# COMMISSION DECISION

## of 2 August 2004

## on the State Aid implemented by France for France Télécom

*(notified under document number C(2004) 3060)*

**(Only the French version is authentic)**

**(Text with EEA relevance)**

(2006/621/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to those comments,

Whereas:

### 1. PROCEDURE

(1) By letter dated 31 January 2003, the Commission informed France of its decision to open the formal investigation procedure provided for in Article 88(2) of the EC Treaty ('the opening decision') in respect of financial measures introduced by the French authorities for France Télécom ('France Télécom', 'FT' or 'the Company') and in respect of the business tax scheme applicable to that operator. A description of the facts which led to the procedure being opened is not included in this Decision ([2]).

(2) The opening decision was notified to France on 31 January 2003. After a number of substantive errors had been corrected, a corrigendum was notified to France on 7 March 2003.

(3) France communicated additional information to the Commission by letters dated 4 April 2003, 15 May 2003 and 29 January 2004.

(4) The Commission's decision to open the procedure was published in the *Official Journal of the European Union* ([3]). The Commission invited interested third parties to submit their comments on the aid measures in question.

(5) The Commission received the following comments on the subject from interested third parties:

— 21 March 2003: comments from Cable and Wireless plc and Cable and Wireless SA

— 11 April 2003: comments from Cegetel

— 10 April 2003: comments from AFORS Telecom

— 11 April 2003: comments from LDCOM

— 11 April 2003: comments from A ([4])

— 10 April 2003: comments from Tiscali

— 11 April 2003: comments from WorldCom France ([5])

— 11 April 2003: comments from B ([6])

— 11 April 2003: comments from Bouygues ITS and Bouygues Telecom ([7])

— 14 April 2003: comments from Telecom Italia

— 14 April 2003: comments from C ([8])

— 29 April 2003: comments from B

— 30 April 2003: comments from LDCOM ([9]).

(6) The Commission transmitted the comments to France on 16 May 2003, giving it the opportunity of commenting on them. It received France's comments by letters dated 30 June and 29 July 2003 ([10]).

(7) On 30 May 2003, the Commission published an invitation to tender for a contract 'for the provision of services to assist in assessing the compliance of the financial assistance granted to France Télécom with the principle of the private investor in a market economy and if necessary to analyse France Télécom's recovery plan' ([11]). By letter dated 3 July 2003, the French authorities wrote to the Commission about the above-mentioned invitation to tender. The Commission replied by letter dated 24 September 2003. On 24 September 2003, the contract for the provision of services was awarded to the firm of consultants NERA ('NERA', or 'the consultant'). The French authorities were informed of the expert's identity by fax dated 8 October 2003.

(8) The Commission received other information and documents from the third parties listed below:

— 23 June 2003: letter from LDCOM

— 25 June 2003: letter from D ([12])

— 27 October 2003: letter from MCI

— 16 October 2003: letter from ECTA

— 25 June 2003: letter from XXX

— 7 January 2004: letter from Bouygues Telecom

— 16 January 2004: letter from Bouygues Telecom ([13])

— 19 March 2004: letter from France Télécom ([14])

— 5 April 2004: letter from Tiscali

— 17 May 2004: letter from LDCOM

— 26 May 2004: letter from Bouygues Telecom ([15])

— 22 June 2004: letter from France Télécom ([16])

— 30 June 2004: fax from France Télécom

— 2 July 2004: fax from France Télécom.

(9) The Commission requested additional explanations from the French authorities by the following letters:

— 11 September 2003 (answer given by the French authorities on 20 October 2003)

— 11 November 2003 (answer given by the French authorities on 4 December 2003)

— 12 January 2004 (answer given by the French authorities on 21 January 2004)

— 2 February 2004 (answer given by the French authorities on 16 February 2004)

— 1 June 2004 (answer given by the French authorities at the meeting on 16 June 2004).

(10) The Commission forwarded to the French authorities on 3 May and 14 June 2004 the letters referred to in paragraph 8 and the NERA report of 28 April 2004 ('the NERA report'). The report is in two separate parts: (i) a legal report by Professor Berlin; and (ii) an economic report.

(11) The Commission heard representatives of third parties at various meetings during the course of the proceeding.

(12) The Commission and the consultant met with the French authorities and France Télécom on 22 January and 16 and 23 June 2004.

(13) By letter dated 14 May 2004, which was confirmed on 3 June 2004, the French authorities stressed that the opening decision did not cover all the facts forming the subject-matter of the Commission's investigation. By email dated 9 June 2004, which was confirmed by letter dated 10 June 2004, the French authorities submitted comments on the NERA report, which were supplemented by letter dated 21 June 2004.

## 2. DESCRIPTION OF FRANCE TELECOM

(14) As indicated in the opening decision, the present proceeding concerns the France Télécom group as a single economic entity. Since the beginning of the proceeding, the Commission has referred to the Company's consolidated accounts. In adopting this approach, the Commission is taking a line which is consistent with economic reality as reflected by the market, which assesses France Télécom's performance and financial strength on the basis of its consolidated results. In the opening decision, the France Télécom group was described as follows (unofficial translation from the original French):

'Originally part of the Ministry of Posts and Telecommunications, France Télécom was formed in 1991 as a public operator endowed with legal personality. Since 31 December 1996 the operator has had the status of a public limited company, and since October 1997 it has been listed on the First Market of Euronext Paris SA and on the New York Stock Exchange (NYSE). In 2002, the State held a majority stake in France Télécom of 56,45 %, the remainder being divided between the public (32,25 %), France Télécom itself (8,26 %) and employees of the Company (3,04 %) ([17]).

France Télécom is an operator and a supplier of telecommunications services, active in France and throughout the world with a presence in the following markets: fixed telephony, mobile telephony, the Internet and other information services, services to business, TV broadcasting and cable TV. Following the reorganisation of Orange plc and the formation of Orange SA as France Télécom's main mobile telephony subsidiary, its placing on the stock exchange and the placing on the stock exchange of Wanadoo SA, France Télécom's activities are henceforth organised in four segments: (i) Orange; (ii) Wanadoo; (iii) fixed, voice and data services in France; and (iv) fixed, voice and data services outside France, mainly through its subsidiary Equant.

At the end of 2001, France Télécom employed 211 554 people worldwide, including 146 882 in France' ([18]).

(15) The above description remains valid for the period covered by this Decision. During that same period, the group's structure was characterised by 'a policy of out-and-out subsidiarisation through the creation of four listed companies centred on France Télécom: Orange, Wanadoo, TPSA in Poland and Equant. The group thus took shape in a quite paradoxical and unbalanced manner, with the parent company France Télécom SA carrying all the debt while the subsidiaries concentrated on growth …' ([19]).

## 3. CHRONOLOGICAL DESCRIPTION OF THE FACTS AND FINANCIAL SITUATION OF THE COMPANY

### 3.1. The data known during the first half of 2002 and events at that time

(16) The Commission would point out that the analysis under the state aid rules of a State's conduct must be carried out

using the data and information available at the time of each state intervention. Given that the present case concerns events occurring in 2002 and early 2003, it is essential, in order to understand the facts on which the Commission has based its analysis of the State's conduct, to set out chronologically the evidence available from the time of publication of the results for the 2001 financial year. The financial results for the first half of 2002 were not made public until 13 September 2002. Before that date, the last financial results to have been published by France Télécom were those for the 2001 financial year. However, some additional data emanating from financial analysts were to be found in the latters' forecasts, opinions and recommendations.

(17) As is clear from the analysis below, France Télécom was, from June 2002 onwards, a company with serious structural problems and an unbalanced balance sheet. During the first quarter of 2002, the nature of these problems was revealed by the publication of the 2001 accounts. The publication of these accounts showed improved operating results and substantial cash flow generation. Nevertheless, it also pointed up the heavy weight of the past, which wiped out the net result before exceptional provisions of EUR 1,9 billion, turning it into a EUR 8,3 billion loss. While the provisions correct the value of France Télécom's assets to a more realistic level, the colossal size of the debt, at EUR 63 billion, persists. This context, together with the inadequacy of the expected cash flow, helps explain the serious structural problems. This is clearly demonstrated by the HSBC study submitted by France Télécom (see Section 4), which calculates a financing requirement of EUR 35 billion over the period 2002-05.

(18) On 31 December 2001, France Télécom's net debt came to EUR 63,5 billion, as can be seen from Tables 1 and 2.

*Table 1*

**Debt (leverage) ratios**

| | 1999 | 2000 | 2001 |
|---|---|---|---|
| Debt ratio [1] | 0,78 | 0,89 | 0,92 |
| Debt/equity [2] | 3,61 | 8,25 | 12,16 |
| *Times interest earned* [3] | 14,52 | 5,39 | 3,2 |

*Source*: NERA.

[1] NERA: 'The debt ratio is defined as the ratio of long term debt to total long term capital (debt and equity)"

[2] NERA: 'The debt-equity ratio is calculated as the ratio of long-term debt to equity"

[3] NERA: 'The "times-interest-earned ratio" or "interest cover" measures the extent to which interest is covered by earnings before interest and taxes (EBIT) plus depreciation. The measure gives a level of the adequacy of cash flow generation and the consequent comfort a company enjoys in meeting its interest payments"

*Table 2*

**Bonds falling due from the third quarter (Q3) of 2002 to the fourth quarter of 2003**

| | 2002 | | 2003 | | | | |
|---|---|---|---|---|---|---|---|
| | Q3 | Q4 | Q1 | Q2 | Q3 | Q4 | Total 2003 |
| *Amount in EUR billion* [1] | 3,89 | 3,61 | 8,86 | 4,08 | 4,09 | 2,23 | 19,26 |

*Source*: NERA.

[1] NERA: 'Calculations based on data supplied by France Telecom. Figures include bond and commercial paper interest and principal (interest on commercial paper was computed from 25 July 2002 to 31 December 2003 due to data unavailability for previous dates)"

(19) In the light of these data, the Commission would observe that, in view of the scale of its debt, France Télécom was forced to announce, on 21 March 2002, not only a major clean-up of its balance sheet through balance sheet provisions and asset disposals totalling EUR 27,2 billion (comprising disposals worth EUR 17 billion and exceptional provisions of EUR 10,2 billion), but also a substantial increase in the available cash flow to the tune of EUR 14 billion for the period 2002-05.

3.1.1. *The downgrading of France Télécom's credit rating*

(20) During the first half of 2002, France Télécom's situation worsened rapidly, as reflected in a series of downgrades in the Company's credit rating. Thus, on 27 March 2002, the Moody's credit rating agency announced a downgrading of France Télécom's rating for long-term debt ([20])/ ([21]).

(21) On 28 March 2002, Standard & Poor's ('S & P') maintained France Télécom's rating but downgraded its prospects to negative ([22]) following news concerning Mobilcom.

(22) On 13 May 2002, Moody's, doubting the Company's capacity to implement its debt-reduction strategy, announced a possible downgrade of France Télécom's short-term debt rating ([23]).

(23) On 14 May 2002, Standard & Poor's maintained France Télécom's existing rating ([24]).

(24) On 24 June 2002, Moody's downgraded France Télécom's rating. The Company's prospective rating was maintained at a negative level ([25]). Moody's decision at that time was based on the fact that the agency did not expect France Télécom and Orange to be in a position to generate sufficient cash flow to reduce the group's consolidated debt. Although Moody's was not concerned about the likelihood of a liquidity crisis in the Company in the immediate future, it did point out that France Télécom was confronted with debts of about EUR 15 billion falling due in 2003.

(25) On 25 June 2002, Standard & Poor's downgraded France Télécom's short- and long-term debt rating ([26]), basing its decision on the difficulties concerning Mobilcom and the Company's inability to reduce its debt far and fast enough. S & P also mentions France Télécom's considerable financing requirements, referring also to the EUR 15 billion of debt coming due in 2003.

(26) This downward trend was confirmed several times ([27]) over the next few days. On 12 July 2002, Standard & Poor's even drew attention to a potential problem involving the refinancing of the debt coming due in 2003. The downgrading of France Télécom's rating clearly revealed the Company's debt problems ([28]), worsened by the uncertainty surrounding Mobilcom.

(27) Table 3 recapitulates the various positions of S & P, Moody's and Fitch regarding France Télécom's rating:

*Table 3*

**Events connected with credit ratings**

| | S & P | | Moody's | | Fitch | |
|---|---|---|---|---|---|---|
| | Short term | Long term | Short term | Long term | Short term | Long term |
| Situation in May 2002 | A2 | BBB+ | P2 | Baa1 | F2 | BBB+ |
| 24 June 2002 | | | P3 | Baa3 | | |
| 25 June 2002 | A3 | BBB | | | | |
| 05 July 2002 | | | | | F3 | BBB- |
| 12 July 2002 | | BBB- | | | | |

*Source*: NERA.

3.1.2. *Analysis of credit spreads*

(28) It is important that the behaviour of spreads in the financial markets be examined. The spreads relating to the debt of a company reflect the assessment, by the markets, of the risk linked to the capacity of the company to meet its obligations in respect of the payment of interest and the reimbursement of the debt upon maturity. Spreads influence the valuation, by the market, of bonds and the

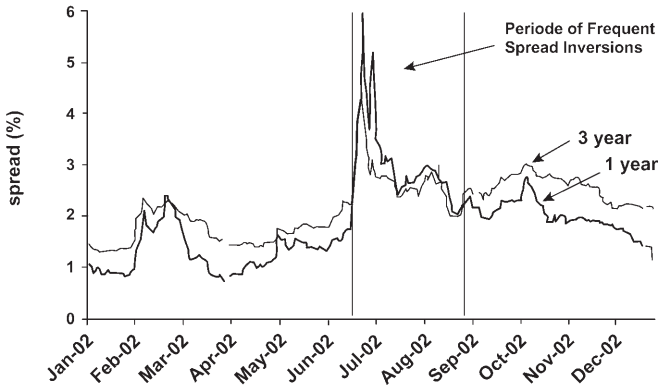
level of interest that may be required for the issue of new bonds. A widening of the spreads indicates an increase in the risk attributed to the issuer and/or the bond. The Commission has analysed France Télécom's spreads for the period covering the 2002 financial year and has established a relatively high assessment of the risk at the beginning of July.

(29) Normally, the spreads for long-term debt are greater than those for short-term debt, with several factors coming into play here: lack of visibility, uncertainty as to future prospects, macroeconomic parameters, and the trend in interest rates. However, an examination of Table 3 shows clearly that the problems encountered by France Télécom were particularly concentrated on short-term debt. The spreads study concerning France Télécom has thus demonstrated that the very short-term risks were higher than those in the medium and long term. This phenomenon is called a 'spread inversion'. The frequency of these inversions, during which debt coming due in one year was considered by the market to be more risky than three-year debt, was particularly evident during the period July-September 2002.

(30) Table 4 provides a graphical representation of the behaviour of France Télécom's *spreads*.

*Table 4*

**Credit spreads for bonds with a 1- and 3-year maturity — France Télécom**

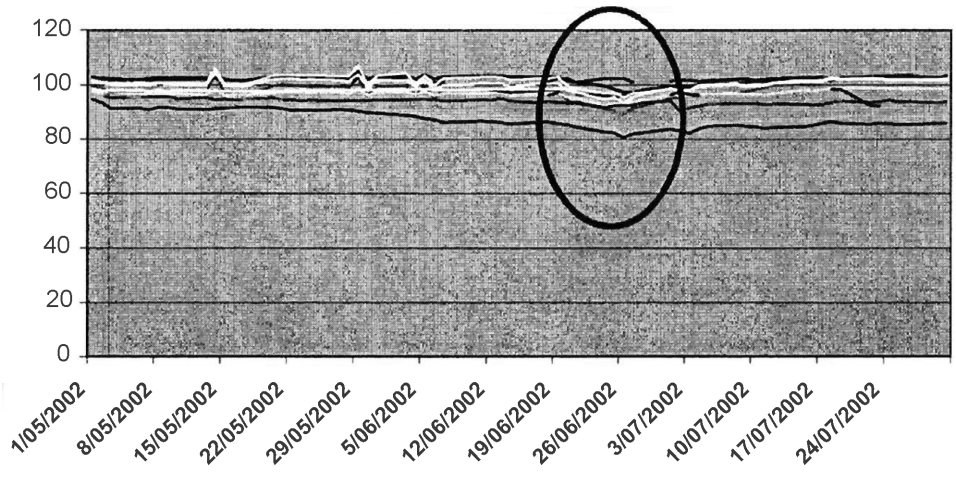



*Source*: Bloomberg.

(31) A different way of observing the increased risk associated with France Télécom's debt is to study the price of its bonds. Table 5 shows a subset of France Télécom's bonds. The fall in the price of the bonds in June/July 2002, which is a mirror image of the increase in the credit spreads, reflects a lesser value of France Télécom's debt due to the increased risk of default perceived by the market.

*Table 5:*

**Price of France Télécom's bonds from 1 May 2002 to 24 July 2002**



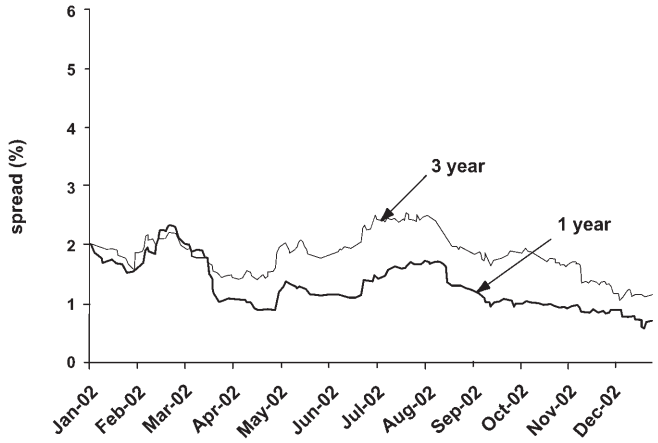

*Source*: Bloomberg.

