Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 28 June 2012 [1]

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

Bouygues SA and Bouygues Télécom SA
v
European Commission and Others
and
European Commission
v

French Republic and Others

(Appeal — State aid — Concept — Advantages granted directly or indirectly through State resources — Financial measures in favour of France Télécom)

1. By their appeals, Bouygues SA and Bouygues Télécom SA (Case C-399/10 P), two companies governed by French law the latter of which is active on the French market in mobile telephony ('the Bouygues companies'), and the European Commission (Case C-401/10 P) are seeking to have set aside the judgment of the General Court 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* ('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 2004 L 257, p. 11; 'the contested decision') and ruling that there was no need to adjudicate on the claims for annulment of Article 2 of that decision.

I – Background to the dispute and the contested decision

2. France Télécom ('FT'), which heads up a group active in the supply of telecommunications networks and services, is a limited liability company quoted on the stock exchange 56.45% of whose capital was, in 2002, held by the French State. On 31 December 2001, FT posted a net debt of EUR 63.5 billion and a loss of EUR 8.3 billion in its published accounts for 2001. As at 30 June 2002, FT's net debt reached EUR 69.69 billion, including EUR 48.9 billion of bond debt becoming due for repayment during the period from 2003 to 2005.

1 — Original language: French.

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

'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 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 …'

4. In a press release of 13 September 2002 ('the declaration 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 … 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.'

5. On 2 October 2002, FT's new CEO was appointed. The press release announcing that appointment ('the declaration of 2 October 2002') reads as follows:

'… Within this framework, [FT's new CEO] 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.'

6. 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.

7. The presentation of the Ambition 2005 plan was accompanied by a press release by the Minister for Economic Affairs, Finance and Industry of 4 December 2002 ('the declaration 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 a public industrial and commercial entity, the Entreprise de recherches et d'activités pétrolières (Petroleum Research and Activity Corporation) (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.'

8. On 4 December 2002 the French Republic notified the Commission of the financial measures provided for in the Ambition 2005 plan, including the shareholder loan proposal also announced that day.

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

10. On 20 December 2002 ERAP, through which the French State held 28.6% of FT's capital on 14 April 2003, sent FT an initialled and signed draft shareholder loan contract ('the shareholder loan contract proposal of 20 December 2002'). FT did not sign that draft contract and the shareholder loan was never implemented.

11. 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.

12. 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. FT ended the 2002 financial year with a loss of approximately EUR 21 billion and a net financial debt of almost 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.

13. On 22 January 2003 the Bouygues companies submitted a complaint to the Commission concerning certain aids granted by the French State to FT and to Orange in connection with the refinancing of FT.

14. 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 … 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 the contested decision, '[t]he aid referred to in Article 1 does not have to be recovered'.

15. The Commission found that, from June 2002 onwards, FT's financial situation was characterised by serious structural problems and an unbalanced balance sheet. It stated that, on the date of the declaration of 12 July 2002, any further downgrade of the rating of FT's debt would have led to the loss of its investment-grade rating and that the rating agencies S & P and Moody's were about to downgrade that rating to junk bond level. The Commission found that, in July 2002, FT was facing a crisis of confidence.

16. In paragraph 186 of the contested decision, the Commission noted that the measures of December 2002, which were the subject matter of the notification, had been preceded by several declarations and measures by the French authorities from July 2002. Firstly, these declarations and measures made it possible to better understand the reasons for and scope of the December 2002 measures. Secondly,

they had an impact on the perception which the markets and economic operators had of FT's situation in December 2002. Next, the Commission expressed the view that it was possible to view the declarations and measures from July 2002 onwards as forming a set that might be seen as threatening to jeopardise State resources (paragraph 187). It identified a time lag between the advantages for the company, which were particularly distinct in July, and the potential commitment of State resources, which seemed to be more clearly established in December. The Commission found, however, that it would not be easy to establish beyond all doubt whether the July 2002 declarations were of such a character as to commit, at least potentially, State resources. The argument to the effect that the July 2002 declarations were aid 'is therefore innovative, but probably not without foundation' (paragraph 188). However, the Commission considered that it did not have sufficient evidence to establish irrefutably the existence of aid on the basis of that argument (paragraph 189).

17. It therefore focused its analysis on the measures taken from December 2002 onwards and notified by the French State, in respect of which it considered that the existence of a commitment of State resources and an advantage was more evident 'as soon as one takes account of the impact on the markets of the prior declarations'. The Commission pointed out next that the shareholder loan proposal of 20 Decenber 2002 conferred an advantage on FT as it enabled it to increase its means of financing and to reassure the market as to its capacity to meet its maturities. Even if the loan agreement was never signed, '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' (paragraph 194). It took the view that the fact that an advantage resulted from the giving of a State commitment leading to a potential, but not immediate, transfer of resources did not rule out the possibility that the advantage might have been granted through State resources. According to the Commission, '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' (paragraph 196).

18. The Commission concluded that the measures in question constituted State aid which was incompatible with the common market. However, since its impact could not be evaluated precisely, respect for the rights of defence might constitute an obstacle to recovery. Furthermore, since the Commission had undertaken an overall analysis of factors other than the shareholder loan proposal of 20 December 2002, and since the question of the compatibility of such conduct with the rules on State aid was new, the principle of the protection of legitimate expectations also constituted an obstacle to recovery.

II – The judgment under appeal

19. By their actions before the General Court, the French Republic, FT, the Bouygues companies and the Association française des opérateurs de réseaux et services de télécommunications (French Association of Operators of Telecommunications Networks and Operators) sought the (full or partial) annulment of the contested decision.

20. In the judgment under appeal, the General Court, after finding that the various applicants had an interest in bringing proceedings, examined the Commission's classification of State aid in the contested decision. In this regard, it stated, in paragraph 221, that 'it is necessary to determine, firstly, whether the declarations from July 2002 and the shareholder loan proposal of December 2002, considered in isolation or together, conferred one or more advantages on FT. If so, secondly, it must be determined whether those possible advantages for FT derive from a transfer of State resources. If so, thirdly, it must be examined whether those possible advantages deriving from State resources were granted in compliance with the criterion of the prudent private investor in a market economy.'

21. With regard, first of all, to the declarations of 12 July, 13 September and 2 October 2002, the General Court found, in paragraph 234 of the judgment under appeal, 'that the Commission has demonstrated satisfactorily, in the contested decision, that those declarations resulted in an appreciable advantage for FT inasmuch as they enabled the financial markets to regain confidence, made it possible, easier and cheaper for FT to gain access to new loans necessary in order to refinance its short-term debts to the amount of EUR 15 billion and, in the end, helped to stabilise its very fragile financial situation which, in June and July 2002, was on the point of deteriorating substantially'. In the following paragraph, the General Court also found that 'the Commission assembled a body of evidence capable of establishing that, following the declaration of 12 July 2002, the subsequent declarations and the announcement on 4 December 2002 of the shareholder loan proposal, the rating agencies adopted a more favourable rating for FT than those which they had adopted or envisaged previously in the light of its financial crisis …'. In paragraph 237, it recognised that 'as a whole, those declarations decisively influenced the reaction of the rating agencies and that that reaction was then decisive for the improvement of FT's image in the eyes of investors and creditors and for the conduct of the financial market operators which subsequently participated in the refinancing of FT'. Finally, it concluded in paragraph 240 that 'the positive and stabilising effect on FT's rating, stemming directly from the declarations from July 2002 and from the intention of the French authorities, was therefore bound to result in the conferment of a financial advantage on FT and in a strengthening of its economic position. That finding on its own led the Commission to conclude that FT had been granted an advantage as referred to in Article 87(1) EC, without there being any need to quantify it.'

22. In paragraph 243 et seq. of the judgment under appeal, the General Court examined, next, 'whether the shareholder loan on its own, which remained at the stage of a draft contract which was not signed by FT and was never performed, produced an additional and separate advantage for FT, as distinct from the advantage described in paragraphs 235 to 237 above'. In paragraph 244, the General Court referred to paragraph 194 of the contested decision, 'according to which, notwithstanding the fact that the shareholder loan contract was never signed by FT and therefore never performed, it conferred an advantage on FT as it enabled it to increase its means of financing, to reassure the market as to its capacity to meet its maturities and thus to influence FT's borrowing terms', pointing out that 'it was "the appearance given to the market of the existence of such a loan [which was] likely to confer an advantage on [FT] as the market has considered [FT's] financial situation to be more secure"'. In paragraph 245, the General Court observed that, 'in so far as the Commission treats the advantage so described as comparable to a reassuring effect for the market and to the appearance to third parties of provision of the shareholder loan to FT, that advantage is manifestly indissociable from that deriving from the declarations from July 2002 and, in particular, from that associated with the announcement on 4 December 2002 of the shareholder loan proposal, both of which had already produced such an effect on the financial markets and led to an improvement in borrowing terms for FT'. In the following paragraph, it explained that 'it seems inconceivable that the shareholder loan proposal which was the subject-matter of the contract signed, initialled and dispatched by ERAP to FT could, along the lines of its announcement on 4 December 2002, have had an identical or, at the very least, similar impact on those markets', since 'the dispatch of the shareholder loan contract by ERAP to FT on 20 December 2002 was not made public separately and in addition to the announcement, made on 4 December 2002, of the shareholder loan proposal'.

23. In paragraphs 251 to 256 of the judgment under appeal, the General Court considered whether the Commission 'has established to the required legal standard that the mere option for FT to use, unilaterally and unconditionally, the EUR 9 billion credit line which was the subject matter of the shareholder loan contract constituted an advantage for it, even though the draft contract was never signed by it and never performed'. According to the General Court, the contested decision indicated 'with the requisite minimum of clarity and precision', that the Commission had taken into account such an additional and separate advantage as distinct from that described in paragraphs 235 to 237 of that judgment, arising from the declarations from July 2002 onwards and the announcement of

4 December 2002 (paragraphs 248 to 250). At the end of its analysis, the General Court concluded that no such evidence existed, the Commission having failed to consider whether, taking into account the conditions governing the performance of the loan contract in question, that contract did in fact involve advantageous economic effects for FT (paragraph 257).

24. In paragraph 262 et seq. of the judgment under appeal, the General Court addressed the question of whether the previously identified advantages derived from a transfer of State resources. It first of all dismissed the argument put forward by the Bouygues companies that such a transfer resulted from the declarations of 12 July, 13 September and 2 October 2002, because of the open-ended, imprecise and conditional character of the declarations and the fact that it was not shown that they 'fulfilled the conditions for a legally binding unilateral commitment on the part of the French State, if only in the form of a letter of intent, involving a transfer of State resources within the meaning of Article 87(1) EC' (paragraphs 268 to 289).

