' second ground of appeal and the first part of the Commission's second ground.

114 In those circumstances, and without there being any need to examine the other grounds of appeal, the judgment under appeal must be set aside.

The action before the General Court

115 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

116 In this case, the Court of Justice has the necessary information to give final judgment, first, on the application for annulment of Article 1 of the contested decision, in that the Commission 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 are directed against the finding made in the contested decision of an advantage conferred on FT by the French State.

The claim for annulment of Article 1 of the contested decision in Case T-450/04

117 It follows from paragraphs 70 to 79 above that the contested decision does not deal with the Bouygues companies' complaint in so far as they argued that the declarations from July 2002 constituted, in themselves, State aid.

118 Therefore, the pleas in the application seeking annulment of Article 1 of the contested

decision, in that the Commission refused to characterise the declarations from July 2002 as State aid, are ineffective.

The second part of the second plea and the third plea raised by the French Republic and FT in so far as that part and that plea are directed against the finding made in the contested decision of an advantage conferred on FT by the French State

Arguments of the parties

119 By the second part of the second plea of their application, the French Republic and FT contend that the Commission wrongly found that State aid existed as from two separate events, namely, the declarations from July 2002 and the French State's interventions in December 2002. Those events took place at different times and cannot be deemed to be a single measure. The Commission itself acknowledged that, considered separately, neither would have sufficed to justify that finding.

120 By the third plea of their application, the French Republic and FT maintain, inter alia, that the contested decision is vitiated by manifest errors of assessment committed by the Commission in considering that the declarations from July 2002 could be perceived by the markets as a commitment by the French State, and that they had an impact on the situation of the markets in December 2002. FT also submits that the Commission's reasoning to the effect that the shareholder loan offer conferred on FT an advantage not satisfying the prudent private investor criterion is also vitiated by a manifest error of assessment.

121 Thus the French Republic and FT claim that, at the time of the declaration of 12 July 2002, the nature of the measures to be taken with regard to FT had not yet been decided, and no investment decision capable of being characterised as a firm commitment by the French State had been taken. That general, conditional and legally non-binding declaration cannot be characterised as a clear, precise and irrevocable commitment on the part of the French State.

122 Furthermore, the French Republic and FT dispute that the declarations from July 2002 produced an impact on the perception of market operators in December 2002 and led to an abnormal and not negligible increase in the value of FT's shares and bonds. In particular, the conclusions of a report of 28 April 2004 are based on an inappropriate method of analysis and are insufficient to establish both the existence of significantly abnormal movements in FT's share price in July 2002 and that of a causal link between the declaration of 12 July 2002 and such movements.

123 In that regard, the French Republic and FT state that that report referred only to the alleged effects of the declaration of 12 July 2002 on the markets in July 2002. Furthermore, it could not analyse the supposed effects of the declaration of 12 July 2002 on the market situation in December 2002, since it was impossible to distinguish them from the other events which occurred between July and December 2002, such as FT's strong operational performance and prospects during the second half of 2002, the resolution of Mobilcom's situation, the appointment of a new CEO and the presentation of a rebalancing plan.

124 Finally, FT points out that the Commission acknowledged that the shareholder loan offer as such did not confer an advantage on FT, as it had not been accepted by FT, and it contends that it was inconceivable that the market could perceive this offer as a commitment by the French State exceeding its future participation in the capital increase, since that proposal was strictly limited to the amount of EUR 9 billion and to a period of 18 months. The positive reaction of the markets has its origin principally in the appointment of FT's new CEO and in its operational performance improvement plan.

Findings of the Court

125 By their arguments, the French Republic and FT contend, in essence, that the Commission committed errors when it took the view that the various interventions of the French State from 12 July 2002 to 20 December 2002 constituted a single intervention, that the declaration of 12 July 2002 entailed a commitment of the French State, that the declarations from July 2002 produced an impact on the perception of market operators in December 2002, and that the shareholder loan offer conferred an advantage on FT.

126 In that regard, it must first be pointed out that it follows in particular from paragraphs 188 and 189 of the contested decision that the Commission did not base its finding of the existence of State aid on a commitment which the French State gave when it made the 12 July 2002 declaration.

127 Next, it follows in particular from paragraph 194 of the contested decision that the Commission considered that the offer of a 'shareholder loan (which constitutes the upfront prepayment by the State towards the Company's recapitalisation), confers an advantage on [FT] as it enables it to increase its means of financing and to reassure the market as to its capacity to meet its maturities'. It added that even if this offer has not been accepted by FT, 'the appearance given to the market of the existence of such a loan is likely to confer an advantage on [FT], as the market has considered [FT's] financial situation to be more secure'.

128 In paragraph 196 of the contested decision, the Commission added, in its analysis relating to the commitment of State resources, 'that a potential additional burden on the State's resources was created by the announcement of the provision of the shareholder loan coupled with the fulfilment of the preconditions for such provision ..., by the impression given to the market that the loan had actually been provided ... and, lastly, by the dispatch to [FT] of the loan contract initialled and signed by ERAP'.