(32) It is clear, moreover, that, despite the difficulties of a few other operators in the telecommunications sector in Europe, the difficult situation with which France Télécom was faced was a direct result of the state of its balance sheet and financial structure.

(33) This is highlighted by a study of the spreads of Deutsche Telekom and KPN, as shown in Tables 6 and 7.

*Table 6:*

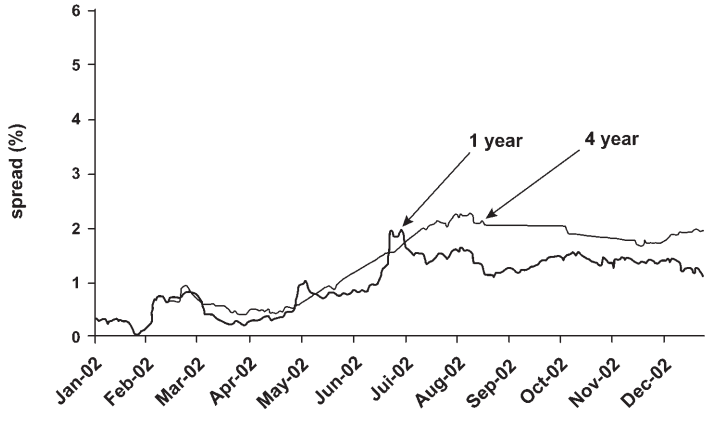
**Credit spreads for bonds with a 1- and 3-year maturity — KPN**




*Source*: Bloomberg.

*Table 7:*

**Credit spreads for bonds with a 1- and 4-year maturity — Deutsche Telekom**




*Source*: Bloomberg.

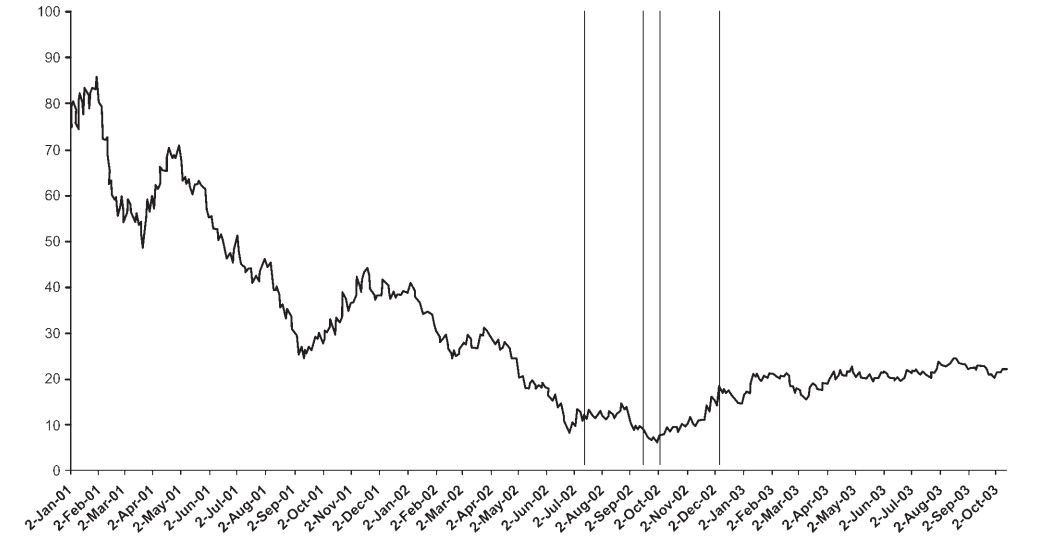
(34) This study reveals that Deutsche Telekom also experienced spread inversions, but they were of short duration only and on a much smaller scale. The levels attained by France Télécom during the period June/July 2002 were much higher.

3.1.3. *France Télécom's share price*

(35) At the same time, France Télécom's share price fell significantly during the first half of 2002, reaching its lowest level first on 27 June 2002 (EUR 7,79), and then on 30 September 2002 (EUR 6,01), as can be seen from Table 8.

*Table 8:*

**France Télécom's share price**




*Source*: Bloomberg.

3.1.4. *The events of July 2002*

(36) In an interview published in *Les Échos* on 12 July 2002, the French Minister for Economic Affairs, Finance and Industry ('the Minister for Economic Affairs and Finance') said that: 'The State shareholder will behave like a prudent investor and would take appropriate steps if France Télécom were to face any difficulties … I repeat, if France Télécom were to face any financing problems, which is not the case today, the State would take whatever decisions were necessary to overcome them' ([29]).

(37) On that same day, as indicated above, S & P downgraded France Télécom's rating to BBB-. This downgrade was nevertheless limited to a rating still qualifying as investment grade: any further downgrade would have led to the Company's debt being accorded junk-bond status, as being no longer of investment grade. The fact that France Télécom's rating was being kept at investment grade was commented on by Goldman Sachs in a report dated 22 July 2002, which states that France Télécom was about to be downgraded to junk-bond level by S & P and Moody's ([30]).

(38) In its press release of 12 July 2002, S & P states that the reason why it had decided to continue France Télécom at investment grade was to do with the State's indications as to its intentions towards the Company: 'France Télécom could face certain difficulties refinancing its debt obligations coming due in 2003. Nevertheless, the State's indication underpins France Télécom's investment-grade credit quality'. This assurance had been provided, firstly, directly by the French Government to S & P: 'the French State — which owns 55 % of France Télécom — has made clear to Standard & Poor's that it will behave as an aware investor and would take appropriate steps if France Télécom were to face any difficulties. France Télécom LT rating cut to BBB-' ([31]).) and, secondly, publicly in the interview referred to in paragraph 36.

(39) In the light of the above, there is no question but that in July 2002 France Télécom was facing a crisis of confidence. Rating agencies and analysts alike were convinced that the Company risked not being able to implement the refinancing plan presented by the management in order to meet its maturities. The Company was therefore faced with an acute financing problem linked to its indebtedness ([32]). Nevertheless, the agencies had maintained the Company's rating at investment grade on the strength of the State's indications. A downgrading of the rating would

have worsened the crisis and lessened the Company's ability to cope. In the words of the group's former CEO, Mr Michel Bon: 'It will be in June 2003, therefore, that France Télécom's financing problems may become critical or even insurmountable. If, between now and then, France Télécom has not regained access to the market (owing to its penalising rating), the State will have to find ways of helping it to refinance itself' ([33]).

### 3.2. The data published on 13 September 2002 and events at that time

3.2.1. *The data published on 13 September 2002*

(40) The conclusion set out in paragraph 39 was confirmed retroactively in September 2002 when France Télécom's half-yearly accounts were presented. From its scrutiny of the half-yearly accounts published on 13 September 2002, the Commission notes an improvement in France Télécom's figures for the first half of 2002 compared with the previous year: an increase of 10 % in turnover, 13,2 % in EBITDA and 17,3 % in the operating result. The Commission notes also the sustained growth in mobile telephony and the improved performance of the Internet business. However, the operating result of the fixed telephony segment in France, which accounted for 31 % of turnover for the same period, was down by 12,2 %.

(41) Alongside the good operating results described above, France Télécom confirmed the imbalance in its financial situation. The negative result of EUR 12,2 billion as at 30 June 2002 was primarily due to the substantial provisions made for investments. As a result of this half-year loss, from being positive overall France Télécom's consolidated own funds became negative as at 30 June 2002 to the tune of EUR 440 million.

(42) A simplified analysis of cash flow as at 30 June 2002 shows that net debt increased during the first half of 2002 by EUR 6,3 billion inasmuch as EBITDA, at EUR 6,870 billion, did not cover expenditure represented by:

— debt interest (EUR 3 099 million),

— investments (EUR 3 820 million),

— the repurchase of France Télécom shares from Vodafone (EUR 4 973 million),

— the repurchase of Orange shares from E.On (EUR 950 million), and

— the payment of taxes (EUR 608 million).

(43) Of a net indebtedness of EUR 69,69 billion as at 30 June 2002, the bulk, or EUR 50,6 million worth, is made up of bonds. Table 9 gives a breakdown, by major category, of the various components of the debt.

*Table 9*

*EUR billion*

| 30 June 2002 | |
|---|---|
| **Exchangeable or convertible bonds** | **10,75** |
| **Bonds** | **39,85** |
| Leasing operation | 0,42 |
| Bank loans | 6,62 |
| Other, non-bank loans | 0,72 |
| Drawings on syndicated loans of EUR 15 billion | 8,15 |
| Drawings on syndicated loans of USD 1,4 billion | 1,48 |
| Other bank overdrafts and other short-term borrowings | 4,14 |
| **Total gross debt** | **72,13** |
| Movable investments | (0,15) |
| Cash in hand | (2,29) |
| Net indebtedness | 69,69 |

*Source*: France Télécom's consolidated accounts: half year ended 30 June 2002.

(44) The maturity schedule of this debt is characterised by its short duration. Thus, EUR 12,9 billion of debt comes due in 2003, including EUR 10,5 billion worth of bonds ([34]), EUR 1,0 billion worth of loans to subsidiaries, and EUR 1,4 billion worth of private investment.

(45) During the first half of 2004, EUR 5,5 billion worth of bonds and EUR 6,4 billion worth of credit lines (EUR 1,4 billion and EUR 5 billion of the EUR 15 billion back-up facility) came due, giving a total of EUR 11,9 billion. France Télécom was therefore faced with having to repay EUR 24,8 billion between 1 January 2003 and 30 June 2004.

(46) During the second half of 2004, EUR 2,8 billion worth of bonds and EUR 2,6 billion worth of loans to subsidiaries will come due, giving an amount of EUR 5,4 billion and a total amount of EUR 17,4 billion for 2004 as a whole.

(47) In 2005, lastly, EUR 8,5 billion worth of bonds, an amount of EUR 10 billion corresponding to the balance of the EUR 15 billion back-up facility, and an amount of EUR 0,1 billion relating to private investments will come due, giving a total of EUR 18,6 billion during the course of 2005.

(48) During the period 2003-05, France Télécom will be faced with a total repayable debt of EUR 48,9 billion.

(49) As was mentioned in the opening decision, the Commission would point out that France Télécom's debt stems mainly from the massive acquisitions engaged in by the Company as from 1999 ([35]), which were financed primarily out of cash ([36]). More than EUR 100 billion was thus spent by France Télécom in its quest for growth, 80 % of which was paid for in cash ([37]).

(50) The Commission would also point out that the Company's external growth was focused on the mobile telephony sector ([38])(including the acquisition of Orange plc ([39]), which was the most costly, and the Mobilcom transaction ([40]), without forgetting the other transactions involving fixed telephony (e.g. TPSA ([41]), the Internet (Freeserver) or cable (NTL) ([42]).

3.2.2. *September 2002*

(51) On 12 September, the Government announced that it had accepted the resignation of France Télécom's CEO, Mr Michel Bon, but remained silent about the appointment of a new CEO ([43]). On 13 September, the Government reiterated in a press release its support for the Company and expressly indicated that it had decided to take part in a forthcoming operation aimed at increasing France Télécom's own funds: '… After the exceptional losses of the first six months, France Télécom is faced with a serious shortage of capital. This financial situation is weakening the company's potential. The Government is therefore determined to exercise its responsibilities to the full. … Taking note of the new situation brought about by the considerable deterioration in the accounts, Mr Bon has tendered his resignation to the Government, which has accepted it. The resignation will take effect at a board meeting to be held in the next few weeks, at which a new chairman will be presented … The new chairman will in a very short space of time propose to the board a plan for improving the company's accounts, enabling its debts to be reduced and its financial structure to be restored while maintaining its strategic advantages. The State will help France Télécom implement this plan and will contribute to a very substantial strengthening of the company's capital base, according to a timetable and in a manner to be determined in the light of market conditions. In the meantime, the State will, if necessary, take steps to prevent the company from being faced with any financing difficulties …' ([44]).

(52) That same day, Moody's changed the outlook of France Télécom's debt from negative to stable owing to the restated commitment to support the Company ([45]).

3.2.3. *October 2002*

(53) On 2 October 2002, the Government appointed Mr Thierry Breton CEO of France Télécom. A press release of the Minister for Economic Affairs and Finance announced the appointment. In the same press release, the Government repeated its commitments: 'On a proposal from the company's board of directors, the Council of Ministers has decided to appoint Thierry Breton chairman of France Télécom … To that end, the new chairman will immediately carry out an inventory of the company, the findings of which will be communicated to the board in the weeks ahead and which will form the basis for a financial recovery and strategic development plan enabling the company's debt to be reduced while building on its strengths. Within this framework, Thierry Breton will enjoy the support of the State in its capacity as shareholder, determined as it is to exercise its responsibilities to the full. The State will assist in implementing the recovery measures and will contribute, for its part, to the strengthening of the company's own capital base in a manner to be determined in close collaboration with the company's chairman and board. As already indicated, the State will, if necessary, take steps to prevent the company from being faced with any financing difficulties' ([46]).

3.2.4. *December 2002/January 2003*

(54) On 4 December 2002, at a meeting of the Company's board, an action plan entitled Ambition FT 2005 ([47])('the Ambition 2005 plan') was presented by France Télécom's new management, being aimed, according to the French authorities ([48]), at bringing about a noticeable improvement in the Company's operational performance and offering the prospect of a satisfactory return on capital invested. Thus, the medium-term objectives were (i) to meet France Télécom's financing requirements; and (ii) to achieve a net reduction in debt and a reconstitution of capital, a *sine qua non* for the Company's rehabilitation in the long run in terms of borrowing on the stock market. In the HSBC report, it is stated that: 'Assuming a business plan which incorporates the operational improvement in the TOP programme, we consider that France Télécom has a refinancing requirement over the period 2002-07 of approximately €22 billion ... [On the other hand], assuming a business plan which does not incorporate the operational improvement in the TOP programme, we estimate that France Télécom has a refinancing requirement over the period 2002-07 of approximately €35 billion'.

(55) The key elements of the plan in question and the measures which the French authorities envisaged adopting with regard to France Télécom were notified to the Commission by letter dated 3 December 2002 and additional information was submitted by letters dated 14 and 15 January 2003. A detailed description of the Ambition 2005 plan and its various aspects (operations, debt renegotiation and strengthening of the Company's capital base) as well as of the other measures envisaged by the French authorities is given in the opening decision and is not repeated in this Decision.

(56) The presentation of the Ambition 2005 plan was accompanied by a press release of the Minister for Economic Affairs and Finance in which the Government confirmed its support for the plan, its commitment to take part in the operation to strengthen the Company's capital base and the making-available of a shareholder loan in the form of a EUR 9 billion credit line. The parts of the press release that are relevant to this Decision are as follows: 'Francis Mer, Minister for Economic Affairs, Finance and Industry, confirms the State's support for the action plan approved by France Télécom's board of directors on 4 December. 1/The France Télécom group is a coherent industrial entity with a remarkable track record. However, the company 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 France Télécom to finance its growth otherwise than through debt has made the situation worse. 2/The State, as majority shareholder, has asked the new management to restore the company'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 State will participate in the EUR 15 billion strengthening of the company's capital base in proportion to its share in the capital, giving an investment of EUR 9 billion. The State shareholder thus intends to act like a prudent investor. It will be for France Télécom to work out the detailed arrangements and precise timetable for the strengthening of its capital base. The Government wants the utmost account to be taken during the operation of the situation of individual shareholders and of employees with shares in the company. To enable the company to launch a market operation at the most opportune moment, the 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 France Télécom's disposal. 4/The State's entire shareholding in France Télécom will be transferred to a public industrial and commercial entity, ERAP. The latter will borrow on the financial markets in order to finance the State's share in the strengthening of the company's capital base' ([49]) .

(57) A few days after the presentation of the Ambition 2005 plan, France Télécom launched two successive bond issues on 11 and 12 December 2002 for a total amount of EUR 2,9 billion. The first bond issue was for a total amount of EUR 2,5 billion over seven years, at a fixed rate of 7 %, or Euribor + 290bp. For France Télécom, the cost of the fixed-rate tranche is 7,165 % (all-in). The second bond issue was placed on the pound sterling (GBP) market for an amount of GBP 250 million at a fixed rate of 8 % over 15 years, or LIBOR + 330bp ([50]). Other issues were made on 15 January 2003 for a total amount of EUR 5,5 billion ([51]). These were part of a three-tranche issue (EUR 1 billion at a fixed rate of 6 %, scheduled to mature in 4,7 years; EUR 3,5 billion at a fixed rate of 7,5 %, scheduled to mature in 10 years; and EUR 1 billion at a fixed rate of 8,125 %, scheduled to mature in 30 years). On 10 February 2003, that part of the EUR 15 billion syndicated loan which had matured, namely approximately EUR 5 billion over three years at the rate Euribor + 125bp, was renewed.

(58) On 17 December 2002, S & P indicated that, since July 2002, the Government's support had been a key factor in maintaining France Télécom's investment-grade status ([52]) and that its announcement concerning the shareholder loan and the commitment to subscribe, in proportion to its shareholding, to a EUR 15 billion recapitalisation operation had confirmed that support ([53]).

3.2.5. *February/March 2003*

(59) France Télécom ended the 2002 financial year with a loss of approximately EUR 21 billion and a net financial debt of almost EUR 68 billion.