25. The General Court considered next whether a transfer of State resources had been established in relation, on the one hand, to the announcement of 4 December 2002 and, on the other hand, to the shareholder loan contract proposal of 20 December 2002.

26. With regard to the announcement of 4 December 2002, the General Court found that neither the Commission nor the Bouygues companies had maintained that that announcement involved a transfer of State resources under French administrative or civil law and that, consequently, it was not its task to consider such a question (paragraphs 293 to 295). In paragraph 296, the General Court went on to say that, 'in any event, a transfer of State resources resulting from the announcement of 4 December 2002 could correspond only to an advantage residing in the opening of the EUR 9 billion credit line expressly envisaged in that announcement. On the one hand, as was recalled in paragraph 292 above, the Commission failed to characterise, to the required legal standard, such an advantage in the contested decision. On the other hand, that advantage is separate from that deriving from the declarations from July 2002, as found in that decision (see paragraph 243 et seq. [of the judgment under appeal]), without prejudice to the question whether the latter advantage consists in the improvement of the terms of FT's refinancing and/or in any increase in its share and bond prices.' In the following paragraph, the General Court pointed out that 'that requirement of a 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 found in the contested decision, which results from the declarations from July 2002, on the one hand, 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 of the shareholder loan proposal, on the other.' It therefore concluded that the Commission had not shown that the announcement in question involved a transfer of State resources.

27. As regards the shareholder loan contract proposal of 20 December 2002, the General Court simply found that, 'in so far as the Commission did not establish satisfactorily in the contested decision an advantage deriving from the contractual offer as such (see paragraphs [254 to 257 of the judgment under appeal]), it is not, a fortiori, possible for the Court to find the existence of any transfer of State resources linked to that advantage' (paragraph 299).

28. The General Court turned finally to the question whether, 'on the basis of its overall approach (see paragraph 266 [of the judgment under appeal]), the Commission was nevertheless entitled to assess the declarations from July 2002 in conjunction with the announcement of the shareholder loan proposal and the dispatch of the shareholder loan contract in order to conclude that the criterion of transfer of State resources was satisfied in this case' (paragraphs 302 to 309). At the end of that examination, it

concluded that, 'even though it was permissible for the Commission to take account of all the events which preceded and influenced the final decision taken by the French State in December 2002 to support FT by means of a shareholder loan in order to characterise an advantage, it failed to demonstrate the existence of a transfer of State resources connected to that advantage'.

III – Procedure before the Court of Justice and forms of order sought

29. By document lodged at the Registry of the Court of Justice on 4 August 2010, the Bouygues companies brought an appeal against the judgment under appeal (Case C-399/10 P). By document lodged at the Registry of the Court of Justice on 5 August 2010, the Commission also brought an appeal against that judgment (Case C-401/10 P). By order of the President of the Court of 28 February 2011, the Kingdom of Denmark and the Federal Republic of Germany were granted leave to intervene in Case C-399/10 P in support of the Commission and the French Republic respectively. The Kingdom of Denmark subsequently withdrew its intervention. By order of the President of the Court of 8 September 2011, Cases C-399/10 P and C-401/10 P were joined for the purposes of the oral procedure and judgment.

30. In Case C-399/10 P, the Bouygues companies claim that the Court should set aside the judgment under appeal; give a ruling on the substance of the case and annul, first, in part, Article 1 of the contested decision, in so far as the Commission implicitly but necessarily refused in it to classify as aid the declarations made by the French State on 12 July, 13 September and 2 October 2002, and, secondly, Article 2 of that decision; in the alternative, in the event that the Court considers that the state of the proceedings does not permit it to give judgment, refer the case back to the General Court for judgment; and order the Commission, FT, the French Republic and the Federal Republic of Germany to pay the costs. In Case C-401/10 P, they refer to the claims set out in their appeal.

31. In Case C-401/10 P, the Commission claims that the Court 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 as well as paying those incurred by the French Republic and by FT in Joined Cases T-425/04 and T-444/04, and refer the case back to the General Court for reconsideration, reserving the costs of the proceedings. In Case C-399/10 P, the Commission seeks the same form of order as the Bouygues companies, except in relation to the claims that Article 1 of the contested decision should be annulled in so far as it implicitly but necessarily refused to classify as aid the declarations made by the French State on 12 July, 13 September and 2 October 2002, that Article 2 of that decision should be annulled, and that the Commission should be ordered to bear its own costs and pay those incurred by the Bouygues companies.

32. FT and the French Republic contend that the Court should dismiss the appeals brought by Bouygues and the Commission or, failing that, refer the case back to the General Court. In the event that the Court sets aside the judgment and refuses to refer the case back to the General Court, they contend that the Court should uphold in whole or in part their respective submissions at first instance, and order the Bouygues companies and the Commission to pay the costs.

33. The Federal Republic of Germany supports the form of order sought by the French Republic and also contends that the Court should order the Bouygues companies and the Commission to pay the costs incurred by the interveners.

IV – The appeals

34. In support of their appeal in Case C-399/10 P, the Bouygues companies put forward two grounds, the first alleging errors in the classification as aid of the declarations of the French State of 12 July, 13 September and 2 October 2002, and the second alleging errors in the classification as aid of the shareholder loan granted by the French State to FT in the form of the opening of a line of credit of EUR 9 billion in December 2002.

35. The Commission puts forward three grounds in support of its appeal in Case C-401/10 P. The first alleges contradictory reasoning in the judgment under appeal, the second alleges an error of law in the interpretation of Article 87(1) EC, and the third raises the issue of a distortion of the contested decision.

A – *Complaints alleging infringement of Article 87(1) EC*

36. In the following points, I shall examine, first, the complaints raised by the Bouygues companies under their first ground of appeal, alleging that the General Court wrongly refused to classify as aid the declarations made by the French Republic on 12 July, 13 September and 2 October 2002, and then, together, the complaints relied on by the Bouygues companies under their second ground of appeal and by the Commission under its second ground of appeal, concerning the classification as aid of the shareholder loan granted by the French State to FT. Since the condition as to the financing of aid from State resources is at the heart of the dispute between the parties, it is appropriate, before examining those complaints, to give a brief summary of the relevant case-law.

1. Brief summary of the case-law on the condition of financing aid from State resources

37. It is now settled case-law that the commitment of State resources is one of the conditions constituting aid and must, therefore, include a charge on the State budget.

38. Although the foregoing is an established principle under the law on State aid as it currently stands, it has not always been so and, in its early case-law, the Court seemed more inclined to identify the State origin of a measure *either* by the public nature of the resources used to finance it *or* by its attributability to the State.[2] Thus, in a judgment in 1985, the Court, having been called upon to rule on the nature as aid of a grant to farmers which was financed from the operating surplus of the French Caisse nationale de crédit agricole (National Agricultural Credit Fund), expressly held that 'aid need not necessarily be financed from State resources to be classified as State aid'.[3] The Court confirmed that approach a few years later in *Kwekerij van der Kooy and Others* v *Commission*[4] and, in 1988, in a judgment concerning the classification as aid of preferential interest rates on export loans

2 — That position was based on the use of the disjunctive preposition 'or' in the expression 'aid granted by a Member State or through State resources' in the former Article 92(1) of the EEC Treaty (which became Article 92(1) of the EC Treaty, which itself became, after amendment, Article 87(1) EC and then Article 107 TFEU). See in this regard Merola, M., 'Le critère de l'utilisation des ressources publiques', in *Les aides d'état*, Editions de l'Université Libre de Bruxelles, 2005, p. 15.

3 — Case C-290/83 *Commission* v *France* [1985] ECR 439, paragraph 14. In that case, although there was no doubt that the measure had been decided on at the instigation of the public authorities and was therefore attributable to the State, the French Government submitted that the surpluses used to finance the grant were the financial proceeds from the management by the banks of savings from a private source and not State resources.

4 — Joined Cases 67/85, 68/85 and 70/85 [1988] ECR 219, paragraphs 32 to 38. Those cases concerned the application in the Netherlands of a preferential tariff for natural gas that favoured a particular group of users and was fixed by gas producers, including Gasunie, a company governed by private law in which the Netherlands State directly or indirectly held 50% of the capital. After establishing, in the light of the structure of the shares in Gasunie, that the fixing of that tariff was the result of conduct attributable to the Netherlands State, the Court held that 'it may therefore be concluded that the fixing of the contested tariff … falls within the meaning of the phrase "aid granted by a Member State" under Article 92 of the Treaty'.

granted by the Greek authorities through the Bank of Greece,[5] the Court described that approach as 'settled case-law'.[6] A reading of Article 92 of the EC Treaty to the effect that the public financing of aid is not an essential condition for the purposes of classifying as aid a measure which is indisputably attributable to the State was also supported by a number of Advocates General.[7]

39. Since the judgment in *Sloman Neptun*,[8] however, the Court has clearly taken the opposite view. Rejecting the argument put forward by the Commission, which was based on the case-law set out above, and contrary to the Opinion of Advocate General Darmon, the Court held in that judgment that 'only advantages which are granted directly or indirectly through State resources are to be regarded as State aid within the meaning of Article 92(1) of the EC Treaty' and that 'the wording of this provision itself … show[s] that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question'.[9] That reversal of precedent was confirmed in *Kirsammer-Hack*,[10] which was also concerned with the field of social legislation. Since then, the Court has consistently adhered to its new position.[11] In *PreussenElektra*[12] the Court had been openly invited by the Commission to reconsider its case-law, particularly in the light of the recent developments in the Community legal system, but it did not take up that invitation.[13]

40. Although an advantage granted to one or more undertakings must be financed through State resources in order to be regarded as State aid within the meaning of Article 107(1) TFEU, it is none the less settled case-law that it is not necessary to establish in every case that there has been a transfer of such resources.[14] The fact that the State chooses not to collect revenue, even though it does not involve any direct transfer of public resources, may also constitute aid within the meaning of Article 107 TFEU.[15] Thus, the Court has already held that a tax exemption or tax relief,[16] a deferment of tax and, in some circumstances, facilities for the payment of social security contributions granted to an undertaking on a discretionary basis by the body responsible for collecting them,[17] the supply of goods or services on preferential terms,[18] the *de facto* waiver of public debts or exemption from the obligation to pay fines and other pecuniary penalties[19] may satisfy the condition of financing through State resources.