129 It follows that the Commission 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.

130 In this context, in so far as the French Republic and FT consider that, by examining the announcement of 4 December 2002 and the shareholder loan offer together, the Commission committed an error, it must be held that, as was pointed out in paragraphs 103 and 104 above, State interventions can take various forms and must therefore be assessed in relation to their effects. Consequently, it cannot automatically be excluded that several consecutive measures of State intervention must be regarded as a single intervention, especially where those interventions, having regard to their chronology, their purpose and the circumstances of the undertaking, are so closely linked to each other that they are inseparable from one another.

131 It is clear that the announcement of 4 December 2002 is inseparable from the shareholder loan offered in the form of a EUR 9 billion credit line which the announcement expressly mentions.

In that regard, it must be added that the announcement of 4 December 2002 was made on the actual day the Commission was notified of the shareholder loan.

132 Furthermore, the Commission rightly found that the shareholder loan, announced and notified on 4 December 2002, conferred on FT an advantage within the meaning of Article 107(1) TFEU.

133 It follows, first, from paragraph 212 of the contested decision, as was recalled in paragraphs 4, 6, 10 and 15 above, that during the period from March to July 2002, Moody's and S & P downgraded FT's rating for credit notes to the lowest investment grade, with a negative outlook, stating that this grade was maintained only as a result of the French State's comments regarding FT.

134 Next, it follows from the information set out in footnotes 112 and 116 of the contested decision that, from 9 December 2002 at the latest, the markets could consider that the intervention of the French State referred to in paragraph 132 above had ensured FT's liquidity with respect to its debts for the following 12 months.

135 Finally, it follows from paragraphs 14 and 17 above that on 11 and 12 December 2002 FT launched two successive bond issues for a total amount of EUR 2.9 billion, on 15 January 2003 it raised loans in the form of bond issues for a total amount of EUR 5.5 billion, and on 10 February 2003 it renewed part of a maturing syndicated loan to the amount of EUR 15 billion.

136 It follows from the foregoing that, as the Commission rightly pointed out in paragraph 194 of the contested decision, the shareholder loan constitutes an advantage within the meaning of Article 107(1) TFEU, as it allowed FT 'to increase its means of financing and to reassure the market as to its capacity to meet its maturities'.

137 As to the condition relating to the commitment of State resources, also included in Article 107(1) TFEU, it must be held that the shareholder loan concerns the opening of a credit line of EUR 9 billion. While, admittedly, it is true that FT did not sign the loan agreement sent to it, as the Commission rightly found in paragraph 196 of the contested decision, the beneficiary could have signed it at any time, thereby acquiring the right to obtain immediate payment of the sum of EUR 9 billion.

138 Furthermore, the Commission pointed out in footnote 116 of the contested decision that, in a presentation to investors on 5 December 2002, FT described the French State 'back-up facility' as immediately available, that on the same day S & P announced that the French State would immediately grant a shareholder loan, that it had been indicated to the Finance Committee of the French National Assembly that the shareholder loan 'has already been made available to [FT]', and that Moody's announced on 9 December 2002 that it was confirmed that 'the EUR 9 billion loan facility has been put in place'.

139 Having regard to the potential additional burden of EUR 9 billion on the State's resources and to the case-law cited in paragraph 107 above, the Commission rightly found that the advantage referred to in paragraph 132 above was granted through State resources within the meaning of Article 107(1) TFEU.

The other aspects of the second part of the second plea and the third plea raised by the French Republic and by FT, and the other pleas raised by the French Republic and by FT

140 It is quite clear that the state of the proceedings does not permit a decision by this Court in relation to the second and third pleas relied upon by the French Republic and FT, in so far as

these pleas are directed against the Commission's application of the prudent private investor criterion.

141 The same applies to the first plea relied upon by the French Republic and FT, alleging infringement of an essential procedural requirement and the rights of defence, and to the fourth plea of the French Republic, alleging a failure to state adequate reasons, and, accordingly, to the claim by the Bouygues companies for the annulment of Article 2 of the contested decision.

142 Consequently, Cases T-425/04, T-444/04 and T-450/04 must be referred back to the General Court for judgment on the above part and the above pleas and arguments raised, and on the claim before it on which the Court has not given a ruling.

Costs

143 Since the cases are being referred back to the General Court, it is appropriate to reserve the costs.

On those grounds, the Court (Grand Chamber) hereby

1. **Sets aside the judgment of the General Court of the European Union of 21 May 2010 in Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 France and Others v Commission;**
2. **Refers Cases T-425/04, T-444/04 and T-450/04 back to the General Court of the European Union for judgment on the pleas raised and the claims made before it on which the Court of Justice has not given a ruling;**
3. **Reserves the costs.**

[Signatures]

*Language of the case: French.