(60) On 4 March 2003, the operation to strengthen the Company's capital base by EUR 15 billion as envisaged by the Ambition 2005 plan was launched. The operation was broadly successful and was terminated on 11 April. On 14 April 2003, the State held 58,9 % of France Télécom's capital, of which 28,6 % through ERAP.

(61) The Commission notes that the capital increase largely met the structural needs of France Télécom's financing. Thus, following the operation, France Télécom's credit rating began to improve: on 14 May 2003 S & P raised its rating to BBB, outlook stable (from A-3 to A-2 for its short-term rating) and on 8 August 2003 Fitch raised its rating from BBB- to BBB. The Commission would point out in this connection that the agencies thereupon ceased to consider the State's support to be a key factor in the Company's credit rating ([54]).

## 4. COMMENTS FROM THIRD PARTIES

(62) The Commission has received comments from a number of interested third parties. The essence of those comments is reproduced in this section.

### 4.1. Comments from Telecom Italia

(63) Telecom Italia stresses that any aid granted to France Télécom is likely to affect competition in the telecommunications markets, and in the French market in particular. It is therefore essential that the aid granted by the French authorities should be accompanied by compensatory measures aimed at reducing its impact on competition. In this context, it would be particularly appropriate to adopt regulatory measures making for easier and speedier access by new entrants and their use of France Télécom's infrastructures, particularly as regards access to the local loop and the length of time it takes to negotiate interconnection and provisioning agreements.

### 4.2. Comments from WorldCom

(64) WorldCom indicates that it shares the Commission's analysis as set out in the opening decision. It points out that the aid granted by the State to France Télécom enabled the latter to obtain the liquidity it needed to reimburse its debt without having to dispose of any strategic assets. It adds that the support of the State enabled France Télécom to ensure the continuance of its industrial strategy, that is to say, the creation of a series of vertically integrated operators of telecommunications networks and services. WorldCom concludes that this industrial strategy entails anticompetitive practices, including the existence of cross-subsidies and of a price squeeze between the price proposed by France Télécom to the final customer and the price of access proposed to competitors of the historical operator, and the possibility of making tailor-made bids that are impossible to match when public contracts are being awarded (the 'Sipperec' and 'public assistance/Paris hospitals' contracts being two such examples).

(65) In order to reduce the distortions of competition caused by the aid granted to France Télécom, WorldCom proposes compensatory measures of a structural nature, including the disposal of assets such as Global One/Equant, Orange, Wanadoo/Oléane and/or the local network in France, or else the effective and transparent separation of France Télécom from its commercial activities. Under the heading of behavioural quid pro quos, WorldCom mentions a to-be-wished-for accounting segregation between France Télécom's commercial and non-commercial activities, full publication of its accounts and a monitoring of its prices.

### 4.3. Comments from C

(66) C submits the following comments:

(a) the measures at issue constitute state aid. C argues that, in accordance with the Guidelines on state aid for rescuing and restructuring firms in difficulty ([55])('the Guidelines'), where public funding is provided to a firm which is in financial difficulties there is a presumption that state aid is involved. C states that the announcement of and terms governing the making available by the French State to France Télécom of the EUR 9 billion credit line and the participation by the French State in the recapitalisation of France Télécom involve aid elements. It points out that the prudent investor test is not satisfied as regards the arrangements for providing the credit line *inter alia* because of the interest rate proposed and the amount of the commitment fee. It also points out that the principle of concomitance has not been complied with in so far as the French authorities granted the credit line and announced their participation in the recapitalisation prior to the announcement of the Ambition 2005 plan and prior to the firm commitment of the investors. Inasmuch as France Télécom's competitors are not in a position to raise capital on these terms and on such a scale, France Télécom has received an advantage which it would not have obtained under market conditions.

(b) the measures at issue cannot be considered compatible within the meaning of the Guidelines. Alternatively, C takes the view that the aid granted should be strictly limited to that which is necessary to ensure France Télécom's viability and that it must not help to finance France Télécom's aggressive expansion. C adds that France Télécom's privatisation would ensure compliance with the 'one time last time' principle applicable to restructuring aid. It draws the Commission's attention to the distortions of competition in the German telecommunications market caused by the aid measures and proposes, by way of compensatory measures within the meaning of the Guidelines, the sale of all or part of France Télécom's subsidiary Orange.

### 4.4. Comments from A

(67) A points out that, as indicated in the opening decision, the State's intention of restoring France Télécom's financial health by granting a EUR 9 billion shareholder loan and the provision by the State to France Télécom of an 'intangible' guarantee covering its bond issues are measures which do not satisfy the prudent private investor test and which contain aid elements. It adds that France Télécom's policy regarding the collection of royalties for its patents also contains aid elements.

### 4.5. Comments from Bouygues and Bouygues Télécom

(68) Bouygues and Bouygues Télécom submit the following comments:

(a) Bouygues Telecom points out that the unfailing and irrevocable support of the State is the cornerstone of France Télécom's recapitalisation plan, which has led to the Company's recovery. Thus, according to Bouygues Telecom, only the French State could, in view of the Company's critical financial situation, restore the markets' confidence and create a virtuous circle enabling it to meet its short-term commitments and launch a huge recapitalisation operation under favourable economic conditions. In Bouygues Telecom's opinion, the following measures satisfy the requirements of Article 87(1) of the Treaty and hence constitute state aid:

(i) the statements made by the Minister for Economic Affairs and Finance during the period from 12 July to 4 December 2002 constitute a state guarantee committing the State's resources;

(ii) the shareholder loan and the operation to strengthen the Company's capital base commit state resources;

(iii) the measures at issue confer advantages on France Télécom which it would not have obtained under normal market conditions;

(iv) the measures at issue do not satisfy the test of a prudent private investor operating under normal market conditions;

(v) the measures at issue affect competition;

(vi) the measures at issue affect intra-Community trade.

(b) the measures at issue cannot be considered compatible within the meaning of the Guidelines.

(69) As a preliminary remark, Bouygues Telecom observes that the policy of expansion carried out in 2000 in the mobile telephony sector with encouragement from the State led to a worsening of the operator's financial and economic situation, which an initial savings drive did not succeed in containing.

(70) As regards the statements by the Minister for Economic Affairs and Finance, the unfailing and repeated support of the State, expressed in a series of announcements from 12 July 2002 to 4 December 2002 and supplemented by a series of measures including the opening of the EUR 9 billion credit line and the irrevocable commitment by the State to participate in a capital increase in proportion to its shareholding in the Company, amounts to a commitment on its part, from which it cannot withdraw, to make good by all available means any failure by the Company to meet its financial commitments. Bouygues Telecom stresses here that this commitment constitutes a veritable state guarantee producing legal effects committing the State's resources. It adds that the State's guarantee is unlimited in amount and time.

(71) Bouygues Telecom refers in this connection to the *Crédit Foncier de France (CFF)* decision ([56]), in which the Commission found that the public declarations by the Government had the object and effect of reassuring the bank's creditors about the quality of their loans and could not be considered — as the French authorities maintained — to be a mere political commitment without any legal value. Bouygues Telecom thus states that, in that case, the declarations of support had the effect of reassuring those of CFF's creditors who had not yet demanded the immediate repayment of their loans, of avoiding the need for CFF to use the credit line opened by the State on its behalf and of enabling the latter to devise and implement a restructuring plan.

(72) Bouygues Telecom points out, furthermore, that the Community-law approach is borne out by an analysis of domestic law. Under French commercial law, such declarations of support may be likened to letters of intent, which, as can be seen from recent case law, the courts equate with actual guarantees ([57]). Bouygues Telecom adds that, even if the French Court of Cassation has not yet adopted a position in principle on the general value of a unilateral commitment as a source of obligation, it does recognise the value thereof on a case-by-case basis.

(73) In preparing its comments, Bouygues Telecom called on the services of an expert ([58]) who stated that it followed from a long line of judgments by the French administrative courts that the existence of a commitment entered into by an administrative authority must be assessed in the light, not of the commitment's form, but of its intrinsic characteristics. The expert remarked that that case law was expressly applied in the specific case of declarations: the administrative courts thus considered that, even where they were not accompanied by any specific legal act, the promises constituted commitments as they were the embodiment of the administrative authority's will. For there to be a commitment on the part of the State, it was sufficient for the authority to have behaved in such a way as to convince others that it would act in a certain manner. It mattered little, therefore, whether the commitment was written or verbal or whether it could simply be deduced from the authority's conduct, the only condition laid down by the administrative courts being that the promise in question must be firm and precise or sufficiently persuasive.

(74) Bouygues Telecom's expert stated that, in the present case, the declarations by the Minister for Economic Affairs and Finance satisfied all the criteria for being characterised as a commitment by the State. In each of his declarations, the Minister manifested his wish to lend France Télécom his unconditional support — in accordance with procedures which, moreover, were expressly specified: the strengthening of the Company's capital base, the taking of measures enabling the Company to avoid any financing problems, and the recourse to ERAP, to which would be transferred the State's entire shareholding. Inasmuch as those declarations were firm and precise and made without reservations, they could be construed as constituting commitments by the State. Furthermore, because the Minister had had his declarations published, they could not be mere declarations of intent.

(75) Bouygues Telecom's expert stressed that, since those promises could be construed as constituting commitments by the State, they had by their very nature legal value and were of such a character as to render the State liable, whether they were legal or not, vis-à-vis France Télécom, its creditors and its employees.

(76) Bouygues Telecom maintains that the declarations made by the French Government on and after 12 July 2002 are 'administrative acts' binding on the State which are of such a character as to render the State answerable before the administrative courts. The latter thus have to judge any conduct of the authorities through the resulting administrative acts, whatever their form, whether they cause damage or not, and the effects of which stem either from a modification of the regulatory set-up or from an effect on the personal situation of the plaintiff. Bouygues Telecom

also submitted to the Commission on 26 May 2004 another study ([59]) which also comes to the conclusion that the declarations by the State constitute the expression of a formal, precise and irrevocable commitment by the State — legally sanctionable, where appropriate, via the incurment of the liability of the State should it be at fault in failing to respect its commitments towards France Télécom.

(77) Bouygues Telecom states that there is therefore no doubt that the measures at issue constitute, not psychological support as the French authorities have maintained, but a guarantee legally binding on their author.

(78) Bouygues Telecom states lastly on this point that the binding nature of the declarations made by the State by way of the guarantee is confirmed by a circular of the Ministry of Economic Affairs and Finance dated 22 July 2003 which expressly refers to the existence of implicit guarantees ([60]).

(79) With regard to the shareholder loan and the operation to strengthen the Company's capital base, Bouygues Telecom maintains that, firstly, the opening of a EUR 9 billion credit line for the benefit of France Télécom and, secondly, the irrevocable commitment by the State to participate in any future capital increase in proportion to its shareholding in the Company followed by the recapitalisation operation as such, are the implementation of the state guarantee and are financed by state resources. In this connection, Bouygues Telecom adds that the recourse to ERAP in the granting, by the French authorities, of a EUR 9 billion credit line for the benefit of France Télécom in no way alters the state origin of the funds. It points out that the recourse to ERAP means that France Télécom benefited, firstly, from an advantageous interest rate owing to its status as an industrial and commercial public establishment and, secondly, from the express guarantee provided by the State for an amount of EUR 10 billion ([61]). As a result, the measures at issue are financed by state resources, even if the credit line has ultimately not been used.

(80) In its additional comments of 11 April 2003, Bouygues Telecom maintains that, in view of the Company's financial situation, the recapitalisation operation carried out on 24 March 2003 was possible only because of the prior intervention of the other aid measures. Consequently, the recapitalisation constitutes *per se* state aid as it stems directly from prior state aid ([62]).

(81) As regards the condition relating to the advantage, Bouygues Telecom points out that the occurrence giving rise to the guarantee took place subsequently to the reduction in France Télécom's credit rating by the rating agencies with a view to restoring the market's confidence.

(82) Again on this point, Bouygues Telecom states that the guarantee had the effect of enabling France Télécom to gain renewed access to the financial markets. Thus, the guarantee improved the prospects attaching to France Télécom's credit rating and enabled it to avoid junk-bond classification. Bouygues Telecom observes next that the stock-exchange price of France Télécom's shares improved considerably. In addition, the spreads on the bond market narrowed after the month of June 2002 and France Télécom was able to stagger its debt maturities and face up to the liquidity wall. Bouygues Telecom stresses that, not only did the guarantee make possible France Télécom's very recourse to the financial market, but it also enabled the bond issues to be made at a rate which did not reflect France Télécom's true financial situation.

(83) Bouygues Telecom states more precisely, in its comments of 11 April 2003, that the announcement and implementation of the state support gave rise to aid at the origin of advantages linked to the shareholder loan and the recapitalisation. These advantages had the effect *inter alia* of moving the liquidity wall further away, that is to say, of increasing the amount of financing available for meeting debt repayments and of permitting an actual and potential postponement of payments and actual and potential cost savings.

(84) Concluding on this point, Bouygues Telecom maintains that the advantage gained by France Télécom amounts to more than EUR 40 billion (EUR 3 billion in respect of all the support measures taken by the French State on France Télécom's behalf and EUR 36,7 billion in respect of the State's participation in the Company's recapitalisation), which amount takes no account of the considerable latitude granted to France Télécom as a result of the removal of all financial concerns, the liquidity wall being shifted by almost EUR 43 billion.

(85) In its additional comments of 7 January 2004, Bouygues Telecom states that the advantage enjoyed by France Télécom as a result of the State's irrevocable commitment of support may be estimated at more than EUR 30 billion, while the advantage derived from the recapitalisation operation may be put at more than EUR 50 billion.

(86) As to the prudent private investor test, Bouygues Telecom argues that the support measures do not satisfy that test for the following reasons:

a) *Unconditional, unlimited commitment:* Bouygues Telecom takes the view that the State's declarations constitute a firm and unconditional legal commitment which an investor would never have undertaken without entering the slightest reservation. It is therefore an unlimited guarantee granted to a company which is extraordinarily leveraged and fragile in the short term. In Bouygues Telecom's opinion, the measure at issue does not fulfil the criteria mentioned in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to state aid in the form of guarantees ([63])(hereinafter called 'the Notice on state aid in the form of guarantees') in so far as, in particular, France Télécom was in financial difficulties at the time the guarantee was granted and in so far as the guarantee does not relate to any specific transaction and gives rise to no remuneration. France Télécom has therefore secured advantages which it would not have secured under normal market conditions.

b) *Terms governing the granting of the shareholder loan:* Bouygues Telecom argues that the mechanism adopted by the State meets by and large a concern falling within the realm of public finances (compliance with the Maastricht criteria, notably), and is not in keeping with the principle of a prudent investor operating in a market economy. Repayment of the loan subscribed by ERAP on behalf of the State with a view to participating in the recapitalisation is not assured. The method of repayment first and foremost envisaged is linked to the sale of shares, the profit on which is potential and cannot for that reason confer on the investment in question the nature of a 'prudent' transaction. Bouygues Telecom points out that the guarantee granted by the French State to ERAP to the tune of EUR 10 billion enabled ERAP to gather together the funds needed to grant the credit line on advantageous terms, i.e. at a rate of 3,375 %. Any prudent private investor would have carried out such a transaction at a higher cost for which he would have demanded specific guarantees linked to the company's assets.

c) *Recapitalisation:* In substance on the commitment by the French authorities to recapitalise France Télécom and the recapitalisation operation itself, Bouygues Telecom claims that the prudent private investor test is not satisfied in the present case as the State undertook to participate in France Télécom's recapitalisation on 12 July 2002, i.e. prior to the existence of the Ambition 2005 plan, without knowing France Télécom's exact economic situation, which had become much worse, and without the concomitant participation of private investors. In this connection, Bouygues Telecom stresses the following points:

— *The company's financial situation:* Bouygues Telecom stresses that the historical operator's financial health at the time of the decision to invest prevented it from resorting to private investors without the State's support (EUR 70 billion of losses, EUR 8 billion of negative equity and debt maturities amounting to EUR 50 billion over the following three years). Moreover, the plan presented by Mr Bon at that time did not appear relevant in the eyes of the market and was followed by France Télécom's downgrading by the rating agencies. This situation was reflected by the statement by Thierry Breton before the Senate finance committee ([64]).

— *Return on the transaction:* Bouygues Telecom indicates that the period for calculating the return on the investment begins at the earliest on 12 July 2002, the date of the first declaration by the State having the effect of binding it legally vis-à-vis France Télécom and its creditors, and ends at the latest on 4 and 5 December 2002, the dates on which the Ambition 2005 plan was made public and the EUR 9 billion credit line was opened. It argues that the reasonable return which a prudent private investor would have been entitled to expect in such circumstances cannot be reliably calculated. Thus, the recapitalisation of France Télécom cannot be compared to any other financial transaction in view of the scale of the liquidity crisis faced by the Company. As a result, the State was unable to assess its risk by making a probability calculation and was confronted with a radical uncertainty (that is to say, a non-probabilisable risk) when it decided to guarantee France Télécom: thus, both the level of risk and the return were not quantifiable. At all events, the investment could not be characterised as reasonable. In particular, a projection of France Télécom's stock-exchange valuation and of the return on investment expected by a private investor shows that the investment is unreasonable. In accordance with the method used by the Commission to assess the prudent nature of an investment, the return on investment which a prudent investor would have demanded, bearing in mind in particular the risks connected with the transaction, may be estimated at at least 30-40 %. This rate is the minimum required by the Commission in the *Alitalia* ([65]) and *Iberia* cases ([66]). According, however, to the methods used by Bouygues Telecom, that is to say, EPS (*Enterprise value or Analysts target price 12 months*), the return on investment in the transaction at issue is only 16 %. Nor can the State count on a remuneration in terms of dividends as France Télécom has announced that it will not be distributing any. Generally speaking, it is not appropriate to make an *ex post* analysis of France Télécom's positive results in the assessment of the prudent investor test. A private investor would never have committed himself financially without entering the slightest reservation at a time when the total amount of the France Télécom group's debts had not been established. Bouygues Telecom adds in this regard that, in accordance with the case law of the Court of Justice of the European Communities, it cannot be maintained that the commitments entered into by the State towards France Télécom are a reflection of the conduct of a prudent investor solely on the ground that France Télécom had become a profitable company.