5 — Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 12.

6 — It should be noted, however, that, even at that time, the Court had twice ruled out the existence of aid after establishing that the advantages were not conferred directly or indirectly from State resources: see Case 82/77 *Van Tiggele* [1978] ECR 25, paragraph 24, and Joined Cases 213/81 to 215/81 *Norddeutsches Vieh- und Fleischkontor Will and Others* [1982] ECR 3583, paragraph 22.

7 — See the Opinions of Advocate General Verloren van Themaat in *Norddeutsches Vieh- und Fleischkontor Will and Others*, Advocate General Slynn in *Greece* v *Commission*, and Advocate General Darmon in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887. More recently, see the Opinion of Advocate General Poiares Maduro in Case C-237/04 *Enirisorse* [2006] ECR I-2843, points 44 to 53.

8 — Cited above.

9 — The Court stated in paragraph 19 that 'the distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State'. In a subsequent judgment, the Court held that the condition as to the transfer of State resources did not replace the condition as to the attributability to the State of the advantages conferred on the beneficiaries of the measures at issue but was additional to it: Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 24.

10 — Case C-189/91 [1993] ECR I-6185.

11 — See Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 36, which concerned the question whether the Italian law introducing a special administration procedure for large undertakings in difficulties, which derogated from the rules of ordinary law relating to insolvency, constituted aid, and Case C-295/97 *Piaggio* [1999] ECR I-3735, which concerned the same Italian law. In the same line of case-law, albeit slightly different in terms of the reasoning followed, see also Joined Cases C-52/97 to C-54/97 *Viscido and Others* [1998] ECR I-2629.

12 — Case C-379/98 [2001] ECR I-2099.

13 — It is interesting to note that, in *PreussenElektra*, the costs of the measure at issue were borne mainly by private operators active in the same market as the beneficiaries of the aid, which further distorted competition.

14 — Case C-387/92 *Banco Exterior de España* v *Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 14; Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 45; and *France* v *Commission*, paragraph 36.

15 — See in particular *Banco Exterior de España*, paragraph 14, and Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 16.

16 — See *Banco Exterior de España*, paragraph 14; *Italy* v *Commission*, paragraph 16; and Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 26 and 27.

17 — Case C-256/97 *DM Transport* [1999] ECR I-3913.

18 — Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 59.

19 — *Piaggio*, paragraphs 41 and 42.

41. Moreover, in *Ecotrade*, the Court accepted that the grant of a State guarantee might entail 'an additional burden for the public authorities',[20] a situation explicitly referred to by the Bouygues companies in relation to the declarations of 12 July, 13 September and 2 October 2002. In this regard, I would point out that, in its Notice on State aid in the form of guarantees ('the Notice on aid in the form of guarantees'),[21] on the question of the commitment of public resources, the Commission, 'in order to avoid any doubts', states that, where the risk carried by the State is not remunerated by an appropriate premium, 'there is both a benefit for the undertaking and a drain on the resources of the State'. Consequently, the aid is granted 'at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee' and it exists 'even if it turns out that no payments are ever made by the State under a guarantee'.[22] The use of public resources therefore follows not from the – future and uncertain – burden that would be borne by the State budget if the guarantee were enforced but from the fact that the State *assumes the risk of such a loss without adequate consideration*, which fact, according to the Commission, constitutes a loss of revenue now. To be more precise, it is the combination of those two factors, the risk-taking and the lack of an appropriate premium, that gives rise to a mobilisation of public resources in the case of a guarantee.[23]

42. Finally, it should be pointed out that, as the Bouygues companies have rightly highlighted, in *Ecotrade*, cited above, the Court recognised that even a *future and potential burden* for the public authorities might suffice to satisfy the condition as to the use of State resources.[24]

2. Classification as aid of the declarations of the French State of 12 July, 13 September and 2 October 2002 (first ground of appeal in Case C-399/10 P)

43. By their first ground of appeal, the Bouygues companies complain that the General Court was wrong to reject the classification as aid of the declarations of the French State of 12 July, 13 September and 2 October 2002. That ground of appeal is divided into three parts. By the first part, the Bouygues companies accuse the General Court of having committed errors in the definition of the conditions required in order for a declaration of support to be capable of involving a commitment of State resources (see (a) below). In the second part, they claim that the rules of national law presented to the Commission were distorted (see (b) below). Finally, by the third part of their first ground of appeal, they allege that the General Court made an error of classification in wrongly refusing to take into account, in the context of the use of public resources, the economic effects connected with the expectation raised by the State's declarations (see (c) below).

20 — See Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 43. See also Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897 and Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, in which the General Court states that 'the grant of a guarantee by the State cannot avoid the prohibition in Article 92 of the Treaty merely because that advantage was not conferred on the beneficiary undertaking by way of a direct and clear mobilisation of State resources' (paragraph 81).

21 — OJ 2008 C 155, p. 10.

22 — To this effect, see the judgment.

23 — As far as I am aware, the Court has not so far given an express ruling on this question (see, however, Case C-275/10 *Residex Capital IV* [2011] ECR I-13043, in which the Court, in the same way as the Notice on aid in the form of guarantees, identifies the aid component as being found in the lower financial cost which the beneficiary of a State guarantee bears as compared with the cost it would have borne if it had had to obtain the financing or the guarantee at market prices). As regards the General Court, see *EPAC* v *Commission*, paragraphs 80 and 81. See also, more recently, Case T-318/00 *Freistaat Thüringen* v *Commission* [2005] ECR II-4179, paragraph 125, and judgment of 10 November 2011 in Case T-384/08 *Elliniki Nafpigokataskevastiki and Others* v *Commission*, paragraph 92, which refers to paragraph 80 of the judgment in *EPAC* v *Commission*.

24 — In paragraph 41 of that judgment, the Court accepted that, 'in view of the priority accorded to debts connected with the pursuit of economic activity', the authorisation given to undertakings subject to the special administration procedure to continue trading 'might … involve an additional burden for the public authorities if it were in fact established that the State or public bodies were among the chief creditors of the undertaking in difficulties …'.

(a) The errors allegedly committed by the General Court in the definition of the conditions required in order for a declaration of State support to be capable of involving a use of public resources (first part of the first ground of appeal in Case C-399/10 P)

44. In the first part of their first ground of appeal, the Bouygues companies, without calling into question as such the condition as to the financing of aid through State resources, contest the requirements to which the General Court subjected the demonstration of proof that that condition was satisfied in the case of the declarations of 12 July, 13 September and 2 October 2002. First, they submit, the General Court was wrong to rely on the future and uncertain nature of the risk that public resources would be mobilised in order to find that those declarations did not constitute aid. Secondly, contrary to the view expressed by the General Court, the indefinite nature of the mode of intervention by the State and of the amount guaranteed are not a decisive factor in ruling out the existence of a commitment of State resources, since the concept of a guarantee is not confined to the traditional securities provided for and governed by national law. Finally, the Bouygues companies argue that the General Court was wrong to take the view that a legally binding commitment by the State is necessary to show that public resources are being used.

45. The complaints set out above are directed against paragraphs 279 and 280 of the judgment under appeal. In paragraph 279, after analysing the nature of the declarations of 12 July, 13 September and 2 October 2002 (paragraphs 272 to 278 of the judgment under appeal), the General Court concludes that, 'because of their open-ended, imprecise and conditional character, in particular as regards the nature, scope and conditions of any State intervention in favour of FT … [those declarations] cannot be treated in the same way as a State guarantee or interpreted as disclosing an irrevocable commitment to provide specific financial assistance for FT'. It goes on to say, in the following paragraph, that 'a concrete, unconditional and irrevocable commitment of public resources on the part of the French State would have required those declarations to set out explicitly either the exact sums to be invested, or the specific debts to be guaranteed, or, at the very least, a predefined financial framework, such as a credit line up to a certain amount, as well as the conditions for granting the proposed assistance'.

46. I would point out straight away that the General Court's assertions as reproduced in the preceding point fall outside the context of an analysis in the light of the relevant national law, which the Court conducts only in paragraph 283 et seq. of the judgment under appeal. I must admit that I find this approach by the General Court, to consider the question whether a declaration of support by the State constitutes a legally binding commitment capable of mobilising public resources without referring to the relevant provisions of national law, perplexing.

47. Furthermore, even supposing that such an analysis is valid, I also have fundamental reservations about the conditions laid down by the General Court in the aforementioned paragraph 280. They appear to me to be excessively restrictive, inasmuch as they have the effect of ruling out the possibility that a transfer of public resources may result from any support measure the economic effects of which can be regarded as being the same as those of a State guarantee [25] but the precise scope of which, in terms of the financial risk it represents to the public budget, is not yet measurable

25 — One has only to think, for example, of the implicit guarantees arising from the legal rules specifically applicable to the beneficiary, or of letters of intent or comfort. I would point out in this regard that, for the purposes of the Notice on aid in the form of guarantees, the term 'guarantee' includes 'any measure of support whose economic effects are equivalent to those of a guarantee' and result either from a provision of national law or from the conduct of the administrative authorities. Thus, for example, the Commission distinguishes between guarantees from a 'contractual source' or 'another legal source', on the one hand, and 'guarantees whose form is less visible', of which it gives 'oral commitments' as an example, on the other hand.

at the time when the measure in question is adopted,[26] *even where, under the applicable national law, such a measure creates a legally binding obligation incumbent on the State*. An exclusion in principle of this kind does not seem to me to be justified, particularly in the light of the Court's case-law to the effect that, when it comes to classifying a measure as State aid, account must be taken of the effects which that measure may produce.[27]

48. That said, I do not consider it necessary to examine this question any further. After all, the General Court's dismissal of the allegation by the Bouygues companies that the declarations of 12 July, 13 September and 2 October 2002 constitute State aid is based largely on grounds other than those mentioned in paragraphs 279 and 280 of the judgment under appeal. Since, as I shall indicate below, it is my view that the complaints raised by the Bouygues companies against those grounds must be dismissed in their entirety, it follows that, even if I were to conclude that the General Court committed an error of law in paragraph 280 of the judgment under appeal, such an error would not on its own be sufficient to lead to the setting aside of the judgment under appeal.

49. I shall therefore turn now to analysing the complaints raised by the Bouygues companies against the grounds of the judgment under appeal by reference to which the General Court held, first, on the basis of the rules of French civil and administrative law, that the declarations of 12 July, 13 September and 2 October 2002 did not create a legally binding obligation incumbent on the State (see (b) below) and, secondly, that they were not capable of involving a commitment of State resources even in the absence of any legal obligation (see (c) below).