— *Difference between the situation of a private investor and that of the State:* Bouygues Telecom argues that, in view of the prolonged crisis in the world economy and more particularly in a telecommunications sector undergoing transition, and bearing in mind the size of the sum in question, no private investor could have envisaged a capital increase of that amount without conditions and only a State of the creditworthiness of France could have coped with such uncertainty.

It thus points out that the financing of the strengthening of the Company's capital base, covered entirely by debt without any own funds, would have affected the credit rating of any private investor who behaved in a similar way, whereas a State, on the other hand, can be punished only by its electors, who do not have the same objectives. The creditors and shareholders of the private investor would have asked for the investment to be backed by a business plan containing precise commitments, including the disposal of assets. Bouygues Telecom concludes that, at all events, a prudent investor whose financial capacity was comparable to that of the French State and who issued such a guarantee would not have inspired much confidence in the markets and that it is clear that it was due to the qualification of 'sovereign debt' enjoyed by the State's commitments that confidence was restored.

— *Concomitance criterion:* Bouygues Telecom argues that the concomitance principle has not been complied with. The French authorities' decision to invest dates from 12 July 2002 and France Télécom's financial difficulties on that date by themselves point to the recapitalisation being state aid, all the more so as the State took its investment decision in ignorance of the Company's exact economic and financial situation and prior to the drawing-up of the financing plan. Bouygues Telecom points out that the participation of private investors was neither certain nor significant at the time of the announcement by the Government of its participation in the capital increase, even if the analysis of the date of taking of the decision to invest is brought forward to 5 December. According to the case law of the Court of Justice, where private investors are prepared to intervene only after the authorities have decided to grant aid, the fact that those investors are then prepared to intervene at the same time is no longer relevant. Such an intervention is the consequence of the support given by the State and not the result of a decision of a private investor. Hence, in the present case, the fact that a banking syndicate undertook to underwrite the transaction cannot be taken as a basis for concluding that the concomitance principle is complied with. The French authorities' decision to invest is firm and unconditional whereas that of the private investors is not, and the private investors made their contribution only after having received, on a number of occasions and with certainty, the assurance that the State would also participate in the transaction and especially that it would take every step to ensure that France Télécom did not have any financing problems. At all events, Bouygues Telecom takes the view that, in accordance with the case law relating to the *Seleco* decision referred to in paragraph 80, a significant participation by private investors is not in itself sufficient to rule out any aid element. It maintains, moreover, that the State's investment is higher than the amount of its participation in France Télécom's capital. It argues, lastly, that the very high level of banking commissions allows the bank to subscribe to the underwritten shares at a lower discount than that offered to the public.

(87) As regards the effect on competition, Bouygues Telecom points out *inter alia* that the measures at issue have had the effect of affecting competition in the market for mobile telecommunications. In substance, it refers to the fact that the scale of France Télécom's debt can be traced back to the development of the mobile telecommunications business. Thus, Orange does not bear the debt linked to its acquisitions; instead, the parent company bears it in its entirety. Being endowed with the means of coping with its debt thanks to the measures at issue, France Télécom enables Orange to consolidate and develop its position in the mobile telecommunications markets. With a 49,8 % market share, Orange is in a dominant position in the French mobile telephony market. In its comments of 11 April 2003, Bouygues Telecom points out that the structure of the mobile telecommunications market in France is due to a capitalistic investment strategy (together with an aggressive commercial strategy) carried on by Orange to the detriment of its operational profitability, thanks to the support granted to it by the State through France Télécom, notably via the aid at issue in the present case. It stresses, moreover, that the measures at issue affect competition throughout the telecommunications market and dissuade foreign operators from coming to propose their services in France. France is thus the only European country in which no 'foreign' mobile operator has been able to establish itself.

(88) As to the compatibility of the support measures within the meaning of the Guidelines, Bouygues Telecom argues that they do not possess the exceptional character required in order to be characterised as rescue aid within the meaning of the Guidelines. Basically, the fact is that the Ambition 2005 plan does not satisfy the minimum requirements of the Guidelines. The plan contains measures not forming part of a rescue operation, such as recourse to the bond market or the envisaged recapitalisation. Among other things, the amount of the recapitalisation is more than is needed to cover France Télécom's short-term operating needs alone, excluding reimbursement of the loans taken out at the time of its expansion. Moreover, the plan is not a restructuring plan capable of modifying the structure of France Télécom with a view to improving its profitability, but is limited to increasing the Company's liquidity so as to lessen the impact of its current difficulties. Bouygues Telecom insists also on the fact that the measures at issue

are weak in comparison with those taken by the historical operator's competitors, such as KPN, Deutsche Telekom or British Telecom, both as regards the disposal of assets and as regards the social measures taken.

(89) The restructuring plan does not contain any substantial compensatory measures capable of preventing any undue distortions of competition so as to offset the aid granted by the State. Bouygues Telecom notes among other things the lack of any disposal of valuable or strategic assets. Thus, the sales envisaged by France Télécom are limited to non-strategic assets worth very little (EUR 3,5 billion, according to France Télécom's own estimates).

(90) Additionally, Bouygues Telecom maintains that compensatory measures must be adopted for the benefit of the historical operator's competitors in the mobile telecommunications market, and in particular for the benefit of the last entrant, the presence of whom is a precondition for the existence of genuine competition in the French market. It proposes *inter alia* as compensatory measures within the meaning of the Guidelines a five-year ban on Orange proposing lower rates than its competitors for equivalent services, and the imposition of a self-limitation on Orange's monthly market shares to 33 % until such time as Orange's net market share is reduced to 40 %. It also proposes a limitation of the length of the commitments entered into by consumers vis-à-vis Orange to 12 months (acquisition and renewal), a freezing of the deployment of Orange's GSM and GPRS network so as to re-establish a competitive balance, the obligation to dispose of strategic assets and the obligation to limit marketing activities.

(91) In its comments of 26 May 2004, Bouygues Telecom furnishes *inter alia* an economic analysis which states that, in view of the specific attitude of States (variable according to their own credibility), the support of the State has a substantially different scope from that of a majority shareholder. The analysis also points out that state intervention is part of a long tradition and that that intervention is judged on the basis of an already established reputation. In Bouygues Telecom's view, it is clear that, by supporting France Télécom, the State is staking its reputation and hence is placing on the line its ability to intervene again in favour of other French companies. The analysis also stresses that the question of the French State's credibility is to be seen in the context of the specific French situation with regard to privatisation. Any flagging in its support would have deprived the State of its capacity to act subsequently, which was speedily done in the case of Alstom.

(92) Bouygues Telecom also furnishes an analysis of whether the State's declarations had any binding effect under the law of the state of New York, where the Company is also quoted. According to that analysis, it is probable that such declarations would be considered binding either as a unilateral contract or by virtue of the principle of estoppel.

(93) Bouygues Telecom furnishes, lastly, a study of whether such declarations emanating from the British Government would have a binding character under English law. The conclusion of that study is that such declarations would be binding or would impose on the State the burden of justifying a change of position.

### 4.6. **Comments from Cable & Wireless**

(94) Cable & Wireless expresses the view that the measures at issue constitute state aid. The market's confidence following the announcement of the granting by the French authorities of the shareholder loan sufficed to confer an advantage on France Télécom. In so far as a prudent private investor would not have taken the decision to recapitalise a company such as France Télécom, which was clearly inefficient prior to the adoption of the 2005 Ambition Plan, the Company enjoyed an advantage which it would not have secured under normal market conditions. Cable & Wireless also points to the dangerous precedent that would be created by allowing a government to underwrite all the financial problems of public undertakings and to the negative dynamic that would be created for competition. It adds that the measures cannot be considered compatible within the meaning of the Guidelines. Inasmuch as the Company is not in financial difficulties, the Guidelines are not applicable.

### 4.7. **Comments from AFORS Télécom**

(95) AFORS Télécom (Association française des Opérateurs de Réseaux et Services de Télécommunications) observes that the measures at issue constitute state aid. More particularly, it states as follows:

(96) Through a series of step-by-step decisions taken in the course of 2002 — including the State opting for payment of the 2002 dividends in shares and not in cash — until the opening of a EUR 9 billion credit line made available to France Télécom via ERAP, the French authorities restored investors' confidence by giving formal status to their support. Moreover, even if the credit line opened by ERAP were never used by France Télécom, it symbolises the guarantee of state support and hence mobilises state resources within the meaning of Article 87(1) of the Treaty.

(97) The terms on which the credit line was granted and the terms governing its remuneration do not satisfy the tests of the prudent private investor principle. AFORS Télécom argues that France Télécom's financial failings since 2000 could not have happened in the presence of a prudent investor. The State thus did not perform its role of 'watchdog' and it allowed France Télécom to increase its indebtedness on an unheard-of scale. AFORS Télécom observes that France Télécom's past acquisitions strategy

was conducted without regard to the inherent risks inasmuch as the State in its capacity as shareholder assured France Télécom of its support against any prospect of bankruptcy.

(98) The State's support has had the effect of preventing any further downgrading of France Télécom's credit rating by the rating agencies, which has made it possible to speed up France Télécom's return to the market and the refinancing of its debt under less onerous financial conditions. France Télécom has enjoyed an advantage which AFORS Télécom estimates is worth EUR 1,5 billion ([67]). Hence, it is the credibility of the French State, enjoying as it does excellent creditworthiness, and not that of the restructuring plan, that determined the conditions of France Télécom's return to the financial markets. Moreover, the State's support had the advantage that France Télécom no longer had to modify its strategic perimeter.

(99) The Ambition 2005 plan consists of guidelines and not of clearly worded, binding and irreversible commitments and cannot be compared to the restructuring process implemented in Europe by, say, British Telecom.

(100) The advantages enjoyed by France Télécom prolong distortions of competition damaging to the members of AFORS Télécom. In AFORS Télécom's opinion, the aid granted by the French State reinforces the already existing anticompetitive practices which are highly detrimental to alternative operators. AFORS Télécom mentions among other things the exclusive utilisation of France Télécom's distribution network by Orange and Wanadoo, the unbundling offers which systematically benefit Wanadoo and France Télécom, and the monopoly position held by France Télécom in the market for shared-revenue services (the supplying to consumers of value-added content accessible by telephone). AFORS Télécom points to the real risk of prolongation of this conduct which the state aid would allow.

(101) Compensatory measures should be imposed on France Télécom with a view, firstly, to ensuring that the conduct of the State is analogous to that of a company which has to restore its financial capacity without benefiting from exceptional aid and, secondly, to restoring fair competition. This would involve (i) restricting France Télécom's investment to that of an indebted company, e.g. by limiting its overall investment policy to investments the return on investment period of which is less than 12 months in the case of retail activities; (ii) introducing transparent structures between each business within the group; and (iii) preventing the state aid from being used to fuel a price war, for example through the systematic publication of its tailor-made retail offerings.

### 4.8. **Comments from Cégétel**

(102) Cégétel maintains that there are two separate measures: (i) the announcement by the French authorities of the granting of a shareholder loan to France Télécom; and (ii) the participation by the State in the recapitalisation of France Télécom.

(103) As regards the first measure, Cégétel remarks first of all that the situation of a company with a private reference shareholder and that of a company with a public majority shareholder are not comparable. A similar announcement made by a private shareholder would have been received with the greatest circumspection by the rating agencies and would have caused them to take a close look at the arrangements for the refinancing by the shareholder in question of the credit line thus extended. Cégétel concludes from this that the mere fact of being backed by the State confers a considerable advantage vis-à-vis investors and prevented any further downgrading of France Télécom's credit rating by the rating agencies despite the fact that the operator appeared to be in an insoluble situation. It maintains that the Commission may justifiably consider that the French State granted aid to France Télécom even before an agreement for the granting of a EUR 9 billion credit line was signed as the announcement of support was sufficient to render this emergency financing unnecessary. Lenders were thus certain that France Télécom could never default on its payments inasmuch as the State would always be ready to grant it the funds it needed to honour its commitments, and this enabled France Télécom to obtain financing directly on the market. Cégétel concludes on this point that the government declarations were worded in such a way that the markets would be certain that lending money to France Télécom would be strictly equivalent to lending money directly to the State. France Télécom thus enjoyed advantages which it would not have secured under normal market conditions, compared, for example, with the situation of Vivendi Universal. The recourse to the bond market enabled it to avoid having to resort exclusively to financial institutions in order to cope with its liquidity crisis and suffering all the constraints linked to that type of financing. Cégétel maintains that the terms of grant of the credit line by the French authorities are not in keeping with those granted by a prudent investor in relation to one of his participations. More particularly, a prudent investor would never have agreed to the policy of financing acquisitions through debt which placed France Télécom in a critical financial situation such that the State had to carry out a recapitalisation. Cégétel refers to the *Crédit Lyonnais II* decision, in which the Commission finds that the aid measures could not be justified by the failings over many years of the State as shareholder ([68]). In Cégétel's opinion, opting to channel the aid through ERAP is not what a prudent investor would have done. In this connection, Cégétel notes in particular the interest rate applicable to the drawings on the loan and the absence of securities and

guarantees. Regarding quantification of the aid relating to the shareholder loan, Cégétel maintains that point 3.2, fourth subparagraph, of the Notice on state aid in the form of guarantees is applicable and that, in view of the fact that, thanks to state support, France Télécom has been able to borrow EUR 16 billion to meet its maturities despite the catastrophic nature of its finances, the amount of the aid is equivalent to the amount raised thanks to the announcement.

(104) Cégétel maintains that the same reasoning applies to the recapitalisation, which it analyses, from an economic point of view, as being the transfer of EUR 9,2 billion of France Télécom's debt to ERAP, which benefits from the State's guarantee. Cégétel counts the whole of this amount as aid. It also highlights the amount of the aid corresponding to the redundancy costs which a company would have had to bear in terms of staff cuts, namely EUR 1,5 billion, and which the historical operator would not bear owing to its employees being transferred to civil service jobs under the Ambition 2005 plan.

(105) Cégétel maintains that France Télécom benefits from a formal guarantee in so far as the Court of Cassation considers that private-law companies enjoying special legal status are not subject to the applicable judicial liquidation procedures (cf., for example, SEITA or Air France). Thus, by virtue of this case law, France Télécom must be regarded as not falling within the ambit of the ordinary-law arrangements. Cégétel acknowledges that France Télécom has not enjoyed EPIC status since 1996, but points out that, in reality, the guarantee has not disappeared inasmuch as the state authorities have sought, through their repeated declarations, to convince the markets that France Télécom would retain, come what may, the support of its reference shareholder and that, if necessary, the State would help the operator to meet its maturities ([69]).

(106) Cégétel maintains, lastly, that the measures cannot be considered compatible within the meaning of the Guidelines. It recalls that, according to the Guidelines, where a State injects capital into a firm in difficulty, 'it must be deemed likely that the financial transfers involve state aid' ([70]). It argues that the compensatory measures taken by France Télécom cannot be considered sufficient within the meaning of the Guidelines. Thus, the Ambition 2005 plan does not contain any specific provisions on asset disposals or a social plan. Cégétel proposes *inter alia* the following compensatory measures in the fixed telecommunications market: (i) the sale of local loop access and associated services; and (ii) increased ring-fencing between France Télécom and the companies Orange and Wanadoo.

### 4.9. **Comments from LDCOM** ([71])

(107) LDCOM identifies a dual mechanism of aid in support of France Télécom, backed by support for staff mobility, namely: (i) the provision of an unlimited guarantee; and (ii) the granting of a EUR 9 billion credit line.

(108) *Provision of the unlimited guarantee*: LDCOM bases its considerations on the content of the declarations by the French authorities which have appeared since 20 June 2002 in the press via press releases of the Ministry of Economic Affairs and Finance addressed directly or indirectly to the rating agencies. These declarations, which seek to reassure the financial markets about France Télécom's situation ([72]), have contributed directly to the improvement in France Télécom's credit rating in the markets and have helped the Company to face up to the liquidity wall with which it was confronted. According to LDCOM, the State's intervention by may be characterised from a legal standpoint in a number of ways. It points out that, under French law, no form is required for the creation of a legal obligation and that an oral declaration may therefore, under certain conditions, constitute a legal act giving rise to a right on the part of its addressee. The binding force of the unilateral act is based on the theory of commitment by unilateral will, which is one of the sources of the law of obligations. This obligation arises from the dual condition of the firm and precise nature of the will. LDCOM also affirms that the State's responsibility is based, in company law, on the analysis of the theory of the apparent mandate and of the *de facto* manager — in the latter instance for having directly contacted the rating agencies. Under international law, the State's contractual responsibility is also incurred in so far as a unilateral legal act has binding force where it can be shown that the declaration was expressed publicly with the intention of binding its author ([73]). Thus, a mere oral and public declaration made by a State may create a legal obligation on its part. In the present case, according to LDCOM, the content of the declarations binds the French authorities as the letter of the declarations constitutes a clear and unequivocal unilateral commitment by the State to be the lender of last resort to France Télécom and not to leave the latter in the financial crisis it has known since the summer of 2002. Inasmuch as the State's commitment is of a binding nature, any failure to honour that commitment may incur the State's contractual responsibility (third parties could have forced the State to carry out its commitment).