(b) The alleged distortion of the rules of national law presented to the Commission (second part of the first ground of appeal in Case C-399/10 P)

50. The Bouygues companies contend that the General Court distorted the rules of national law submitted to it in finding that certain aspects of the declarations of 12 July, 13 September and 2 October 2002, in particular the fact that they were not precise, clear and firm in relation to the steps to be taken to remedy FT's financing problems, that they were made conditional on the occurrence of financing difficulties on the part of FT and that they were geared towards the future, precluded the recognition of a legal obligation incumbent on the State under French administrative or civil law.

51. I would point out that the Court of Justice recently gave a ruling on the limits of the review which it carries out, in the context of an appeal, on the findings made by the General Court with regard to the national law of a Member State.[28] In particular, it stated that it 'has jurisdiction to determine, first of all, whether the General Court, on the basis of the documents and other evidence submitted to it, distorted the wording of the national provisions at issue or of the national case-law relating to them, or of the academic writings concerning them; second, whether the General Court, as regards those particulars, made findings that were manifestly inconsistent with their content; and, lastly, whether the

26 — I note in passing that the conditions laid down in paragraph 280 of the judgment under appeal, which require that the amount of the guarantee provided should be measurable at the time when it is granted, are among those listed in paragraph 3.2 of the Notice on aid in the form of guarantees as having to be fulfilled for the purposes of compliance with the principle of a private investor in a market economy. In other words, where the same requirements relating to the definition of the financial framework for the support measure are not satisfied, the Commission considers that the measure is capable of constituting aid, while the General Court takes the view that the measure falls outside the scope of Article 107 TFEU, since a commitment of State resources has not been established.

27 — Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27; Case 310/85 *Deufil* v *Commission*, [1987] ECR 901, paragraph 8; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20. With regard more specifically to the form of the State support, see Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 31; Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, paragraph 8; Case C-156/98 *Germany* v *Commission*, paragraph 25. Moreover, this lack of formalism is reflected in the meaning of the term State resources itself, which, according to the Court of Justice, 'covers all the financial means by which the public authorities may actually support undertakings': see Case C-482/99 *France* v *Commission*, paragraph 37, where the broad definition given by the Court was meant to include the financial resources of public undertakings, which, although not permanently held by the Treasury, none the less remained under constant public control).

28 — Case C-263/09 *Edwin* v *OHIM* [2011] ECR I-5853. In that case, the appellant claimed that there had been an infringement of a rule of national law made applicable to the dispute by the reference made to it in a provision of European Union law.

General Court, in examining all the particulars, attributed to one of them, for the purpose of establishing the content of the national law at issue, a significance which is not appropriate in the light of the other particulars, where that is manifestly apparent from the documentation in the case-file'. [29]

52. In the present case, in support of their complaint of distortion, the Bouygues companies refer, first of all, to a legal opinion requested by the Commission and annexed to its written submissions to the General Court. That opinion, it is maintained, indicates that, in French law, a commitment to achieve a clear and precise result gives rise to an obligation to secure that result, the lack of precision or clarity as to how such a result is to be achieved being immaterial.

53. Contrary to the submission made by FT, that argument is admissible, since it forms part of the plea alleging an incorrect interpretation of French law by the Commission which the Bouygues companies raised at first instance. As regards the substance of the case, in so far as the Bouygues companies seek to argue that there has been a distortion of the content of the aforementioned legal opinion, their argument must be rejected as having failed to specify how that opinion was distorted, since such a distortion cannot be inferred solely from the finding that the General Court did not endorse the view expressed in the opinion. By contrast, in so far as the Bouygues companies rely on the legal opinion in question to support their claim that the rules of national law have been distorted, I would point out, first, that it is apparent from the actual wording of the opinion that its author simply supports the view that it *seems likely* that the declarations of 12 July, 13 September and 2 October 2002 should be classified under French commercial law as 'a commitment of intent'. [30] Secondly, as the General Court observes in paragraph 283 of the judgment under appeal, it is also apparent from that opinion that such a view rests on the premise that the declarations express a clear and precise, albeit relatively indeterminate, commitment on the part of the State, which premise is specifically rejected by the General Court in paragraphs 272 to 278 of the judgment under appeal. [31] The same applies to the judgment of the Cour de cassation of 9 July 2002 in *Lordex*, cited in the aforementioned opinion. [32]

54. Secondly, the Bouygues companies submit that, according to the rules of French administrative law submitted to the General Court, declarations by the State in support of an undertaking are capable of imposing a binding legal obligation on the State.

55. They argue, first of all, that 'the case-law of the administrative courts has recognised promises made by the State as having binding force'. In particular, they cite a judgment of the Conseil d'État of 30 June 1922 in *Lamiable and Others* to the effect that it is sufficient for the authorities to have behaved 'in such a way as to engender the conviction' that they would act in a certain way in order for there to be a commitment on the part of the State. That judgment is applicable in this instance, where, as the General Court itself recognised, the declarations of 12 July, 13 September and 2 October 2002 gave rise to an expectation on the market. In this regard, I would point out that that same argument was put forward by the Bouygues companies before the General Court and was rejected in paragraph 284 of the judgment under appeal, essentially on the ground that it presupposes that those declarations can be regarded as being sufficiently clear, precise, unconditional and firm, which the General Court held not to be the case in paragraphs 272 to 278 of the same judgment. It is clear from the text of the aforementioned judgment in *Lamiable* and the other judgments of the Conseil d'État

29 — Ibid., paragraph 53.

30 — In particular, in the passages from the opinion at issue to which the Bouygues companies refer, its author concludes that 'it *seems possible* to show that the declarations made by the State between July 2002 and December 2002 do indeed exhibit the characteristics of a guarantee in the form of a unilateral commitment which, it *seems likely*, should be classified as a commitment of intent, notwithstanding its original nature' (my emphasis).

31 — The conclusions reached by the General Court as regards the vague, imprecise and conditional nature of the declarations made by the State in support of FT are assessments of fact against which the Bouygues companies do not raise a direct and express plea of distortion, as they do in respect of the relevant rules of French law.

32 — In that judgment, the French Cour de Cassation, while rejecting its classification as a security, held that a letter of intent from a parent company stating that 'we shall henceforth ensure that this transaction progresses satisfactorily and …, as far as you are concerned, we shall take the necessary steps to bring it to a successful conclusion' constituted a legal obligation to achieve a result.

cited by the Bouygues companies and annexed to their written submissions [33] that the General Court was not guilty of a manifestly erroneous reading of that case-law and did not distort its meaning in taking the view that it predicated the liability of the authorities on the existence of specific assurances given to the public or behaviour clearly indicating an intention on the part of the authorities to act in a particular way. The argument which the Bouygues companies base on that case-law is therefore unfounded.

56. Next, the Bouygues companies refer to the circular from the Minister for Economic Affairs, Finance and Industry of 22 July 2003 on the listing of the implicit or explicit guarantees granted by the State, and the explanatory note attached to it. It is apparent from those documents that a State guarantee may take the form of an 'implicit guarantee', defined as an administrative act 'which produces and involves financial consequences for the State', that it may result, in particular, from a 'ministerial letter or [from] any other basis' and that even guarantees which may have been granted without a valid legal basis may nevertheless 'create rights for their beneficiaries'. In this regard, I note that, in paragraph 285 of the judgment under appeal, the General Court states that the Bouygues companies cannot rely on that circular and on the explanatory note attached to it, since the declarations of 12 July, 13 September and 2 October 2002 'do not contain anything to show that there is an implicit guarantee on the part of the French State in favour of FT', and it refers to paragraph 284 of the same judgment, [34] in which it dismisses the applicability to this case of the administrative case-law cited by the Bouygues companies. It follows that, in order to overcome the objection raised by the General Court to the effect that the aforementioned circular and its explanatory note are irrelevant, it fell to the Bouygues companies to call in question the conclusions reached in the aforementioned paragraph 284. However, the arguments which they adduce do not succeed in achieving that result.

57. An examination of the arguments put forward by the Bouygues companies in support of the second part of their first ground of appeal does not substantiate the distortion of the rules of French law that is alleged. Generally speaking, those arguments cannot be recognised as being well-founded because of the conclusion reached by the General Court to the effect that the declarations made by the State in support of FT are vague, imprecise and conditional. That conclusion is an assessment of fact against which the Bouygues companies have not raised a direct and express complaint of distortion. Also, the arguments put forward by them do not seek to show, or in any event do not succeed in showing, that the French civil and administrative courts' factual assessment of the nature of those declarations would manifestly have been different.

58. In those circumstances, this part of the first ground of appeal raised by the Bouygues companies must be dismissed.

33 — In addition to the aforementioned judgment in *Lamiable and Others*, which was produced before the General Court, the Bouygues companies annexed to their appeal inter alia the judgments of the Conseil d'État of 3 March 1993 in *Comité central d'entreprise de la société d'exploitation industrielle des tabacs et allumettes* and of 26 October 1973 in *Société civile immobilière 'Résidence Arcole'*, which judgments were cited and commented on in Maître Sureau's report of 14 January 2004, which was annexed to the application at first instance.

34 — In that paragraph, the General Court concludes that 'it is … not established that, in view of their intrinsic characteristics, [the declarations of 12 July, 13 September and 2 October 2002] are capable of creating such a legally binding and unconditional commitment on the part of the French State to support FT'.

(c) The classification error allegedly committed by the General Court inasmuch as it refused to take into account, in the context of the use of public resources, the economic effects associated with the expectation raised by the declarations made by the State (third part of the first ground of appeal in Case C-399/10 P).

59. Before examining the third part of the first ground of appeal raised by the Bouygues companies, we must look first of all at the third complaint raised by them under the first part of that ground of appeal, alleging that the General Court wrongly considered that a binding legal commitment by the State is necessary to support the conclusion that public resources have been mobilised. According to the Bouygues companies, since the form of State intervention is immaterial and its effects alone are to be taken into account, it is sufficient to demonstrate the existence of an economic financial risk, even if not based on a legal obligation resulting from the intervention, to establish that State resources have been used. The French Republic takes issue with that argument, citing in support of its objection the judgment of the Court of Justice in *Austria* v *Commission*[35] and the judgment of the General Court in *Fleuren Compost* v *Commission*.[36]

60. In the first of those cases, the Commission submitted that, because of an unconditional and legally binding promise made to the beneficiary of the contested aid before its notification, effectively implementing the aid, the Republic of Austria was prevented from relying on the case-law in *Lorenz*. According to the Commission, in Austrian law, such a promise produced the same effects as would legislation instituting a system of aid, because it imposed a legal obligation on the Austrian authorities to grant the aid promised. In response to that argument, the Court of Justice simply held that the Austrian authorities had expressly made the grant of the aid subject to prior authorisation from the Commission and that, consequently, the Commission had not produced any evidence enabling it to find that the aid in question had been promised unconditionally, and therefore in such a way as to be legally binding under Austrian law, before it was notified. The *Fleuren Compost* case, cited above, raised the question, however, of when the aid at issue had been granted, that is to say at the time when the Netherlands authorities sent an acknowledgement of receipt of the application for a grant of aid made by the applicant, as the latter submitted, or at the time when the decision to grant the aid was adopted following the evaluation of the application, as the Commission maintained. The General Court stated that the relevant criterion was 'the legally binding act by which the competent [national] authorities undertake to grant aid'.[37]

61. Like the Bouygues companies, I do not consider it possible to give the judgments cited above the meaning and scope conferred on them by the French Government. In particular, I do not think it is possible to infer from the judgment in *Austria* v *Commission*, cited above, that 'it establishes a general principle that a legally binding commitment is necessary for the purposes of classifying aid', as the French Government maintains. After all, that judgment, in common with the judgment in *Fleuren Compost*, cited above, does not deal with the definition of aid but is exclusively concerned with the question of when a planned aid measure may be regarded as having been granted for the purposes of deciding which legal regime is applicable to it.[38] Furthermore, in *Austria* v *Commission*, the only question raised by the Commission, and examined by the Court of Justice, was whether, under Austrian law, the promise to grant the aid made by the Austrian authorities created a binding legal obligation incumbent on the State to act accordingly. At no time, however, did the question arise as to whether the existence of a commitment of State resources may be contemplated even in the absence of such an obligation. Finally, as the Bouygues companies rightly point out, in neither case

35 — Case C-99/98 [2001] ECR I-1101.

36 — Case T-109/01 [2004] ECR II-127.

37 — Paragraph 74.

38 — In *Austria* v *Commission*, the question was whether the measure at issue should be regarded as new or existing aid, while, in *Fleuren Compost*, it was whether or not the contested measure formed part of a scheme of aid previously approved by the Commission.

had it been established or even submitted that the acts in question (the promise to grant aid in *Austria* v *Commission*, cited above, and the acknowledgment of receipt of the application for aid in *Fleuren Compost*, cited above) had conferred any advantage on the future beneficiaries of the aid, unlike in the present case in relation to the declarations of 12 July, 13 September and 2 October 2002.

62. That said, although I am not entirely convinced by the French Government's argument that a legally binding commitment on the part of the State is always necessary in order for a measure of support for an undertaking to be capable of being regarded as granted from public resources,[39] I do not think it necessary to examine this question any further, in so far as the General Court none the less examined, in paragraph 288 of the judgment under appeal, whether '*even in the absence of legally binding character* under national law of the alleged commitment resulting from the declarations from July 2002, they would involve a transfer of State resources'.[40] The third part of the first ground of appeal raised by the Bouygues companies relates to that very examination.

63. In this part of the ground of appeal, the Bouygues companies argue, in substance, that, after recognising that, in the declarations of 12 July, 13 September and 2 October 2002, the French State had implemented a strategy based on its reputation as a creditor and solvent and reliable debtor to restore market confidence, the General Court then disregarded the corollary of such a strategy, which is to say that the State would have lost market credibility if it had not fulfilled the expectation it had thus created. They point out that, in the contested decision, the Commission recognised, on the basis of an economic study which it had commissioned, that that loss of reputation was a very high price for the State to pay. It was within the Commission's discretion to deal with a complex economic matter of this kind and it was not for the General Court to substitute its own analysis for that of the Commission.

64. I would point out, first of all, that, after examining, in paragraphs 214 to 218 of the contested decision, both the question whether the declarations of 12 July, 13 September and 2 October 2002 were binding under domestic law and the question whether they were capable of undermining the credibility of the State, the Commission concluded in paragraph 218 that, 'taken as a whole, [the factors under consideration] may be deemed to actually endanger State resources (either by incurring the State's responsibility vis-à-vis investors, or by increasing the cost of the State's future transactions)' and that 'the argument to the effect that the French authorities' declarations as from July 2002 are aid is therefore innovative, but probably not without foundation'. However, in paragraph 219 of the contested decision, it considered itself unable to 'establish irrefutably the existence of aid on this basis'. It follows that, as the General Court rightly observed in paragraph 288 of the judgment under appeal, the Commission ultimately refrained from adopting a definitive position on the question whether the declarations cited above were capable of causing the State to lose credibility on the financial markets in such a way as to expose it to a financial risk in the form of an increase in the costs of its future transactions. In those circumstances, the Bouygues companies are not justified in maintaining that the General Court substituted its own assessment for that of the Commission when it stated, in paragraph 288 of the judgment under appeal, that 'it is not established that, even in the absence of legally binding character under national law of the alleged commitment resulting from the declarations from July 2002, they would involve a transfer of State resources'.

65. Next, I take the view that, in so far as they criticise the General Court for having failed to take account of the impact on the public finances of the expectation which the declarations created on the markets and having thus disregarded the effectiveness of Article 107(1) TFEU, the Bouygues companies are in reality asking the Court of Justice to undertake a new assessment of the facts. In paragraph 288

39 — In the light of the case-law cited in point 47 above, to the effect that, when it comes to classifying a measure as State aid, account must be taken of its effects, one might be prompted to regard the condition as to the commitment of State resources as being fulfilled where the conduct of the State is such as to create a charge on the State budget by exposing it, *in fact* if not in law, to a sufficiently concrete financial risk.

40 — My emphasis.

of the judgment under appeal, the General Court held that, 'even assuming that non-compliance with any promise of support by the French State for an undertaking is capable of jeopardising its credibility and reputation on the financial markets, the fact remains that, in the present case, it is not demonstrated that the declarations from July 2002 included a precise, unconditional and firm commitment in favour of FT capable of giving rise to such detrimental consequences'. It went on to state that 'the conduct of the French authorities from July 2002 was specifically designed to avoid such consequences by allowing uncertainty to persist as to the nature, scope and exact conditions of any future intervention [by the French State]'. Similarly, in paragraph 282 of the judgment under appeal, after recognising that, by those declarations, the French State had intended actively to influence the reaction of those markets in order to restore their confidence with the aim of preparing for the refinancing of FT, the General Court stated that 'the mere fact that, in such a context, the French State used its particular reputation with the financial markets cannot suffice to demonstrate that its resources were exposed to a risk such as can be considered to constitute a transfer of State resources'.

66. It is therefore clear that, contrary to the submission advanced by the Bouygues companies, the General Court did take into account the possibility that a commitment of public resources may result from the costs incurred as a result of any loss of credibility by the State on the financial markets, but ruled out that possibility in this instance in the absence of any conduct on the part of the State that was capable of actually jeopardising that credibility. Once again, that conclusion is based on factual assessments of the wording and nature of the declarations in question. In the absence of a complaint explicitly alleging that the content of those declarations has been distorted, such assessments fall outside the Court's power of review.

67. For the reasons set out above, I consider that the third complaint of the first part of the first ground of appeal raised by the Bouygues companies and the third part of that ground of appeal must be dismissed.

(d) Conclusion with respect to the first ground of appeal in Case C-399/10 P

68. In the light of all the foregoing considerations, I propose that the Court dismiss in its entirety the first ground of appeal in Case C-399/10 P, alleging errors in the classification as aid of the declarations by the French State of 12 July, 13 September and 2 October 2002.

3. Classification of the shareholder loan as aid (second ground of appeal in Case C-399/10 P and second ground of appeal in Case C-401/10 P)

69. Using largely similar arguments, the Bouygues companies and the Commission contest different aspects of the reasoning on the basis of which the General Court concluded in the judgment under appeal that the Commission had not demonstrated to the required legal standard that the shareholder loan granted by the French State to FT constituted aid and annulled Article 1 of the contested decision. The various complaints and arguments raised in this regard by the appellants in both appeals will be combined and examined together below.

(a) The error allegedly committed by the General Court in requiring proof of a close connection between advantage and commitment of State resources (first and second subsections of the first part of the second ground of appeal in Case C-399/10 P and first part of the second ground of appeal in Case C-401/10 P)

70. While recognising the need to establish a connection between advantage and commitment of public resources in order to be able to draw the conclusion as to the existence of State aid within the meaning of Article 107 TFEU, the Bouygues companies and the Commission contest the position adopted by the General Court in the judgment under appeal to the effect that a strict correspondence between those two factors is required. Such a view, which they consider to be entirely novel, is not only unsupported by the case-law of the Court of Justice and the General Court, it is also contradicted by it.

71. This criticism is directed essentially against paragraph 262 of the judgment under appeal, in which the General Court, after pointing out that the advantage must derive from a transfer of State resources, goes on to say that 'that 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 …'.[41] In support of that statement, the General Court refers to paragraph 21 of the judgment in *Sloman Neptun*, cited above, paragraph 27 of the judgment in *Germany* v *Commission*,[42] and paragraph 58 of the judgment in *PreussenElektra*, cited above.

72. The first question that arises is what exactly the General Court means when it says that the advantage must be closely linked to 'a corresponding charge' or, elsewhere in the judgment under appeal, that it must 'correspond to an equivalent charge' (paragraph 297) or that it must be 'offset by a corresponding reduction of the State budget' (paragraph 309). According to FT and the French and German Governments, the General Court is simply reiterating the requirement to the effect that the advantage must be granted directly or indirectly through State resources, whereas the Bouygues companies and the Commission argue that the correspondence sought by the General Court goes further than a mere connection and requires that the advantage and the resources employed should be 'one and the same', including in relation to their amounts.

73. While I myself am not convinced that the General Court really meant to require proof of equivalence in financial terms between the advantage and the charge, nor do I consider that it merely required proof of the existence of a correlation between them, as FT in particular claims. After all, as it is applied in the judgment under appeal, the requirement of a correspondence between the advantage and the charge envisaged by the General Court implies such a close link that that only a pre-defined type of advantage would be capable of corresponding to a given charge on the State budget, with the consequence that there would be no link where the advantage and charge are not of the same type.