(109) LDCOM asserts that the State's tortious liability was also incurred, notably under company law. Thus, a company which gives the impression of taking over the debts of another company gives rise to a claim on itself by third parties. According to LDCOM, the State, by its declarations, guaranteed third parties that it would take over France Télécom's maturing debt. More precisely, LDCOM maintains that the State's declarations to the effect that it 'will contribute to the very substantial strengthening of the company's capital base ([74])' give rise to an obligation on its part incurring its legal and financial responsibility ([75]). According to learned opinion: 'if the State did not respect the commitment thus entered into, its responsibility would

incontestably be incurred before the administrative courts, the forum for hearing cases involving promises not kept by the State' ([76]). LDCOM states that Article L465-1, third subparagraph, of the Monetary and Financial Code provides for the punishment of persons who distort the normal functioning of markets by illicit actions which influence the trend of stock prices. Consequently, according to LDCOM, it is clearly established that the State did not at all intend to announce hypothetical future events but was in fact announcing its future line of conduct.

(110) In LDCOM's opinion, Community case law also confirms that any press article, emanating either from the company concerned or from the Government, which is of an unconditional nature necessarily indicates that state resources are being made available ([77]). In the present case, the declarations emanate directly from the Government and are of an unconditional nature.

(111) It follows from the above that the legally and financially binding declarations of support made by the French authorities on and after 2 June 2002 are akin to a guarantee the purpose of which is to enable France Télécom to avoid bankruptcy and to survive within its existing business perimeter. In LDCOM's opinion, the guarantee is an unlimited one. LDCOM states that it is therefore not only the provision of a credit line and the amount thus granted but the very announcement of that provision which constitutes the aid. In accordance with the Notice on state aid in the form of guarantees, the criterion relating to state resources is fulfilled, whether or not the guarantee is called. Considering that the measures at issue did not satisfy the criteria of the said Notice, on the grounds that France Télécom could not then find the necessary funds on the markets, LDCOM observes that the measures constitute aid. LDCOM also argues that 'in view of the amounts involved, the State alone was capable of providing such a guarantee, no prudent investor being able to ensure the credibility vis-à-vis the markets of the "taking in hand" of France Télécom' ([78]). Lastly, LDCOM stresses that any analysis to the contrary would be fraught with consequences inasmuch as not only would it run counter to the principles of domestic positive law but it would also open up the possibility for Member States to sustain with impunity the share price of companies in which they have an interest ([79]).

(112) The effect of this unlimited guarantee is clearly felt in the market and the market's reaction corresponds to the value investors actually place on the guarantee. Thus, the stock exchange price of France Télécom's shares rose as from July 2002, leading to an increase in the operator's stock exchange value. LDCOM argues that the increase in value thus brought about by the State's announcement may be put at EUR 5,9 billion. Similarly, France Télécom's spreads ([80]) started to improve as from July 2002, thereby reducing the operator's financial burden and permitting the rebuilding of its financial capacity. These spreads make it possible to evaluate in concrete terms the financial weight of the State's announcement. They must be related to France Télécom's entire debt financed through bond issues. Depending on the circumstances, they vary from 2 % to 3 %, equal to an annual saving of between EUR 1,37 billion and EUR 2,05 billion. Assuming that France Télécom will maintain a constant level of indebtedness and hence that the debt will be financed indefinitely, LDCOM evaluates the impact of the saving thus made at between EUR 19,57 billion and EUR 29,36 billion. Moreover, the State's support has enabled France Télécom to refinance itself on the bond markets on more advantageous terms than it would have obtained beforehand.

(113) *Announcement of the making available of a EUR 9 billion credit line*: LDCOM does not analyse this measure in the light of Article 87(1) of the Treaty, but refers to the analysis carried out by the Commission in its opening decision, insisting on the part played by ERAP.

(114) In LDCOM's opinion, both from the point of view of its amount and of that of its modalities or its very objective, the State's support is not covered by the prudent investor criterion. Thus, no prudent investor would, in September 2002 (when the State announced that it would be supporting France Télécom financially), have advanced EUR 9 billion under such economic circumstances without basing itself on a restructuring plan. LDCOM explains, moreover, that no private investor would have had the financial capacity to mobilise such amounts in such a short space of time. It also states that, for a private investor, maintaining the integrity of a group's operational structure is a means to the end of earning a return on his investment. In the present case, for the French authorities it is an end in itself. It is understandable that the State should bear social and political considerations in mind, but such a move would violate the principle of equality between public and private sectors.

(115) In LDCOM's opinion, the State's position that a prudent majority investor would not have called into question France Télécom's functional integrity does not stand up to an analysis of the conduct of such an investor under the market conditions prevailing in June-July 2002. Thus, investors who invest an extremely large proportion of their assets in a company threatened with collapse will be the first to demand a radical and immediate review of its strategy, involving, if necessary, a huge sell-off of strategic assets. The relevance of this analysis can be verified by comparing the situation in which France Télécom would have found itself without the State's support with that of Vivendi Universal, which was obliged, under pressure from the markets, to revise its range of assets. LDCOM thus

maintains that the Commission must not only refuse to take as point of departure the maintenance of the group's functional integrity, but also analyse the impact of such maintenance as being the veritable effect on competition. It argues that, in July 2002, without any state intervention, France Télécom would have had no choice but to reduce its range of assets, enforce redundancies ([81]) and revise its strategic objectives.

(116) LDCOM puts the total amount of aid at EUR 15 billion, this being the sum which France Télécom succeeded in raising on the financial markets thanks to the aid granted to it by the State. The aid amount cannot therefore be limited to the EUR 9 billion provided directly by the State, since it was through various state measures (unlimited guarantee, shareholder loan, staff movements) that France Télécom was able to increase its capital by such an amount.

(117) In LDCOM's opinion, the aid granted by the State constitutes restructuring aid. LDCOM has carried out a comparison between the situation before and after the public intervention in the markets for voice telephony, high-speed Internet access and low-speed Internet access, and that which would have obtained in the absence of any public intervention. This comparison confirms that the aid has had the effect of maintaining the status quo ante in the run-up to 2005 (intact operational and marketing capacities), which makes it possible by deduction to quantify in terms of market shares some of the effects of the public intervention. LDCOM proposes that remedies should be imposed on France Télécom under point 35 of the Guidelines, the effect of which will have to be to restore the market situation to what it would have been had France Télécom been forced to modify its business perimeter spontaneously. In so far as the State has, in LDCOM's view, set itself the primary objective of maintaining France Télécom as an integrated telecommunications operator, the main markets affected are that for mobile telephony and that for fixed telephony, both upstream (interconnection, DSL access) and downstream (retailing of communications, DSL Internet access, etc.). LDCOM proposes therefore that the Commission should take behavioural measures to limit the distortion of competition thus brought about and to enable alternative operators to work under the conditions which they would have enjoyed in the absence of aid. It proposes, therefore, a reduction in the market shares of France Télécom and its subsidiaries in the high-speed Internet market (maximum of 42 % of the market for the sale of high-speed Internet access by DSL, in terms of value) and in the voice telecommunications market (maximum of 55 % of the local and national voice communications market, in terms of value) and a series of measures aimed at implementing the limitation in France Télécom's market shares ([82]). The second category of measures proposed by LDCOM consists of the imposition of measures aimed at enabling the development of competitors ([83]).

(118) In its comments of 17 May 2004, LDCOM states that the declarations by the Minister for Economic Affairs and Finance constituted a unilateral state act non-compliance with which was punishable under international law. It also states that the prohibition on a person denying a fact to the detriment of another person (estoppel) is a general principle of international commercial law which is binding on the State. It points out in this connection that the principle's applicability in the present case is incontestable in view of the fact that the French State is acting as a shareholder and hence also as an operator in international trade.

(119) LDCOM also stresses that the State cannot go back on its declarations without harming its own financial credibility. In its intervention on the market, the State plays a role of borrower and a role of majority shareholder in a number of companies. This dual role leads to a dual credit rating by the rating agencies, in its capacity as borrower and in its capacity as shareholder through the ratings given to public undertakings. This twofold intervention possibility calls for particular vigilance as any deficiency established in either of these two roles is likely to have consequences for its other role and for its rating (LDCOM refers to Moody's assessment of public undertakings). LDCOM further stresses the fact that the credibility of the State is fundamentally different from that of other enterprises in a similar situation which cannot reassure the market (as in the case of Vivendi Universal). The security which, for the financial markets, French public borrowings represent is therefore the justification for the unconditional confidence placed by investors in the State's declarations, the State having always respected its commitments. The taking into account of the support given by the State following its entering into direct contact with the rating agencies, the role of which is be extremely critical as regards the risk inherent in a financial investment, highlights the credibility of the State's support for France Télécom. LDCOM also points out that the State's rating attains the top mark of Aaa as it honours its commitments. A disengagement by the State would lead to a fall in its rating, which would result in a re-evaluation of public debt interest. Likewise, a disengagement from one public undertaking might have an impact on the credit rating of all the others.

### 4.10. **Comments from B**

(120) In B's opinion, the making available of funds, coupled with the public commitment by the State to support France Télécom, is comparable to the providing of a financial guarantee capable of reassuring not only the Company's creditors but also the entire market, which has helped to improve France Télécom's situation vis-à-vis the stock markets. Hence, B concludes, the measure at issue has been granted through state resources. Given that the State's conduct cannot be considered to be that of a private investor in a market economy, the Company enjoyed an advantage which it would not have obtained under normal market conditions. Thus, at the time of opening of the credit line, France Télécom's financial situation was such that no prudent investor would have carried out a transaction of this type. Likewise, B maintains that the concomitance principle has not been complied with, the

participation of private investors having been made possible only by the announcement and making available of a shareholder loan the amount of which was so huge that no private investor would have been able to mobilise so much money. It points out that the support measures reassured private investors that any risk of France Télécom's becoming bankrupt could be ruled out. It also argues that the amount of France Télécom's recapitalisation (between 80 and 100 % of its stock exchange valuation) is such that, in the light of France Télécom's economic situation, no private investor would have carried out such a transaction were it not for the declarations of support and the prefinancing measures taken by the Government.

(121) B maintains that the measures cannot be considered compatible within the meaning of the Guidelines. In the alternative, it proposes compensatory measures, *inter alia* in the market for fixed telephony, in the market for Internet access and in the market for mobile telephony. It points to the various effects on the development of competition in the French market ([84]). In the fixed telephony market, it advocates, among other things, accounting separation and the creation of a genuine management system for France Télécom's network activities so as to prevent the pursuit of anticompetitive practices. It also proposes the imposition on France Télécom of an obligation to inform fixed telephony subscribers about the possibility for them to choose their operator for the routing of their telephone calls so as to attenuate the 'tremendous "competitive leverage" afforded it by its virtual monopoly in the market for access to the telephone network and in the markets for the routing of telephone communications'. In the mobile telephony market, B proposes *inter alia* the imposition on Orange of an obligation to make a MVNO (Mobile Virtual Network Operator) offer to operators wishing to penetrate this market.

### 4.11. Comments from Tiscalinet

(122) Tiscalinet argues that the declarations made by the State as from 2 July 2002 signal to the market that any compulsory administration of France Télécom is ruled out. At the same time, the State's option for its 2002 dividends to be paid in shares and not in cash is another signal by the State to the market that it supports France Télécom even though a prudent investor would have opted for payment of the dividends in cash. Tiscalinet adds that the approaches made by the Minister for Economic Affairs and Finance to the Caisse des Dépôts et Consignations, which holds 5 % of the historical operator's capital, to induce it to block the securities to make them less volatile and strengthen investor confidence raises the question as to what private investor would have acted in that way. Tiscalinet also stresses that the set of legislative measures aimed at extending ERAP's company objects so as to enable it to hold France Télécom shares ([85]), the provision of a state guarantee to ERAP to enable it to invest in France Télécom ([86]) and the instrument dealing with the method by which the State would hold France Télécom's capital strengthen the analysis of the irrevocable character of the state guarantee on which market operators, and in particular bond holders, relied when subscribing to the successive calls made by France Télécom. These factors bear out that the State is acting as a 'last resort' vis-à-vis France Télécom, a transaction to which a prudent investor would not have subscribed. In Tiscalinet's opinion, only the French State was capable of mobilising such resources.

(123) Tiscalinet maintains that the guarantee given by the State and the subscription to the capital increase which no prudent private investor would have made enabled France Télécom to avoid having to carry out huge asset disposals with the sole aim of maintaining its business perimeter and of benefiting from relatively low bond rates compared with its intrinsic financial situation.

(124) The aid is incompatible with the Guidelines. Tiscalinet maintains that the conditions for the granting of restructuring aid are not met, *inter alia* because the Ambition 2005 plan does not contain sufficient compensatory measures to safeguard competition. It refers to the distortions of competition brought about by the French State's support in the case of the high-speed Internet access market. It maintains that France Télécom is able to invest heavily in certain aspects of the network, using advertising monies, which benefits Wanadoo. Moreover, Wanadoo has not had to dispose of major assets and continues to benefit from Yellow Pages income and from France Télécom's commercial agency network. Tiscalinet also points out that the strategy introduced by France Télécom, notably as regards the launch of the simplified mixed public purchase and exchange offer concerning Wanadoo's shares of 11 March 2004, had the effect of enabling France Télécom to benefit from fiscal aid which it would not have received without the State's support measures. Tiscali draws attention, moreover, in its letter of 5 April 2004 to the anticompetitive strategy introduced in the DSL market in France thanks to the initial aid from the French State.

(125) In the alternative, if the aid were to be found compatible with the Guidelines, Tiscalinet proposes compensatory measures essentially in the high-speed Internet access market, such as the setting of a minimum price for France Télécom's ADSL retail offerings to its subsidiaries, a ban on making joint offers of France Télécom's and Wanadoo's services, a ban on distributing Wanadoo's services in France Télécom's commercial agencies, and the disposal of the Yellow Pages business and of Wanadoo's foreign subsidiaries.

### 4.12. Comments from D

(126) D has submitted a document entitled 'Stage report on the fulfilment of President Jacques Chirac's campaign commitments in the fields of industry, energy, telecommunications

and posts of June 2003'. On the subject of France Télécom, the document states that: 'Thanks to the State's resolute support and to the appointment of Thierry Breton, France Télécom has been more than just saved from a life-threatening situation.'

### 4.13. **Comments from France Télécom**

(127) France Télécom has presented its comments in the form of three reports: (i) a report drawn up by Mr Ehlermann dated 12 January 2004 entitled 'Opinion for the attention of France Télécom'; (ii) a report drawn up by Mr Galmot dated 6 January 2004 entitled 'Does the case law of the Court of Justice of the Communities allow the conclusion to be drawn that the "financial measures introduced by the State in support of France Télécom", regarding which the Commission has initiated the procedure provided for in Article 88(2) of the Treaty, have effected a "transfer of state resources" for the benefit of that company?'; and (iii) a report by HSBC entitled: 'HSBC Opinion of 6 January 2004'. These three reports are described briefly below.

(128) The first report analyses the French authorities' conduct in the light of the rules applicable to state aid in general and of the prudent investor test in particular. The arguments set out in the report, which seeks to show that the declaration of 5 December 2002 concerning the shareholder loan does not affect the State's resources, are essentially as follows: (i) the December 2002 announcement of the shareholder loan is not an irrevocable commitment (but a mere declaration of intent), and is conditional. The announcement does not therefore constitute a guarantee, and even less so an unlimited guarantee; (ii) the *Crédit Foncier de France* decision (referred to above) is not a valid precedent and, moreover, it concerns a declaration that is not comparable to the December 2002 announcement. The report also seeks to show that France Télécom was not a company in financial difficulties within the meaning of the Guidelines at the time the State decided to take part in the recapitalisation and announced its readiness to provide a shareholder loan. It stresses that it is normal and usual for the majority shareholder to grant a loan upfront of its participation in the recapitalisation.

(129) The second report focuses on whether the mere announcement of the making available of a shareholder loan in the form of a credit line can as such constitute a commitment of state resources. The report states that, according to the Commission's argument, an irrevocable announcement of a commitment to grant a loan, coupled with its apparent provision, is sufficient to establish a commitment of state resources, which corresponds to the concept of measure having an effect equivalent to state aid, which has already been rejected by the Court of Justice. According to the report, there is no transfer of state resources because, in the end, there was no opening of a credit line or provision of a guarantee, which would have required authorisation by a finance act. There is likewise no transfer of state resources because, under French law, no oral declaration by a public authority is capable of having any effect whatever on the public finances and of carrying out the slightest transfer of state resources. And in the present case, all that is involved is mere ministerial declarations having no negative impact on the public finances.

(130) The third report focuses on the economic rationale behind the State's conduct between 4 September 2002 (the announcement of the first six months' results) and 15 April 2003 (the carrying out of the capital increase). The report is based on an analysis of France Télécom's situation in September 2002 and draws a distinction between, on the one hand, France Télécom's operational performance (healthy activities with a potential for improving the operational cash flow) and, on the other, the amount of the operator's debt (level of indebtedness, debt maturities, negative consolidated own capital resulting from losses linked to non-recurring items). The report concludes on this point that the time lag between the generation of the group's cash flow and the heavy short-term financial commitments (2003-2005) poses a problem of refinancing but not of solvency.