74. Although the case-law requires that there be a connection between the advantage and the charge on the public budget, in the sense that only advantages 'granted directly or indirectly through State resources'[43] or creating 'an additional charge for the State'[44] constitute aid within the meaning of 107 TFEU, it does not for that matter require proof of a strict correspondence between the advantage and the charge, as the General Court considers in the judgment under appeal. In particular, such a requirement is not corroborated by the judgments referred to in point 71 above, to which the General Court refers in paragraph 262 of its judgment.

41 — My emphasis.

42 — Case C-156/98 [2000] ECR I-6857, paragraph 27.

43 — See, in addition to the judgments in *Sloman Neptun*, *PreussenElektra* and *Germany* v *Commission*, inter alia the judgments in *Kirsammer-Hack*, *Viscido and Others* and *Ecotrade*; Case C-222/07 *Uteca* [2009] ECR I-1407, in which the Court held that general legislation requiring television operators to earmark a percentage of their operating revenue for the pre-funding of European cinematographic films and films made for television did not constitute aid; and Case C-279/08 *Commission* v *Netherlands* [2011] ECR I-7671, paragraph 103.

44 — See *Piaggio*, paragraphs 34 and 35, and C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraphs 91 and 92.

75. As I explained in point 39 above, the first of those judgments, in *Sloman Neptun*, marks an important stage in the case-law of the Court of Justice, since the Court firmly distanced itself from an interpretation of Article 92 of the Treaty which did not regard public funding as a necessary condition of classifying as aid a measure attributable to the State. Thus, in paragraph 19 of that judgment, the Court pointed out that 'only advantages granted directly or indirectly through State resources are to be regarded as State aid within the meaning of Article 92(1) of the Treaty', whereas 'advantages granted from resources other than those of the State' do not fall within the scope of that provision. That case concerned national legislation governing the contractual relations between certain shipping companies and their employees. In paragraph 21 of that judgment, referred to in paragraph 262 of the judgment under appeal, the Court found that that legislation, having regard to its object and general structure, did not seek to 'create an advantage which would constitute an additional burden for the State …' and stated that the consequences arising from this, particularly in terms of loss of tax revenue, were 'inherent in the system' and were 'not a means of granting a particular advantage to the undertakings concerned'. The proposition put forward by the General Court to the effect that there must be a strict correspondence between the advantage and the resources employed, as explained in point 72 above, is not in any way supported by the passages reproduced above, in which the Court of Justice confined itself, in essence, to stating that an advantage such as that which shipping companies derived from the legislation at issue could not be regarded as being granted through public resources solely because of a loss of tax revenue brought about indirectly by the State's decision to regulate a given sector in a particular way.

76. Paragraph 58 of *PreussenElektra*, cited above, which the General Court also cites in paragraph 262 and, later, in paragraph 308 of the judgment under appeal, reproduces paragraph 19 of the aforementioned judgment in *Sloman Neptune*, reiterating the requirement that the advantage should be granted 'directly or indirectly through State resources'. In *PreussenElektra*, cited above, the Court, asked to give a preliminary ruling on a question concerning the legislation of a Member State which required private electricity supply undertakings to purchase electricity produced from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, held that the diminution in tax receipts which such an obligation was likely to entail could not on its own be regarded as 'constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State'.[45] As in *Sloman Neptun*, the Court came to that conclusion on the basis that the diminution in tax receipts was 'inherent' in the scheme at issue. The financial burden resulting from the obligation to purchase at minimal prices laid down by the scheme at issue thus rested entirely on private undertakings.[46]

77. Finally, in the judgment in *Germany* v *Commission*, cited above, far from requiring a strict correspondence between the advantage and the charge on public resources, the Court classifies as State aid a situation characterised by a dissociation between the addressees of the measure chargeable to the State budget – in this case, a tax concession granted to investors on certain conditions – and the beneficiaries of the aid, who are indirectly placed at an advantage by the investments encouraged by that concession. In order to do so, the Court relies on an analysis of the effects of the legislation at issue on the basis of which it finds, first, that the origin of the advantage indirectly conferred on the undertakings covered by that legislation 'is the renunciation by the Member State of tax revenue which it would normally have received, inasmuch as it is this renunciation which has enabled investors to take up holdings in those undertakings on conditions which are in tax terms more advantageous' and, secondly, that 'the fact that investors then take independent decisions does not mean that the connection between the tax concession and the advantage given to the undertakings in question has been eliminated since, in economic terms, the alteration of the market conditions which

45 — Paragraph 62.

46 — It should also be pointed out that *Sloman Neptun* and *PreussenElektra* both concerned general national legislation governing a particular economic sector, intended, in the first case, to make the sector competitive and, in the second case, to achieve environmental protection objectives. The type of public intervention in question was therefore very different from that in the present case.

gives rise to the advantage is the consequence of the public authorities' loss of tax revenue'.[47] Contrary to the judgments analysed previously, here the Court considers that the advantage indirectly conferred on the undertakings covered by the legislation at issue originates from the diminution in tax revenue, even though that diminution is brought about by a tax concession granted not to those undertakings but to third parties. In my view, this is indicative of a broad interpretation of the connection between advantage and charge which takes into account the practical effects of the State intervention and which does not support the restrictive interpretation adopted by the General Court in the judgment under appeal.

78. As well as finding no support in case-law, the proposition put forward by the General Court in paragraph 262 of the judgment under appeal is also, in my view, marred by excessive formalism, a characteristic which is difficult to reconcile with the principle of applying the concept of aid by reference to the effects of the measure at issue. It may also make it extremely difficult to prove the existence of State aid, particularly in the case of public interventions involving transactions which are sometimes highly complex and, as in this instance, include several composite measures spread over a period of time. Finally, as the Commission rightly submits, certain types of aid, such as indirect aid or aid having a social character, granted to consumers, as provided for in Article 107(2)(a) TFEU – in which the resources committed by the State do not automatically create a corresponding advantage for the beneficiaries – cannot readily be accommodated within the rigid framework imposed by the General Court.

79. For the reasons given, I take the view that the General Court committed an error of law in requiring proof of a close connection between the advantage and the charge on the State budget, as it did in the judgment under appeal.

80. As I shall show below, that error vitiated the entirety of the General Court's analysis of the question of the classification of the shareholder loan as aid.

(b) The error allegedly committed by the General Court in refusing to recognise the existence of a link between, on the one hand, the advantage resulting from the declarations from July 2002 onwards and the announcement of 4 December 2002 and, on the other hand, the commitment of State resources arising from the shareholder loan contract proposal (third subsection of the first part of the second ground of appeal in Case C-399/10 P and first and second parts of the second ground of appeal in Case C-401/10 P)

81. According to the Bouygues companies and the Commission, the General Court's interpretation of the nature of the link that must exist between the advantage and the use of State resources caused it to carry out a fragmented analysis of the French State's intervention in support of FT which did not take into account the distorting effect of the measures adopted when considered in their entirety. On the basis of that erroneous approach, the General Court wrongly ruled out the existence of a link between, on the one hand, the advantage in the form of the reassuring effect on the market of the declarations of 12 July, 13 September and 2 October 2002 and the announcement of 4 December 2002 and, on the other hand, the commitment of State resources in order to make that loan available.

82. It should be pointed out that, in paragraph 262 et seq. of the judgment under appeal, the General Court addresses the question of whether the advantages resulting for FT from the declarations of 12 July, 13 September and 2 October 2002 and the announcement of 4 December 2002, which it has previously identified, do in fact arise from a transfer of State resources. It examines each of the

47 — See also to that effect Case T-93/02 *Confédération nationale du Crédit mutuel* v *Commission* [2005] ECR II-143, and Case T-445/05 *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission* [2009] ECR II-289.

following separately and in turn: (i) the declarations of 12 July, 13 September and 2 October 2002 (paragraphs 268 to 289);[48] (ii) the announcement of 4 December 2002 (paragraphs 291 to 298); and (iii) the shareholder loan contract proposal of 20 December 2002 (paragraphs 299 to 231). In all three cases, the General Court concludes that no State resources were transferred.

83. In the case of the announcement of 4 December 2002, the General Court finds first of all that neither the Commission nor the Bouygues companies has maintained that the announcement involved a transfer of State resources under French administrative or civil law (paragraphs 293 to 295). As the General Court itself recognises in paragraph 302 of the judgment under appeal, in so far as the commitment of public resources established by the Commission in the contested decision results from *the dispatch of the shareholder loan contract proposal coupled with the announcement of 4 December 2002* and not from that proposal on its own, that finding does not appear relevant and, in any event, is not decisive for the conclusion that the Commission did not demonstrate the existence of a commitment of State resources.[49]

84. The General Court goes on to state, in paragraph 296 of the judgment under appeal, that, 'in any event, *a transfer of State resources resulting from the announcement* of 4 December 2002 *could correspond only* to an advantage residing in the opening of the EUR 9 billion credit line expressly envisaged in that announcement' and that such an advantage, which the Commission failed to characterise to the required legal standard in the contested decision, '*is separate from that deriving from the declarations from July 2002*'.[50] In that passage, the General Court therefore rules out *a priori* the possibility that a link sufficient to characterise State aid may exist between, on the one hand, *the advantage in the form of a reassuring effect* on the market that results from the declarations of 12 July, 13 September and 2 October 2002 and the announcement of 4 December 2002,[51] and, on the other hand, assuming that this has been established by the Commission, *a commitment of State resources arising from that announcement*.

85. It follows from the terms used by the General Court that such a conclusion is based *solely* on the finding that there is no relationship of *correspondence* or *equivalence* between the advantage constituted by the aforementioned reassuring effect and any legally binding obligation on the State to make the shareholder loan referred to in the announcement of 4 December 2002. The General Court is here applying the proposition previously discussed and dismissed in points 70 to 78 above to the effect that, in order to establish the existence of State aid, the advantage identified must be closely linked to a '*corresponding*' *or* '*equivalent*' *charge* on the State budget. The application of that notion of the connection between an advantage and a commitment of State resources leads it to rule out the existence of such a link in this case, since the advantage (the reassuring effect on the financial markets generated solely by the announcement of the opening a line of credit for FT) and the charge (legally binding commitment to open the proposed line of credit) are not of the same type.

48 — Points 44 to 78 of this Opinion.