(131) HSBC also describes the background to the short-term liquidity crisis, worsened as it was by a crisis of confidence on the part of the market vis-à-vis the group. It states that, in a situation such as that, reason demanded that urgent steps be taken and required the introduction of a plan to improve the operational results, an increase in capital, a rescheduling of debt and a targeted policy of disposing of assets. It argues that, in the present case, the Ambition 2005 plan is a complete and rational coherent plan as it permits among other things the generation of a EUR 15 billion cash flow via an operational improvement and a disposal of assets that does not involve any amputation of core businesses. It stresses that a capital increase in support of a company introducing an operational recovery plan is a natural way of rebalancing the accounts. It points out that the oral support of a majority shareholder is also usual and rational and that it is normal practice for reference shareholders to announce their decision before other shareholders do. It also points out that in this case the shareholder loan was a low-risk, profitable and normal transaction — pending a capital increase — aimed at safeguarding the majority shareholder's financial interests at a time (the month of December) when it was not possible to recapitalise the company for reasons of scheduling. It adds that the loan was to be made on market conditions.

(132) The HSBC report mentions also the trend in the price of France Télécom shares on the stock exchange, pointing out that the shares had risen in July 2002 as a result of rumours of nationalisation, only to fall again in September because, although the market had got wind of a possible EUR 15 billion capital increase, the practical arrangements were not as yet clear. It points out that France Télécom's financial projections presage, for the State, a highly satisfactory return: according to the DCF — discounted cash flow — method, the recapitalisation involves an annual rate of return of 25 %, whereas the average rate on the telecommunications market is 9,9 %.

(133) In response to the dispatch of the consultant's legal report and economic report, France Télécom submitted three legal memoranda criticising the reports' content and an economic report ([87]).

(134) The first memorandum states that the various legal categories under French civil, commercial or administrative law used by the consultant in its analysis of the State's declarations are not relevant to any finding that the ministerial declarations may be capable of creating rights on the part of third parties. More particularly, the memorandum claims that the conditions required for the State's responsibility to be incurred for non-compliance with its promise are not met in the present case. It argues that in no way does the mere act of making a promise, even to pay certain sums of money, suffice in itself to commit public finances, to 'immobilise state resources', without a legal instrument. It concludes on this point that there is nothing in French case law to show that there has been a 'transfer of state resources' in the present case due to the conditional promise of a shareholder loan. It adds that there must be a link between the state resources and the advantage granted. Litigation over promises made is designed solely to compensate for any loss suffered by the promise's recipient. The compensation due cannot therefore procure for the latter an advantage.

(135) The memorandum concludes by saying that the Court of Justice has not defined the extent to which an unconditional and legally binding promise to grant aid can be considered as 'having been implemented'.

(136) The second memorandum states that the Commission should formally extend the procedure to include the measures analysed by the experts appointed by it as they were not covered by the opening decision. It adds that 'unilateral declarations made by a state authority, acting in its role of majority shareholder, must, under French law and under Community law, fulfil various criteria in order to be able to be characterised as an irrevocable, clear and unconditional commitment and in order to be able to be characterised as state aid'. The memorandum concludes on this point that the various declarations on which the experts have focused manifestly do not satisfy these conditions. According to Mr Ehlermann, the analysis put forward by the experts would have as a corollary 'a muzzling effect on any state authority which, where it is the majority shareholder in a company, is required to inform the Commission in advance of any public declaration concerning its shares, intentions or opinions as majority shareholder within or in favour of the company it controls'. The experts' analysis would also lead to 'an unfounded enrichment of that same authority which, as a result of non-compliance with an obligation of silence, would benefit from an order to recover funds which it has never mobilised. The State would thus be rewarded — by the company, which is not master of its shareholders' declarations — for having violated this alleged "obligation of silence". The calculation of the aid as carried out by the experts is vitiated, not only by material errors and deficiencies on the economic side as mentioned by HSBC, but also by fundamental errors of law which render it invalid and unusable by the Commission.' The memorandum's author challenges the quantification of the aid set out in the expert report and states that, in quantifying the aid, account should be taken only of the net cost to the State of its intervention in favour of the company.

(137) According to the third memorandum submitted by France Télécom, the State has not placed any credit line at France Télécom's disposal through ERAP. The memorandum argues, moreover, that, under domestic law, declarations are not legally binding on the State, either vis-à-vis France Télécom or vis-à-vis third parties. Declarations do not constitute a legal instrument in the ordinary-law sense, nor are they an act giving rise to a right in the public-law sense. The State, however, cannot commit itself without an act giving rise to a right, carried out in compliance with the rules on competence (the declaration in the present case is a declaration of intent without any material implementation) and on budgetary procedure. Moreover, the State's responsibility is not incurred and in any event the obligation to make amends for wrongdoing does not constitute state aid as 'in the event of the State's being ordered to pay damages, the transfer of resources stems, not from the legal act itself, but from the incurrence of responsibility as a result of that act. And the beneficiary of the transfer of state resources is not the company concerned but the victim who has suffered damage'. The memorandum's author also states that it is impossible to notify a legal act despite the fact that, under the Treaty, all aid measures must be notified to the Commission.

(138) The annex to the memorandum describes more particularly the context in which the declarations were made, pointing out that this is necessary in order to measure their true scope. An analysis of the declarations in the light of events between late June and December 2002 thus shows that the declarations could not constitute a promise, and does not show that the appropriate measures planned by the State were financial measures. There were differences of opinion within the Government at the time and the Minister for

Economic Affairs and Finance did not represent the government standpoint. The author states that the expert provides no legal or factual evidence of the State's will to commit itself. A study of the facts reveals that there was no such intention on the part of those responsible, who were at a loss how to solve the problem, and that operators had never said they believed the State had committed itself to one or other solution.

(139) The economic report submitted by France Télécom, for its part, stresses that the scope of the analysis contained in the consultant's report is highly restrictive 'as it analyses principally the effects of the declaration of 12 July 2002 and uses a single methodology, that of event studies'. The report also states that the methodology used by NERA is based on 'a highly theoretical approach which consists in assuming that the markets are efficient and in measuring the impact of an event by quantifying the variations in stock exchange prices at the time of that event. This over-theoretical approach does not reflect the reality of the situation of a reference shareholder'. The report stresses, moreover, that the NERA report is 'confused about the profits, the sources of profits and the costs for France Télécom and its shareholders'.

(140) The report concludes by saying that the consultant's conclusions are wrong because:

— 'Analysis of the France Télécom group's situation at the time of the announcement of the results for the first half of 2002 shows that (i) the group has an unbalanced balance sheet and a short-term liquidity problem, but (ii) the business's operating results are very good.

— Analysis of the range of measures a prudent shareholder must envisage in a situation of heavy indebtedness indicates that it was rational to introduce a recovery plan, including a recapitalisation, for a group with healthy assets whose intrinsic worth is greater than the sum of its market capitalisation and its net debt.

— Analysis of value creation and profitability prospects suggest that the State is making a very good investment by participating in a capital increase and that it is taking little risk in providing a shareholder loan'.

### 4.14. Comments from ECTA

(141) ECTA is of the opinion that the following measures constitute state aid: (i) the ministerial declarations of July and October 2002 informing the market that the State would not leave France Télécom in financial difficulties; (ii) the acceptance by the State of the payment of dividends for 2001 in shares and not in cash; (iii) the granting of a EUR 9 billion credit line and the advance commitment by the State to take part in the future capital increase; (iv) the provision by the State of a state guarantee for the benefit of ERAP enabling the latter to borrow on the markets at a rate of 3,375 % instead of the 10,4-10,9 % applicable to a company with junk bond status; and (v) the apparent transfer of France Télécom's employees within ERAP despite the fact that they continue to work for France Télécom.

(142) The aid granted to France Télécom enabled it to maintain an aggressive marketing and advertising policy and to continue as an integrated operator while increasing its stake in Orange. ECTA is of the opinion that a company in France Télécom's situation ought to have acted altogether differently, as did France Télécom's competitors in the global telecommunications services market, such as British Telecom and KPN, which had to dispose of strategic assets to reduce their debt.

(143) ECTA is of the opinion that the measures mentioned in paragraph 141 constitute unlawful aid and that they cannot be justified under the Guidelines in so far as none of the criteria laid down in those guidelines are fulfilled. In the alternative, ECTA states that, if the Commission were to adopt any compensatory measures, these should be substantial. ECTA points out under the heading of structural measures that, without the state aid, FT would have had to dispose of Orange and Wanadoo. As to behavioural measures, ECTA proposes a reduction in the market shares of France Télécom, Equant, Orange and Wanadoo, pointing out, however, that these latter measures are harder to introduce than structural measures.

## 5. COMMENTS FROM FRANCE

### 5.1. Summary of the facts

(144) The French authorities state by way of introduction that they have behaved in accordance with the prudent private investor principle from the outset. Since the announcement of France Télécom's results for the first half of 2002, which highlighted an unbalanced financial structure and significant capital needs despite good operating results, the State has drawn the necessary conclusions, placing a new CEO at the head of the Company and gathering together a banking syndicate which undertook from September 2002 to underwrite a capital increase when the time came. At the same time, the State asked the new management to carry out an in-depth audit of the Company. On the basis of the Ambition 2005 plan, about which the majority shareholder was kept regularly informed, and of the banking syndicate's commitment, the State announced, on 4 December 2002, its decision to participate in the strengthening of the Company's capital base to the tune of EUR 9 billion and the fact that it was prepared to place at France Télécom's disposal, through ERAP, an advance on this subscription

remunerated at market rates. However, in view of the financial terms of grant of this advance by the French authorities and of the Commission's misgivings about the presence of aid elements in the measure, France Télécom preferred to resort directly to the bond market.

(145) The French authorities then point out that the total amount of the financing resulting from the bond issues came to approximately EUR 9 billion, equivalent to the maximum amount of the advance constituted by the shareholder loan. They state that the success of the bond issues demonstrated France Télécom's ability to gain access to the financial markets under good conditions as well as the markets' confidence in the operational measures contained in the TOP plan and in the new management's ability to implement it. They also state that the capital increase was launched as soon as was technically possible, namely on 24 March 2003, and that it was a success.

(146) At the meeting between the French authorities and the Commission on 22 January 2004 the French authorities stressed that, in their view, the recapitalisation operation satisfied the prudent investor test and that, consequently, the financial measures granted by the State to France Télécom did not contain any aid element. In their opinion, the prudent investor test may be defined as the need, before acting, to appoint a new CEO, to conduct an audit and to prepare a credible plan. The chronology of events illustrated by the French authorities in itself demonstrated the prudent character of the State's conduct. The French authorities emphasise that, with these factors under control, they were masters of the situation (in particular the issue price).

### 5.2. **The Company's financial situation**

(147) The French authorities maintain that, when the decision to invest was taken, France Télécom was not a firm in difficulty within the meaning of the Guidelines. The Company's turnover was increasing steadily (by 10 % between the first half of 2001 and the first half of 2002), and its gross cash flow was high and growing faster than its turnover. Despite this, the French authorities refer to the Company's unbalanced financial structure as at 30 June 2002 and point out that the losses were mainly due to the exceptional provisions and write-downs linked to the depreciation of assets acquired prior to the entirely unforeseeable reversal of the markets. France Télécom's operating costs were increasing more slowly than its turnover, which meant that its profitability was improving. Moreover, operating results and cash flow were increasing (with cash flow up 15 % on the first half of 2001). France Télécom's very good performance prospects were further improved by the TOP plan. This performance was confirmed when the 2002 accounts were published, showing as they did the virtuous dynamic triggered within the Company by the new management.

(148) On the criterion concerning the movement in company capital referred to in point 5(a) of the Guidelines, the French authorities point out that the relevant indicator is, pursuant to Article L225-248 of the Commercial Code, the company capital of France Télécom SA, which has always remained positive and has never fallen by half. France Télécom was therefore not in the situation referred to in the Guidelines in which shareholders' funds fall below the company capital.

(149) France Télécom was not in a cessation of payments situation; there were merely signs of a possible liquidity requirement by the first half of 2003 should the expected market recovery not occur. The French authorities add that France Télécom had anticipated reserves of EUR 6,9 billion as at 31 December 2003 and could have crossed the threshold of the year 2003 without resorting to the financial market. At the meeting on 22 January 2004, the French authorities indicated that France Télécom had had recourse to the syndicated loan, which was less expensive than the bond market and out of which EUR 4 billion had been made available to the Company.

(150) The French authorities observe *inter alia* that France Télécom had access to the financial markets during the course of 2002 and describe all of the financing instruments at the Company's disposal between 11 July 2002 and 15 January 2003 ([88]). They mention the fact that, on 14 February 2002, France Télécom negotiated the provision of a syndicated credit line of EUR 15 billion and that during the course of 2002 the Company issued bonds ([89]), EUR 442,2 million worth of which was repayable in shares.

(151) The French authorities also state that France Télécom was not open to any financial risk owing to the downgrading of its credit rating by the rating agencies as there was no early repayment clause in the covenants.

(152) Moreover, according to the concordant opinion of several consultant banks consulted between June and November 2002, France Télécom was, prior to the announcement of the Ambition 2005 plan and of the majority shareholder's support, able to refinance itself on the bond markets. The French authorities thus indicate that, in July and September 2002 respectively, […] (*) and […] offered to refinance, through swap programmes starting in October or November, France Télécom's bond debts maturing between 2003 and 2005.

(153) As to the statement by France Télécom's former CEO to the effect that the Company no longer had access to the market ([90]), the French authorities point out that his opinion was necessarily subjective in view of the circumstances.

### 5.3. Duty of care of the State as shareholder

(154) As regards the allegation that the State had failed in its duty of care as shareholder with regard to the Company's past conduct, the French authorities maintain that the argument to the effect that a prudent investor would not have found himself in the same situation as the French State is irrelevant as, according to well established case law, the Commission has to place its analysis at the time when the investment decision was taken, unless it can be shown that the State's past conduct involves aid elements, something which has not been claimed in the present case. At all events, even if the legal obligation on the State to hold a majority of the capital placed France Télécom at a disadvantage, the Commission cannot, without violating the neutrality principle enshrined in the Treaty, call into question the French authorities' choice to maintain the Company in the public sector. The French authorities stress that they intervened as soon as they became aware of the financial difficulties encountered by the Company. In their comments of 29 July 2003, the French authorities insist on the fact that, according to the judgment in *Stardust* ([91]), it is necessary to place oneself in the context of the period during which the financial support measures were taken and that this '… excludes automatically the period before July 2002'. They also stress that the payment in shares of the dividends for 2001 was in keeping with the prudent private investor principle inasmuch as there was at that time a strong potential for an increase in the share price.

### 5.4. Rationality of the TOP plan

(155) The French authorities stress that, in the light of the above, the increase in the cash flow and the strengthening of the capital base provided for in the Ambition 2005 plan are components of a strategy that would have been followed by any prudent majority shareholder. Hence, owing to the fact that the Company's fundamentals were healthy, France Télécom's situation cannot be compared to that of companies such as Vivendi Universal or Crédit Lyonnais.

(156) As to the rationality of the TOP plan, the French authorities state that the plan in question represents a considerable effort on the Company's part. It is an overall plan for a change of management direction based on specific actions which has already produced its first positive results. The French authorities stress in this connection that the plan is an extremely precise one which makes possible an increase in the Company's profitability with a rate of return on investment (RRI) of 43 % in 2005 for those investors who participated in the April 2003 capital increase, that is, a much higher return than the reference RRI (11 %) expected by a private investor in the telecommunications sector. The TOP plan also includes a staff management optimisation chapter. As to the disposal plan, the French authorities state that the disposal of assets at the end of 2002 made it possible to carry forward any liquidity constraint to the end of 2003 without even having to resort to the financial markets. Moreover, a disposal of strategic assets would not have been in the interests of France Télécom and its shareholders in the medium to long term.

(157) The French authorities stress, lastly, that the strategies followed by competing operators are no more prudent and that a plan must be assessed, not in the light of the scope or strategic character of the assets whose disposal is being contemplated, but in that of the rationality of the plan as a whole. Moreover, the success of the December 2002 and January 2003 bond issues confirmed *a posteriori* the confidence private investors place in the Company's operational potential.

### 5.5. Application of the prudent investor principle to the participation in the strengthening of the Company's capital base

(158) With regard to the application of the prudent private investor principle to the announcement by the State of its anticipated participation in the strengthening of the Company's capital base, the French authorities observe that they made their agreement conditional on the presentation, by the new management, of a new, credible rebalancing plan and on participation by the banks.

(159) On compliance with the concomitance principle, the French authorities point out that, from the outset, the State shareholder took every step to ensure the concomitant participation of public and private shareholders and that it took no risk before private investors did. Thus, the announcement of the State's intention to participate in the strengthening of the Company's capital base dates from 12 September 2002 ([92]), and on that date a banking syndicate had already undertaken to underwrite, when the time came, that part of a capital increase which was intended for private investors alongside the public shareholder, on condition that a credible rebalancing plan was announced to the market. The French authorities stress that this condition was normal in view of France Télécom's unbalanced financial situation, the State's participation also being conditional on the announcement of a plan considered by the market to be credible. They add that, if the private investors had not stood guarantors, the State would not have made such an announcement.

(160) The French authorities also state that the private financing predated the public financing inasmuch as the financial contributions by private investors — in the form of debenture loans and the rescheduling of bank loans between December 2002 and February 2003 — took place in significant proportions. The analysis of any making available of state funds must, in the French authorities' view, be carried out in the light of such private financing.

(161) The French authorities maintain that the recapitalisation operation carried out on 24 March 2003 complies with the concomitance principle. The State, for its part, made no capital contribution before the private shareholders did, as can be seen from the arrangements for the shareholder loan described in point 5.6, which included no unconditional recapitalisation commitment by the State before March 2003. The banks' undertaking of September 2002 referred to in paragraph 159 was thus confirmed by the banking syndicate's formal guarantee in March 2003 and enabled the State to take no risk as regards the participation of private investors in the capital increase. The French authorities stress that, in accordance with the judgment in *Alitalia* ([93]), the State did not commit itself formally prior to the banks' formal undertaking. The private shareholder participation is significant at 40 %, which has been held by the Court of Justice to be in keeping with the concomitance principle. The underwriting banking syndicate was selected by open tender, which ensured that the banks' remuneration corresponded to optimised market conditions, notably as regards the commission paid to the banks. The French authorities also mention that the commissions paid in the present case ([…] % of the total amount underwritten) are in keeping with the guidelines set out in the *Alitalia* decision of 19 June 2002 ([94]).

(162) As regards the expected return, the French authorities state that, as has already been indicated, compliance with the prudent private investor principle is also demonstrated by the high profitability prospects of the TOP plan, as confirmed by the plan's favourable reception by the market. They maintain, moreover, that, when the investment decision was taken, France Télécom was not a firm in difficulty within the meaning of the Guidelines and that the Company had access to the financial markets during the second half of 2002.

(163) The French authorities stress that the capital increase was effected as soon as it was technically possible to present to the State and to investors updated data on the Company's operational prospects, which demonstrates the State's choice of high-quality investors motivated by long-term return prospects. The French authorities point out that the timetable constraints were technical constraints linked to France Télécom independent of any favourable stock market conditions.

(164) The French authorities state that the operation was a success and that the fixed amount underwritten was more than five times that sought from the market.

(165) The French authorities add that the amount of the recapitalisation is not a relevant factor and that all that matters is whether the operation was rational. At all events, the amount in the present case was not excessive compared with, say, the capital increase in the case of KPN.

(166) Concluding on this point, the French authorities stress that the capital increase seems already (the French authorities' comments date from July 2003) to be a prudent investment as France Télécom's share price has risen by almost 50 % compared with the rate of capital increase.

(167) As to the repayment of the ERAP loan by the State as announced by the deputy Minister for the Budget in December 2002, it concerns only the modalities for investment by the State and has no impact on relations between the State, the shareholders and the Company.

### 5.6. **The shareholder loan**

(168) The French authorities maintain that the loan proposal was never signed by France Télécom owing to the excessive cost of the financial terms proposed to it and the fact that the Commission was raising doubts about the measure's lawfulness under the Treaty. Consequently, no state resources were placed at the Company's disposal via the shareholder loan proposal. The French authorities argue that the entry into force of the loan cannot be deduced from the announcement made by the State on 4 December 2002, which concerns only the commitment by the State shareholder to participate in the operation to strengthen the Company's capital base, mention being made only of the 'possible' ([95]) provision of a shareholder loan.

(169) The French authorities observe that, at all events, the loan proposal conferred no advantage on France Télécom.

(170) The French authorities thus make clear that, in so far as it has not entered into force, the loan has not been used by the Company and therefore has not been able to postpone the Company's liquidity needs. They maintain that the loan announcement does not constitute a guarantee. French law does not recognise an implicit guarantee: any guarantee provided by the State must be enshrined in a law. It is wrong to treat the announcement of a possible state loan as a guarantee. The French authorities insist that the guarantee which the State provided to ERAP to enable it to finance its participation in the strengthening of France Télécom's capital base must not be equated with a guarantee given to France Télécom. As far as ERAP is concerned, the French authorities state categorically that its role was entirely neutral and that it intervened only for budgetary reasons.

(171) Likewise, the announcement by the State of a loan proposal did not facilitate France Télécom's access to the bond market. First of all, the debenture loans are not covered by any sort of guarantee, their duration being longer than that

of the shareholder loan. Moreover, bondholders have no recourse in the event of non-payment upon maturity. Secondly, it is not possible to compare the announcement, by the State, of the possibility of its making an upfront prepayment towards the strengthening of the Company's capital base with the guarantee given in the above-mentioned *Crédit Foncier de France* decision because, inasmuch as the loan envisaged in the present case was hypothetical and strictly limited in duration and amount, it could not by itself resolve the Company's financial problems having regard to its debt repayment schedule. Thirdly, the bond issues were determined solely by the market's perception of France Télécom's capacity to honour its commitments unaided by any state guarantee. This is attested to by the spreads, which are consistent with France Télécom's credit rating and therefore appreciably higher than those of other operators. The confidence shown by the market at the time of the said bond issues is thus due essentially to the change in the management team and the favourable reception accorded to the new strategy revealed when the Ambition 2005 plan was presented.

(172) As to compliance with the prudent investor principle in relation to any shareholder loan, the French authorities stress that, when the decision to take part in a capital increase was taken and the conditions therefor were met (credible plan and management, underwriting syndicate), it was logical that the State should make an upfront prepayment. The first discussions about the loan proposal date back to November 2002. The French authorities also stress that the legitimacy of such a measure could not be challenged because, as is mentioned above, it was based on a credible, detailed plan the content of which was mostly known at the time of the announcement of the loan proposal on 4 December 2002. Moreover, the State had already received the undertaking, conditional on the presentation to the market of a credible plan, from the banking syndicate and it knew full well at the end of November that that condition would be met given the market's positive reaction to the appointment of the new management. The French authorities stress in this connection that it is not pertinent to assess the amount involved in the present case but that, in accordance with the *Alitalia* judgment, it is necessary to examine the conformity of the conditions of financing the operation for a company of comparable size.

(173) As to the remuneration of the potential loan, the French authorities stress that it was granted on normal market terms and that it was increased by a premium to reflect its subordinate nature. The proposal provided for a non-utilisation commission and the absence of security was in keeping with the practice of a prudent investor in the case of a short-term loan granted by a shareholder upfront of his subscription to a capital increase. The repayment of the sum in shares was customary and was based on the cash value.

(174) The French authorities state that, in accordance with the *Alitalia* judgment, rather than compare the strategy chosen by the public shareholder with alternative solutions involving less risk, the Commission should assess whether, in similar circumstances, a private investor could have taken such a measure.

### 5.7. **The announcements made by the State**

(175) In their comments of 29 July 2003, the French authorities stress the context which must be taken into account when analysing the declarations made by the State in its capacity as a prudent shareholder and not as a public authority. Thus, between the months of September and December 2002, the State engineered a change in management the key feature of which was the change in the Company's CEO and closely monitored the drafting of a rebalancing plan while at the same time ensuring the support of private investors with a eye to the launch of a possible capital increase (see above for a detailed description of the State's intervention). According to the French authorities, these operational measures had a decisive financial impact, were very well received by the financial markets and led to the recovery in France Télécom's share price.

(176) The French authorities stress that the State never indicated or suggested that it would give France Télécom its unconditional and unlimited support. They add that 'the State … emphasised in the summer [the French authorities are referring to the statement made by the Minister for Economic Affairs on 12 July] that it would act like a prudent private shareholder and not as a public authority and that it intended to intervene as a shareholder in a way (still to be defined) which would be no different from that which a private investor would choose, which necessarily ruled out the possibility that the State had already decided to intervene in an unconditional and irrevocable manner' ([96]). This declaration that the conditions would not differ from those of a private investor, excludes *de facto* any unconditional and irrevocable support. The French authorities also argue that the declarations made by the French authorities between July and October 2002 constituted 'vague prior declarations' without any 'corresponding practical measures' ([97]). The French authorities state in this connection that the subsequent declarations were to be assessed in the light of the first declaration and that it is wrong to assert that as of 12 July 2002 the State had 'committed itself irrevocably to supporting France Télécom' and had, on that occasion, entered into 'an irrevocable commitment to participate in the strengthening of the

capital base'. The French authorities point out that the State shareholder announced its intention to participate in the strengthening of the Company's capital base for the first time in September 2002 and that 'this would take the form of a transaction followed by the market (reference to a timetable to be defined in the light of market conditions) ([98])'.

(177) Concerning the declaration of 2 October 2002, the French authorities argue that this confirmed that the presentation of a credible plan was a precondition for the State's participation.

(178) The French authorities state that, at all events, it was not possible 'to deduce from the lack of precision of the State's declarations concerning France Télécom between July and October 2002, despite the State having indicated that it would act like a prudent investor, any intention on the State's part — nor *a fortiori* any commitment- to take measures which would contravene the Community rules on state aid. Infringement of the Treaty rules cannot be presumed and cannot be caused by vague declarations prior to a decision without any measures translating them into practice' ([99]).

(179) The French authorities maintain that 'the only specific measures envisaged by the State in its capacity as majority shareholder in France Télécom are those set out in the information/notification dossier forwarded to the Commission and announced publicly on 5 December 2002, namely the participation alongside private shareholders in a EUR 15 billion capital increase in proportion to the share held by the State in France Télécom's capital and a possible shareholder loan remunerated at market rates upfront of the capital increase. The indication by the State that it would play its role of prudent shareholder in no way constitutes a state guarantee. If the declarations made by the State between July and October 2002 had really been legally equivalent to, or even simply perceived by the market and the rating agencies as being, a promise to provide France Télécom with an "unlimited guarantee", then there would not have been any downgrading of France Télécom's rating in July and the company's spreads and rating during that period would have reflected the state risk (AAA rating and very low spread). Lastly, any factoring in by the rating agencies of the State's presence as majority shareholder irrespective of any implicit or explicit guarantee or of any specific measure and irrespective of the company's specific financial situation at any given moment cannot in itself be considered state aid. Such an approach would be contrary to the principle of neutrality of Community law as recognised by Article 295 of the EC Treaty' ([100]).

### 5.8. Movements in France Télécom's share price and spreads

(180) The French authorities argue that only the operational measures had an impact on France Télécom's share price. Thus, the Company's share price rebounded on 2 October 2002 (up more than 10,4 % on the previous week) following the announcement of the appointment of the new CEO, indicative of a new operational management style, and the share price's progress continued upwards with the announcement of the TOP plan and of the new executive board on 5 December 2002, which led to a rise of more than 25 % in two days. The French authorities maintain that the participation by the State in a strengthening of the capital base and in a possible shareholder loan constituted measures described in the press before 5 December 2002 and cannot therefore be considered as being behind the share price increase. The declarations of principle made by the State between July and October 2002 were not the determining factor in this increase and as long as there were no operational measures the share price fluctuated, reflecting the market's uncertainty about the Company's situation, and the Mobilcom risk in particular. This perception led to a fall in the share price, which reached its lowest point on 30 September 2002 following a period of relative stability during the summer in the absence of any specific announcements or rumours. During that period, the State's declarations as to its intention to play fully its role of shareholder did not stop the downward trend in France Télécom's share price.

(181) As to movements in France Télécom's spreads, the French authorities state that they cannot be relied upon to highlight alleged support for the Company linked to the July declarations. A comparative analysis of the spreads of France Télécom and Deutsche Telekom since January 2002 shows a certain similarity throughout the period concerned: France Télécom's spreads narrowed in July 2002, reflecting the assessment of the telecoms risk independently of the State's declarations. Moreover, the spreads widened in December 2002 following the announcement by the State of the operational measures it was considering taking. The French authorities conclude that the movements in France Télécom's spreads are linked to trends in the telecommunications sector and that the State's declarations were not a decisive factor.

(182) In response to the dispatch of the consultant's legal report and economic report on 9 and 10 June 2003, the French authorities maintained that remarks made by the Minister for Economic Affairs and Finance in an interview published in *Les Échos* on 12 July 2002 are outside the scope of the investigation procedure opened by the Commission on 30 January 2003. The Commission was, they claimed, no longer able to extend the procedure to include these remarks as the 18-month period provided for in Article 7 (6) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([101]) had almost expired. At all events, they reserved the right to present to the Commission further expert opinions on the consultant's reports.

(183) The French authorities have presented the following comments on the legal report:

— They point out 'first of all that the legal report is based on an erroneous (not to say tendentious) interpretation of the facts. In particular, … the report manifestly twists — albeit clear — remarks made by the Minister for Economic Affairs in the course of an interview with a journalist published in July 2002. The French authorities strongly contest that it is possible to propose interpretations as unfounded as these in order to draw legal conclusions and in particular to assert that there exists any guarantee granted by the State to France Télécom'.

— 'They reiterate … that the State as shareholder in France Télécom has not only always intended to behave like a prudent investor with regard to France Télécom but has also chosen to express clearly and publicly that this position would be the point of departure for all of its potential actions in this area …'. The Minister's July 2002 interview makes no mention of any decision being taken. '… [W]hile remaining confident in the company's viability, the State was merely taking note of the market's doubts about France Télécom's situation and, in its capacity as majority shareholder, was trying to refine its analysis without being able, at that stage, to make an accurate diagnosis or take any decision'. 'Moreover, there was no reason to suppose *a priori* that the phrase "appropriate steps" referred specifically to financial measures'.

— 'The French authorities have also noted numerous inaccuracies in the reasoning set out in the legal report. The report is thus manifestly short on objectivity, adopting highly contestable legal analyses (for example regarding the characterisation of letters of intent and the scope of a unilateral commitment in civil and commercial law) and making an unjustified application to the facts at issue of certain irrelevant legal precepts (this is the case, for example, with the application of the theory of business management or of the rules of public international law in relations between a company and its majority shareholder'.

— 'The legal report's finding of the existence of an "unlimited guarantee", granted by the State to France Télécom, is in any event totally baseless in Community law'. In accordance with the *Compagnie nationale Air France* judgment ([102]), the remarks in question cannot give rise to any firm and unconditional commitment on the part of the State. Similarly, 'the solution adopted in the *Crédit foncier de France* case — assuming it is in keeping with Community law, which is not certain as the decision has not been the subject of an appeal — relates to radically different circumstances'. 'What is involved here is not even an official communiqué from the Government or from France Télécom, but merely a press article reproducing the text of an interview with the Minister for Economic Affairs in the wider context of the Government's priorities and therefore lacking any probative force'. 'Attempts to place the Minister's remarks of 12 July 2002 in some domestic-law legal categories (especially company law and administrative law) likewise do not succeed in proving the existence of any guarantee in favour of France Télécom'. With regard to the comparison between the Minister's July declarations and a letter of intent, the French authorities stress that '(i) firstly, it is of the essence of the letter of intent that it is addressed to a beneficiary; (ii) secondly, and as an extension of the preceding observation, the effectiveness of the method is dependent on acceptance by the said beneficiary; and (iii), lastly, the scope of the commitment given (both as regards its object and as regards the force which its author wishes to give to it) depends exclusively on the terms employed'. 'Thus … the general — to say the least — character of the Minister's remarks … rules out without doubt any commitment in favour of France Télécom or its creditors, and *a fortiori* any obligation as to the result to be achieved (and hence any idea of guarantee) as well as any obligation as to the means'. 'The Minister's reply … only confirms that no decision — other than to act like a "prudent investor" — had as yet been taken by the State shareholder, which, while trusting in the operational quality of the company, was not at that time able to make a sufficiently accurate diagnosis or to take any decision'. 'The courts have … never held that a guarantee commitment without a specific beneficiary or beneficiaries may thus be relied upon by any person who might have an interest therein. This is not surprising as it is in the nature of a guarantee or of a letter of intent that it is addressed to one or more beneficiaries. Nor is it surprising, since it was not intended for any specific beneficiary, that the alleged commitment was not accepted'. As for the business management hypothesis, this concept is entirely inapplicable to the present case. 'Regarding Article L.465-1 of the Monetary and Financial Code, the French authorities have stressed that supposing it to be transposable to the State, it would condemn, not the mere changing by the State of its intentions, but only the declaring of an intention that was false or misleading from the outset, which was manifestly not the case here inasmuch as the remarks only reflected the lack of any decision whatsoever in the then state of the shareholder's knowledge'. As far as administrative law is concerned, the French authorities maintain that '[f]irst of all, mere remarks made to a journalist — such as those made by the Minister for Economic Affairs on 12 July 2002 — do not

constitute a "tortious act" capable of giving rise to rights and obligations, and even less a guarantee granted to France Télécom by the State. Secondly, the liability of the State can in no way be incurred by reason of the highly general remarks made by the Minister, whether because of their alleged lack of implementation — the broken promise hypothesis — or, conversely, because of their implementation — the unlawful promise hypothesis'.

— 'The legal consultant's conclusions clearly fly in the face of the Commission's decision-making practice and of Community case law in the field of state aid, which make the existence of aid conditional on proof of a firm, precise and unconditional commitment on the part of the State concerned — something which the Minister's remarks of 12 July 2002 could in no way be construed as being.' 'A state measure, in whatever form, must be sufficiently precise and concrete for the Commission to be able to determine the very existence of an advantage'. 'To be able to apply the prudent investor test, the Commission must have at its disposal all the necessary information concerning the specific modalities of the measure that is being scrutinised'.

— 'The adoption by the Commission of the legal consultant's arguments would have discriminatory effects which would run counter to the principle of legal certainty. In particular, the reasoning followed by the consultant would have absurd procedural consequences in that each Member State would be obliged to notify to the Commission the slightest plan to give an interview or make a public declaration about a company of which it was the reference shareholder'. Moreover, this argument would result in unjustified discrimination between the Community institutions and the Member States. 'It is a principle of Community law that no person may rely even on promises made by a Community institution in the absence of "specific, unconditional and concordant assurances, emanating from authorised, reliable sources, given to him by the administration"' ([103]).

— 'More fundamentally, the approach adopted by the legal consultant is likely to undermine the principle of neutrality enshrined in Article 295 of the EC Treaty and would make it impossible to apply the prudent investor test. If the consultant's reasoning were taken to its logical conclusion, any public intervention by a State in relation to a public undertaking would thus constitute aid and a State would therefore always be presumed to act as a public authority and not in the capacity of a shareholder in the undertaking'.