49 — In the second part of its second ground of appeal, the Commission argues that, contrary to the finding in paragraph 293 of the judgment under appeal, it furnished evidence to show that the declarations of 12 July, 13 September and 2 October 2002, taken as a whole, constituted a commitment of public resources. It also maintains that, in paragraphs 303 to 305 of the judgment under appeal, the General Court itself expressed the view that such a commitment was already implicit in the announcement of 4 December 2002. Those arguments cannot be upheld, in my view. With regard to the first, it is apparent from paragraph 219 of the contested decision that, in the end, the Commission refrained from adopting a definitive position on the question whether, taken as a whole, the declarations from July 2002 involved a commitment of State resources. As regards the second argument, it is apparent from paragraph 293 of the judgment under appeal that the General Court did not address the question whether the announcement of 4 December 2002 involved a legally binding commitment on the part of the State under French law.

50 — My emphasis.

51 — The General Court's reference to 'declarations from July 2002' in paragraphs 296 and 297 of the judgment under appeal should be understood as also referring to the announcement of 4 December 2002.

86. It follows that, according to the General Court, aid intended to create the advantage constituted by the improvement in the terms of FT's re-financing as a result of the positive reaction from the financial markets to the announcement of 4 December 2002 could not have been found to exist even if the Commission had established that, inasmuch as it created a legally binding obligation incumbent on the State, the announcement *itself* involved a transfer of State resources, that is to say, even if the advantage and the charge on the State budget had originated from *a single act* (the announcement of 4 December 2002). Such a result would have been all the more difficult to understand given that the General Court itself recognises that the announcement conferred an undeniable advantage on FT and that that was the very advantage sought by the French State and pursued by all the measures successively adopted over time, from July to December 2002, in the context of a single strategy to support FT.

87. In the light of the foregoing considerations, I take the view that it was on the basis of a misinterpretation of the scope of the connection that must exist between the advantage and the commitment of public resources that the General Court held, in paragraphs 296 and 297 of the judgment under appeal, that such a connection could not be established between the advantage conferred by the reassuring effect on the financial markets of the announcement of 4 December 2002, on the one hand, and any transfer of State resources connected with that announcement, on the other. However, the finding of such an error does not in itself support the conclusion that the judgment under appeal must be set aside. In the scheme of the General Court's reasoning, the aforementioned paragraphs 296 and 297 form part of a line of argument that is superfluous.

88. That said, I would point out that the same misinterpretation has an impact on the remainder of the General Court's analysis.

89. This is true in particular of paragraph 299 of the judgment under appeal, where, in the context of the question whether the dispatch of the shareholder loan contract proposal of 20 December 2002 had involved a transfer of State resources, the General Court considered that, 'in so far as the Commission [had] not establish[ed] satisfactorily in the contested decision an advantage deriving from the contractual offer as such …, it [was] not, *a fortiori*, possible for the Court to find the existence of any transfer of State resources linked to that advantage'. Although, in accordance with the General Court's reasoning, that conclusion follows logically from the findings reached in paragraphs 246 to 267 of the judgment under appeal,[52] the decision by the General Court not to link, at this stage, any commitment of State resources resulting from the dispatch of that proposal to the reassuring effect on the financial markets of the announcement of 4 December 2002, as the Commission had done in the contested decision, can be justified only in the light of the restrictive interpretation of the connection between the advantage and the commitment of State resources that was examined and rejected in points 70 to 78 above.

90. That interpretation is also reflected in the analysis in paragraphs 302 et seq. of the judgment under appeal, where the General Court, in addressing the question whether the Commission had succeeded in establishing a transfer of State resources on the basis of its 'overall approach', endeavours to ascertain, 'firstly, whether the potential burden for the State budget which the Commission found as regards the announcement of the shareholder loan proposal and the dispatch of the shareholder loan contract was already implicit in the declarations from July 2002 and, secondly, whether that burden corresponded to the advantage which the Commission attributed to those declarations'. In that analysis, the General Court finds, in paragraphs 303 to 305 of the judgment under appeal, that, in view of the open-ended, imprecise and conditional character of the declarations of 12 July, 13 September and 2 October 2002, the announcement of 4 December 'amounted to a significant

52 — It should be recalled that, in paragraph 246 of the judgment under appeal, the General Court ruled out the possibility that the shareholder loan contract proposal could in itself have had a reassuring effect on the market similar to that produced by the announcement of 4 December 2002, because it had not been made public, and, in paragraphs 264 to 267, it held that the Commission had not established an advantage linked to that dispatch that was separate from that resulting from the declarations from July 2002 and the announcement.

break in the series of events which led to the refinancing of FT', and it concludes, in paragraph 308, that in the light of that significant break, the Commission was not entitled to establish a link 'between any commitment of State resources at that stage and advantages conferred by earlier measures, namely the declarations from July 2002 …'. After all, the General Court states, 'such a link … between the constituent elements of the concept of aid in the case of separate facts which occurred at different stages would be contrary to the requirement of a connection between the advantage and the transfer of State resources …, as confirmed by the judgment in *PreussenElektra*'. In the following paragraph, the General Court states that 'the fact that the declarations from July 2002 and the announcement of 4 December 2002 resulted in an advantage for FT … is not offset by *a corresponding reduction of the State budget* …' and refers in this regard to paragraphs 296 and 297 of the judgment under appeal.

91. As regards the inferences which the General Court draws from the finding of a break between the declarations of 12 July, 13 September and 2 October 2002 and the announcement of 4 December 2002, I would point out that, as the General Court itself recognises inter alia in paragraph 243 of the judgment under appeal, the advantage in the form of a reassuring effect on the financial markets established in the contested decision derives not only from the declarations *but also* from the announcement of 4 December 2002 and is present, therefore, even after that break. It follows that the mere finding of such a break is not in itself a sufficient basis on which to rule out the link established by the Commission as existing between that advantage and the commitment of State resources at the time when the shareholder loan contract proposal was dispatched.

92. On the other hand, it is clear from the passages reproduced in point 90 above that, even in the analysis of all the measures leading to the refinancing of FT, what actually prevents the General Court from recognising the link established by the Commission between, on the one hand, the reassuring effect on the financial markets produced by the announcement that a shareholder loan of a certain amount was being made available to FT and 'the appearance given to the market of the existence of such a loan' [53] and, on the other hand, the transfer of State resources in connection with the implementation of that measure [54] is the idea that such a link presupposes a strict correspondence between the advantage and the charge on the State budget, which correspondence does not exist between a charge (in this instance, the dispatch of the shareholder loan contract proposal of 20 December 2002) that is not reflected in the beneficiary's assets by an advantage of the same type (that is to say, in this instance, the possibility of granting itself that amount at any time).

93. It follows from all the foregoing considerations that it was on the basis of a misinterpretation of the scope of the connection between the advantage and the commitment of State resources that the General Court held that the Commission had not established the existence of a transfer of State resources in this case.

94. That being so, it remains to be considered whether the Commission was rightly able to establish, in the contested decision, a link between the advantage in the form of a reassuring effect on the financial markets produced, inter alia, by the announcement of 4 December 2002 and the alleged commitment of State resources arising from the dispatch of the shareholder loan contract proposal of 20 December 2002. [55]

53 — See paragraph 194 of the contested decision and footnote 116.

54 — To be more precise, 'the potential additional charge … 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' (paragraph 196 of the contested decision).

55 — Like the General Court, I am not taking a stance on the question whether, as the Commission states in paragraph 196 of the contested decision, the dispatch of the shareholder loan contract proposal in itself involves a commitment of State resources in the form of a potential charge on the State budget, in so far as the latter 'had to keep at France Télécom's disposal, through ERAP, the amount of the corresponding resources' and, therefore, irrespective both of the examination of the conditions to which the contract was subject and of the fact that it was never performed. I would point out, however, that, unlike the German Government, neither the French Government nor FT disputes that a commitment of State resources may have taken place at that stage.

95. In this regard, it seems to me that, in the case of measures which are closely connected, such as the announcement that some form of State intervention is being put in place and the implementation of that announcement (by the dispatch of the signed and initialled contract), [56] and between which there is, moreover, an interval of only about two weeks, the mere fact that the advantage to the beneficiary derives from the first of those measures, whereas the commitment of public resources is linked to the second, does not mean that a connection characterising aid may not be established between them. In my view, it would be excessively formalistic to rule out the existence of such a link solely because the advantage at issue derives not directly from the measure capable of involving a transfer of public resources but from the State's publicising of the fact that that measure would be introduced imminently. More generally, to deny the existence of such a link is, to my mind, to disregard the economic reality of the French State's intervention in the refinancing of FT, since, on the one hand, it is common ground that FT was able to refinance itself on the markets only as a result of the repeated declarations of State support in its favour, [57] including in particular the announcement of 4 December 2002, and, on the other hand, the various measures adopted by the State, including ERAP's dispatch of the signed and initialled shareholder loan contract proposal, which was alone capable of committing public resources, formed part of a single strategy by the State to support FT 'which had the objective and consequence, as a whole, of restoring the confidence of the markets' [58] with a view to enabling FT to be refinanced on more favourable terms.

96. In the light of all the foregoing considerations, I take the view that the General Court committed an error of law in refusing, on the basis of a misinterpretation of Article 87(1) EC, to recognise the existence of a link between, on the one hand, the advantage resulting from the declarations from July 2002 and the announcement of 4 December 2002 and, on the other hand, the potential commitment of State resources resulting from the dispatch of the shareholder loan contract proposal of 20 December 2002. That error is such as to bring about the setting aside of the judgment under appeal. [59]

97. The other grounds of appeal and arguments raised by the Bouygues companies and the Commission will be discussed briefly in the remainder of this Opinion, in case the Court does not concur with the conclusions which I have reached above.

(c) The errors allegedly committed by the General Court in connection with the concept of an advantage resulting from the making available of a line of credit (second part of the second ground of appeal in Case C-401/10 P)

98. Under the second part of their second ground of appeal, the Bouygues companies submit that the General Court was wrong, in its analysis of the existence of an advantage, to give separate consideration to the announcement of 4 December 2002 and the dispatch of the shareholder loan contract proposal of 20 December 2002, when, in their submission, these were components of a single intervention by the State which cannot be analysed in isolation.

99. In so far as it seeks to call in question the General Court's assessment of the existence of an advantage linked to the dispatch of the shareholder loan contract proposal of 20 December 2002, this complaint must, in my opinion, be declared inadmissible. On the other hand, in so far as it criticises the General Court's conclusion as to the absence of a sufficiently close link between 'the reassuring

56 — In its appeal, the Commission refers in this regard to 'two manifestations of the same fact, which, moreover, was perceived in the same way by the markets'.

57 — Although they had an effect on the subjective reactions of the actors on the financial markets, those declarations conferred an objective material advantage on FT.

58 — See the judgment under appeal (paragraph 303).

59 — That conclusion and all of the foregoing considerations are of course without prejudice to the question whether or not the contested intervention by the French State satisfies the criterion of a prudent private investor in a market economy.

effect of the announcement of the opening of a EUR 9 million line of credit and the resulting transfer of State resources', this complaint is the same as that put forward under the third subsection of the first part of the second ground of appeal, which was examined above in conjunction with the similar complaints raised by the Commission.

(d) The error allegedly committed by the General Court in not considering the prudent private investor criterion in order to determine the existence or otherwise of an advantage on the part of FT (third part of the second ground of appeal in Case C-401/10 P)

100. By the third part of its second ground of appeal, the Commission submits in essence that the General Court should have ascertained, as it did in the contested decision, whether the advantage granted to FT as a result of all the declarations from July 2002 and the announcement of 4 December 2002 'was granted under normal market conditions or whether a private entity could have enjoyed the same advantage under the same conditions if the State had behaved as a private investor'. In having failed to undertake such an examination, the General Court is said to have infringed Article 87(1) EC.

101. In my view, that complaint must be dismissed as ineffective. It is clear from the grounds of the judgment under appeal that the General Court concluded that the Commission had misconstrued the concept of aid within the meaning of Article 87(1) EC, since, although it had proved to the required legal standard the existence of an advantage accruing to FT from the declarations from July 2002 and the announcement of 4 December 2002, it had none the less failed to demonstrate that that advantage was the result of a transfer of State resources. The Commission has not explained how any examination of the lawfulness of the method which it used in applying the private investor test could have led the General Court to modify that conclusion, on the basis of which the contested decision was annulled.

(e) The alleged infringement of Article 87 EC in conjunction with Article 230 EC, in so far as the General Court disregarded the discretion enjoyed by the Commission when carrying out complex economic analyses (fourth part of the second ground of appeal in Case C-401/10 P)

102. By the fourth part of the second ground of appeal, the Commission first of all criticises the General Court for having disregarded the discretion it enjoyed when carrying out complex economic analyses in order to apply the criterion of a prudent private investor in a market economy in the contested decision. That complaint must also be rejected, since the Commission has not explained how the General Court could have disregarded the discretion which it exercised in applying the private investor criterion when it did not examine the lawfulness of the contested decision in the part of that decision in which the Commission applied that criterion.

103. In that same part of this ground of appeal, the Commission then criticises the General Court for having substituted its own approach for that of the Commission, inasmuch as it reviewed the appropriateness of the contested decision. In particular, the Commission appears to criticise the fact that, in examining the existence of a transfer of State resources, the General Court dismissed as unjustified the 'overall approach' which the Commission had none the less followed when applying the private investor criterion. That argument cannot be upheld either. The General Court cannot be criticised for having overstepped the limits of its review as to the lawfulness of the application of the concept of aid in concluding, by reference inter alia to its own assessment of the facts, that, even on the basis of an examination of all the events which took place from July 2002 onwards taken together, a transfer of State resources could not be established.

104. Furthermore, the arguments adduced by the Commission in this part of its second ground of appeal are the same as those already set out in the first and second parts of that ground of appeal.

B – *The allegedly contradictory nature of the reasoning in the judgment under appeal (first ground of appeal in Case C-401/10 P)*

105. The Commission submits that, at various points in the judgment under appeal, the General Court carries out analyses of the events under examination which are irreconcilable with each other. More specifically, on the one hand, it undertakes a joint analysis of the declarations of 12 July, 13 September and 2 October 2002 and the announcement of 4 December 2002 and concludes from this that, taken as a whole, those measures placed FT at an advantage and, on the other hand, contradicting its previous assertions, it finds that there has been a significant break between those declarations and that announcement.

106. I do not share the Commission's view. On the contrary, it seems to me that the reasoning followed in the judgment under appeal is fairly linear and the grounds on which it is based strike me as being free from the contradictions alleged by the Commission. In particular, I do not see any contradiction between, on the one hand, the statement that the declarations of 12 July, 13 September and 2 October 2002 and the announcement of 4 December 2002, considered together or separately, confer a single advantage (or a similar advantage) on FT, inasmuch as they reflect an intention on the part of the State to intervene in its support and, on the other hand, the finding that those various measures do not exhibit the same degree of precision when it comes to defining the means to be used to provide such support and that, in terms of their ability to impose a legally binding commitment on the State, they are different in nature and scope. Similarly, in the light of the General Court's interpretation of the connection between the advantage and the transfer of State resources, it is not possible, contrary to what the Commission claims, to identify any contradiction between, on the one hand, paragraph 259 of the judgment under appeal, where the General Court concludes that 'the declarations from July 2002 and the announcement of 4 December 2002 … involved the conferment of an advantage on FT' and paragraph 296, where it states that 'a transfer of State resources resulting from the announcement of 4 December 2002 could correspond only to an advantage residing in the opening of the EUR 9 billion credit line expressly envisaged in that announcement'. As I have explained above, the latter paragraph constitutes the application to this case of the proposition that a connection may exist only between an advantage and a transfer of State resources of the same type, which link, according to the General Court, does not exist in this instance between, on the one hand, an advantage consisting in the reassuring effect on the financial markets resulting from those declarations and that announcement and, on the other hand, the transfer of public resources resulting from the opening of the EUR 9 billion line of credit for FT.

107. I therefore consider that the first ground of appeal raised by the Commission must be dismissed.

C – *Alleged misinterpretation and distortion of the contested decision (third ground of appeal in Case C-401/10 P)*

108. In its third ground of appeal, the Commission criticises the General Court for having misread the contested decision and distorted the facts on which that decision was based. In particular, it criticises it for having taken the view, in paragraphs 254 and 255 of the judgment under appeal, that the Commission should have examined more thoroughly and provided a more detailed statement of reasons for the existence of a separate advantage resulting from the shareholder loan contract proposal of 20 December 2002, when it is clear from paragraphs 190 and 194 of the contested decision that it never took such an advantage into consideration, but only ever took account of the advantage consisting in the re-opening of the capital market on optimum terms for FT and resulting from the 'appearance given to the market of the existence of the shareholder loan'. It also disputes the statement in paragraph 247 of the judgment under appeal that, at the hearing of 21 April 2009 before the General Court, it recognised that it considered that the shareholder loan contract proposal as such involved an additional advantage separate from that resulting from the announcement of 4 December 2002. Contrary to what the Commission claims, it is clear from the grounds of the judgment under

appeal, in particular paragraphs 244 and 245, that the General Court did indeed take into consideration, first, the advantage resulting from the 'appearance given to the market of the existence of the shareholder loan', which the Commission claims to be the only one taken into account in the contested decision, and that it was only for the sake of completeness that, in paragraphs 254 and 255, it examined whether that decision could be interpreted as meaning that a subsequent and separate advantage had also been considered by the Commission. In those circumstances, it being unnecessary to ascertain whether the General Court distorted the Commission's assertions at the hearing of 21 April 2009, the complaint alleging misinterpretation of the contested decision, set out in the preceding point, must in my view be dismissed as unfounded.

109. Under its third ground of appeal, the Commission also criticises the General Court for having 'distorted the [contested] decision and the facts on which it is based' in finding that there was a significant break in the sequence of events from July to December 2002, between the declaration of 12 July 2002 and the announcement of 4 December 2002, inasmuch as it 'omitt[ed] to refer to the other two declarations made in September and October 2002', which, according to the Commission, testify to the gradual implementation of the French State's commitments towards FT. That complaint must also be dismissed. It is apparent in particular from paragraphs 303 and 304 of the judgment under appeal that the General Court took the view that the announcement of 4 December 2002 amounted to a 'significant break' in the sequence of events in relation to *the three declarations* of July, September and October 2002 (the 'declarations from July 2002', to use the form of words adopted by the General Court in paragraph 21 of the judgment under appeal) – the nature and scope of each of which had already been examined in detail in paragraphs 273 to 276 of the judgment under appeal – and that it did not therefore, as the Commission claims, omit to take account of all the measures preceding that announcement.

110. In the light of all the foregoing considerations, I take the view that the third ground of appeal raised by the Commission must be dismissed in its entirety as unfounded.

D – *Request for substitution of grounds by the French Republic*

111. In its response to the Commission's appeal, the French Government argues that it was on the basis of an error of law that, in paragraphs 240 and 259 of the judgment under appeal, the General Court classified the effects produced by the declarations from July 2002 and the announcement of 4 December 2002 as an advantage within the meaning of Article 87(1) EC, before examining those measures in the light of the prudent private investor criterion.

112. The request for substitution of grounds which the French Government is in essence making to the Court cannot be granted, in my opinion. In paragraph 217 of the judgment under appeal, the General Court states that 'the application of the private investor criterion necessarily presupposes that the measures taken by the State in favour of an undertaking confer an advantage deriving from State resources'. In paragraph 221, it says that it will determine, first, whether the measures taken by the French State in favour of FT have conferred an advantage on it, and, secondly, whether such an advantage has been granted in compliance with the prudent private investor criterion. Lastly, in paragraph 313, the General Court declares that there is no need to examine the pleas and arguments put forward by the applicants at first instance in relation to the lawfulness of the application by the Commission of the prudent private investor criterion. In those circumstances, as the FT itself accepts, the General Court cannot be considered to have ruled on whether the material advantage resulting from the measures adopted by the French State in favour of FT, as identified in paragraphs 234 to 240 of the judgment under appeal, was 'undue' for the purposes of Article 87(1) EC. [60]

60 — See also Case C-124/10 P *Commission* v *EDF and Others* [2012] ECR, paragraph 89.

V – Conclusion

113. For the reasons given, I propose that the Court should set 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*. Furthermore, in so far as the error committed by the General Court vitiates the whole of its analysis and given that the General Court did not examine all of the pleas raised against Commission Decision 2006/621/EC of 2 August 2004 on the State aid implemented by France for France Télécom, including that relating to the application by the Commission of the principle of a prudent private investor in a market economy, I consider it appropriate that the Court should refer the case back to the General Court, in accordance with Article 61(1) of the Statute of the Court of Justice of the European Union, for reconsideration of the action at first instance and reserve the costs of the appeal proceedings.