(184) The French authorities have presented the following comments on the economic report:

— 'The economic consultant's conclusions have no intrinsic validity inasmuch as they are based exclusively on the mistaken premiss (contained in the legal report) that France Télécom received an "unlimited guarantee" from the State'.

— 'Moreover … the economic report in no way shows that the company enjoyed any advantage over its competitors'.

— 'The microeconomic method of the event study used by the economic consultant raises a number of fundamental issues, including the use of the very short-term trend in the share price as the sole measure of changes in the value of the company contrary to recognised usage (including by the Community courts ([104]) regarding valuation, and this despite the fact that the manifest errors committed recently by the markets in assessing the value of telecommunications operators call for, to say the least, serious caution. What is more, the economic consultant is completely ignorant of the specificities of the situation with regard to the France Télécom share at the material time, such as its historically high level of volatility, which clearly rule out the use of this method in the present case'.

— 'The event study method is all the more inappropriate in the present case as the share price did not move in only one direction during the relevant period, but underwent a rapid succession of strong rises and falls in response to the multitude of contradictory factors influencing the share price at that time, with the result that the consultant is wrong to carry out his analyses in the light of a single factor (the ministerial interview on 12 July 2002) to the exclusion of all others (despite the fact that there are no grounds for asserting that market operators considered the ministerial interview to be an important factor for investors in July 2002)'. 'The markets thus received at that time information about the situation of the company itself (for example, on the risk associated with MobilCom)'.

— 'Moreover, the consultant's calculations are in reality essentially determined by the choice of methodological hypotheses (such as the observation window and assessment period), established as they are without any solid justification and in a largely arbitrary manner, which deprives his findings of any probative value'. 'The amount calculated by the economic consultant is essentially linked to the utilisation of a reference trend in France Télécom's share price which bears no relationship to the event examined in the study (the Minister's comments of 12 July 2002)'. 'Furthermore, the consultant's deductions are contra-

dicted by simple, unavoidable tests such as the observation that, over the relevant period, France Télécom's shares and bonds moved in quite a similar way to the securities of its closest comparable competitor, Deutsche Telekom'. The consultant's report can also be criticised for 'the unjustified heterogeneousness of the method of reconstituting the "normal" movement' in shares and bonds, or the lack of care taken by the consultant in giving prominence to a 'normal' trend in market indebtedness on the basis of certain highly illiquid bond lines or in extrapolating the market value of a few bonds from the totality of the debt. Likewise, the extremely fragile basis of the theoretical calculation carried out by the consultant to estimate, on the basis of credit default swaps ('CDSs'), the cost of the alleged guarantee granted by the State to France Télécom should be emphasised. The calculation takes no account of the specific rarity of CDSs during the period studied, which explains the excessive reactivity of that instrument (compared, for instance, with bond spreads) and rules it out as a suitable measuring stick over that period.

— 'The economic consultant's conclusions as to the existence of supposed aid granted to France Télécom are based, moreover, on errors of reasoning and stem from a confusion between the alleged increase in the theoretical market value of the company, the profit derived from that increase by shareholders and debtors, and the conferment of a supposed advantage on the company'. 'The consultant proceeds on the assumption that state aid increases the value of the company receiving it … [whereas] it should not be overlooked that market operators are nowadays fully aware of the risks which the grant of incompatible aid poses for a company … Consequently, … if it were to be perceived by the markets as unlawful, the grant of aid might lead to … a fall in the company's share price and hence in its market value'.

— 'Such conclusions, which are based exclusively on an *ex post* analysis of the alleged "guarantee" granted by the State to France Télécom, are, moreover, incompatible with the assessment of the investor criterion, which calls for an *ex ante* evaluation'.

— 'Last but not least, the economic report observes, as if there was any need to, that France Télécom was not a firm in difficulty at the time of the events in question (as it had access to the capital markets and no long-term viability problem) and that the participation by the State shareholder in the plan to rebalance the company's balance sheet was in keeping with the private investor criterion, thereby confirming the absence of any aid element in the financial measures forming the subject-matter of the Commission's investigation'.

## 6. OBJECT OF THE PRESENT DECISION

(185) On 4 December 2002, the Commission received notification of a shareholder loan proposal which France was considering implementing in favour of France Télécom by way of an upfront prepayment towards its participation in a forthcoming operation to increase the Company's capital as part of a recovery plan entitled 'Ambition 2005'. The notification's content is described in the opening decision. In order to decide whether the measures at issue are compatible with the Treaty, the Commission has examined the events connected with the proposal's notification, including the Government's declarations of July to September 2002 ([105])(see Section 5). In carrying out this examination, the Commission has taken the view that the notified measures cannot be analysed without having regard to the Government's declarations of July to September 2002. By these declarations, the State manifested its will to take appropriate steps to resolve France Télécom's financial difficulties. Thus, the shareholder loan proposal is the concretisation of intentions previously expressed by the State. From a material point of view, there is no legal reason to limit the examination of the relevant facts to the facts which the Member State has decided to mention in the notification. The concept of aid is an objective concept based on economic reality. It follows that, if the Commission has knowledge of earlier facts which are objectively relevant, it must include them in its analysis.

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

(187) It is possible to view the successive declarations and measures of the French authorities from July 2002 onwards as forming a set which took concrete shape in the December measures (making available of a shareholder loan), these being the measures which were notified. Of course, aid can be said to exist only in so far as the various

elements of the aid concept are present (selective advantage, state resources, and effect on trade and competition).

(188) The analysis of the present case suggests at first sight the existence of a time lag between the advantages for the Company, which were particularly distinct in July, and the potential commitment of state resources, which seems to be more clearly established in December. Inasmuch as they clearly had an effect on the markets and conferred an advantage on the Company, the declarations by the Minister for Economic Affairs and Finance may be characterised as aid. It would not be easy, however, to establish beyond all doubt whether the July 2002 declarations were of such a character as to commit, at least potentially, state resources. In this respect, the Commission has carefully analysed numerous legal arguments seeking to show, firstly, that such public declarations were equivalent from a legal standpoint to a state guarantee and, secondly, that they placed the State's reputation on the line, with economic costs in the event of non-compliance. Taken as a whole, these elements might be thought to actually risk putting state resources in jeopardy (either by making the State liable towards investors, or by increasing the cost of future state transactions). The argument to the effect that the July 2002 declarations are aid is therefore innovative, but probably not without foundation.

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

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

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

## 7. ASSESSMENT OF THE MEASURE AT ISSUE IN THE LIGHT OF ARTICLE 87(1) OF THE TREATY

(192) Article 87(1) of the Treaty provides that any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. The Treaty does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects ([106]). The concept of aid refers to state measures which, in any form whatsoever, are likely directly or indirectly to favour certain undertakings or products in an appreciable way and which threaten, even potentially, to distort competition ([107]). According to well established case law, the concept of aid embraces not only subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect ([108]). It follows from the above that the concept of aid is based on the economic concept of advantage, the formal criterion being therefore immaterial ([109]). In conclusion, the concept of aid is an objective concept which takes no account of the legal form of a state measure, being exclusively concerned with the latter's effects ([110]). Consequently, these provisions must be interpreted not on the basis of formal criteria but rather by reference to their purpose, which, according to Article 3(g) of the Treaty, is to ensure that competition is not distorted ([111]).

(193) For a measure to qualify as aid, several elements must be present: a selective advantage, granted through state resources, which distorts or threatens to distort competition and trade between Member States.

(194) As regards the advantage, the Commission would observe that the shareholder loan (which constitutes the upfront prepayment by the State towards the Company's recapitalisation), confers an advantage on France Télécom as it enables 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 has never been signed, the appearance given to the market of the existence of such a loan is likely to confer an advantage on France Télécom as the market has considered the Company's financial situation to be more secure ([112]). This may have influenced France Télécom's borrowing terms.

(195) As to the condition relating to state resources, the Commission would point out that the fact that an advantage results from the giving of a state commitment leading to a potential, but not immediate, transfer of resources does not rule out the possibility that the advantage may have been granted through state resources.

'In that respect, it should first be noted that, according to settled case-law, it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 87(1) EC' ([113]). Thus, even an advantage granted through a potential additional burden for the State constitutes state aid where it affects competition and trade between Member States ([114]).

(196) Contrary to what the French authorities and France Télécom maintain, the Commission finds that a potential additional burden on the State's resources was created by the announcement of the provision of the shareholder loan coupled with the fulfilment of the preconditions for such provision ([115]), by the impression given to the market that the loan had actually been provided ([116]) and, lastly, by the dispatch to France Télécom of the loan contract initialled and signed by ERAP ([117]). While it is true that the contract was never signed by France Télécom, this does not mean that there was no potential commitment of state resources. In so far as the document constituted a contractual offer and as long as it was not rescinded, France Télécom could have signed it at any time, thereby acquiring the right to obtain immediate payment of the sum of EUR 9 billion. Inasmuch as it could not be unaware of this, the State accordingly had to keep at France Télécom's disposal through ERAP the amount of the corresponding resources.

(197) The Commission must therefore consider whether the advantage thus granted to France Télécom satisfies the prudent private investor test and whether it affects competition and trade between Member States.

(198) The advantage which the measures at issue procured for France Télécom enabled the Company to mitigate or partly avoid the consequences normally flowing from its unbalanced financial situation. It will be recalled that the purpose of the State's intervention was explicitly to resolve the financial crisis while substantially preserving the integrity of France Télécom's operational structure and its rate of domestic growth (a purpose which has essentially been achieved inasmuch as France Télécom has recovered and at the same time retained the integrity of the group apart from a few minor disposals). In so far as the advantage granted to France Télécom is selective, it is clear that that advantage would distort competition between France Télécom and its competitors. It must be concluded that, in a competitive sector like telecommunications, the advantages enjoyed by France Télécom distort or threaten to distort competition to a particularly appreciable extent.

(199) When state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid ([118]). Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipient undertakings themselves to carry on their business outside the Member State for the aid to have an effect on Community trade ([119]).

(200) In so far as France Télécom operates in markets which have been gradually opened up to competition since the end of the 1980s, the declarations made by the Government as from July 2002 are likely to affect trade between Member States. The telecommunications sector is today one of the most dynamic and most integrated sectors in Europe. Many are the operators in this sector who, like France Télécom, are active in more than one Member State ([120]).

(201) It follows from the above that the measures in question are likely to affect trade between Member States.

(202) The prudent private investor principle is discussed in Section 8 as part of the examination of all the declarations made by the Government during the months preceding the loan proposal.

## 8. PRINCIPLE OF THE PRUDENT PRIVATE INVESTOR IN A MARKET ECONOMY

(203) As previously mentioned, the Commission would stress that the notified measures cannot be analysed without taking into account the declarations made by the Government between July and December 2002. The content of these declarations and the impact they had on the market show that the State had decided as early as July to support the Company.

(204) The Commission would point out first of all that Community law recognises in general the importance of promises and declarations made by the State for the application of the rules on state aid ([121]). On 12 July 2002, *Les Échos* published an interview with the French Minister for Economic Affairs and Finance in which the Minister confirmed more than once that if France Télécom were to have any financing problems, then the State would take whatever measures were necessary to overcome them. The precise wording of the published interview is as follows:

'You mention market excesses. France Télécom's share price is highly volatile. You are the majority shareholder in the company, do you have a message to convey?

We are the majority shareholder, with 55 % of the capital, there is clearly no question of our "renationalising" the company, as I have sometimes heard it said. I feel responsible for the State's financial interests. The State shareholder will behave like a prudent investor and if France Télécom were to face any difficulties, then we would take appropriate steps.

Was the State behaving like a prudent investor when it let France Télécom get deeper into debt, by moving, for example, into Germany?

It is not for me to criticise my predecessors. I would point out that the entire industry was pursuing the same strategy at the same time. Having said that, the ideologically motivated retention of a majority holding

has not made it any easier to internationalise France Télécom, as it has not been able to pay for its acquisitions with shares. Hence the indebtedness. I repeat, if France Télécom had 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.

…' ([122])

(205) The interview has never been disowned by the French authorities ([123]). On the contrary, its substance has been confirmed by successive statements contained in press releases of the Ministry of Economic Affairs and Finance dated 13 September, 2 October and 4 December 2002. The focus became narrower ([124]) with each subsequent declaration, culminating in the indication of the detailed arrangements for implementing the commitment to resolve France Télécom's financing problems (amount of the capital increase and state participation, shareholder loan, support for the Company's refinancing capacity before the recapitalisation) which formed the subject-matter of France's notification. The first press release of the Ministry of Economic Affairs and Finance dated 13 September 2002 spells out how the State will participate in the future increase in France Télécom's capital: 'The State will support the plan's implementation and contribute to a very substantial strengthening of the company's capital base, according to a timetable and in a manner to be determined in the light of market conditions'. It adds that 'Meanwhile, the State will, if necessary, take measures to spare the company any financing problems'. The same remarks are made in the press release of the Ministry of Economic Affairs and Finance of 2 October 2002: 'The State will assist in the implementation of the recovery measures and will contribute to the strengthening of the company's capital base in a manner to be determined in close collaboration with the company's chairman and board. As has already been indicated, the State will, if necessary, take steps in the meantime to prevent the company from being faced with any financing difficulties'. The press release of 4 December also focuses on these two aspects, namely, the participation in the capital increase and the refinancing of the Company through a shareholder loan in the form of a credit line ([125]).

(206) Taken as a whole, these declarations may be regarded as having made public the State's intention whereby, if France Télécom had any financing problems or financial difficulties, it, the State, would do whatever was necessary to overcome them. As will be seen in Section 9, it was already clear at the time of the first of these declarations that France Télécom was experiencing structural financial difficulties as reflected in its unbalanced balance sheet. Cash flow generation was proving insufficient to resolve the debt-related problems. The established inadequacy of the cash flow and undue optimism about the non-strategic asset disposals continued to have an impact on France Télécom's share price and on the rating of its debt ([126]). By asserting that the State would take the necessary decisions or appropriate steps, the Minister was making plain the State's commitment to doing whatever was necessary to resolve the Company's structural financing problems. That was, at any rate, how economic operators saw it.

(207) The question how far these declarations can be attributed to the State arises only in relation to the July declaration. The Commission would point out in this connection that, in the economic context just described, the French financial newspaper of reference, *Les Échos*, met with the Minister responsible and asked him, not how he felt about the events of the day, but whether he had a message for the market. The Minister's reply to the journalist was therefore neither off the cuff nor an analysis of past events. It was, rather, a reflection of the choice made by the Minister and, behind him, the Government to send a clear message to every market player. The Minister was therefore making precise declarations on behalf of the State and the Government (against the background of a series of articles on the new Government's economic policy priorities). In such circumstances, the interview given by the Minister is proof beyond doubt of the Government's resolve to support France Télécom and therefore constitutes an act imputable to the State. In any event, as indicated in paragraph 205, the remarks reported in the press were subsequently neither contradicted or amended by the Minister nor denied by the Government.

(208) The Commission considers that these public declarations are sufficiently clear, precise and firm for them to attest to the existence of a credible commitment on the part of the State. As far as their publication is concerned, the first declaration was published in a national daily newspaper aimed at an audience of business people and financiers. What is more, the Minister's replies were clearly addressed not only to the journalist but also to the whole world of finance and industry. The first question put by the journalist is highly revealing: 'France Télécom's share price is highly volatile. You are the majority shareholder in the company, do you have a message to convey?'. The Minister could not therefore have been unaware that he was sending a message to the Company and its employees as well as to the Company's other shareholders, banks, creditors and competitors. The other declarations were, for their part, published in press releases of the Ministry of Economic Affairs and Finance intended by their very nature to be disseminated as widely as possible.

(209) On the issue of clarity, the Commission considers that as early as July 2002 the message was clear, although the State's means of intervention, i.e. the detailed arrangements for carrying out its commitment, were as yet unspecified: 'I feel responsible for the State's financial interests. The State shareholder will behave like a prudent investor and if France Télécom were to be in difficulty, then we would take appropriate steps' and, a bit later, 'I am simply saying that we shall take appropriate measures when the time comes. If it is necessary'. It is clear from this passage, firstly, that the State claims to be acting like a prudent majority shareholder and, secondly, that it will take steps to alleviate France Télécom's difficulties. The clarity of the majority shareholder's commitment can scarcely be doubted inasmuch as it is reiterated a few lines further down: 'I repeat, if France Télécom had any financing problems, which is not the case today, the State would take whatever decisions were necessary to overcome them'. The Commission would stress that the clarity of the State's commitment did not diminish with each successive declaration.

(210) As to the firmness of the commitment, the Commission is not convinced that the phrases 'if France Télécom were to be in difficulty' or 'if France Télécom had any financing problems' (July declarations) and 'if necessary' (September and October press releases) can be interpreted as provisos having the effect of suspending the effectiveness of the State's commitment. At the time of the first declaration, France Télécom had already seen its credit rating fall strongly, its debt came to approximately EUR 70 billion, and the market knew that it had to meet certain important maturities at the end of 2002/beginning of 2003 and to cover a substantial financing need before the end of 2003. The financing problems were therefore not unexpected, given the general financial context. The situation had not changed by the time the other declarations were published. Consequently, the phrases in question cannot be regarded as conditions precedent when the condition precedent is, by definition, a future, uncertain event ([127]). Moreover, the declarations in question do not contain any reservation as to prior notification to the Commission. Contrary to what the French authorities maintain, their assertion that the State claims to act like a prudent investor (such a 'precaution' was, moreover, simply mentioned in July and December) cannot be considered a condition precedent to the State's commitment. There is nothing to show that the market had knowledge of any such condition. The only mention of the prudent investor concept is to be found in the Standard & Poor's press release of 12 July 2002, and then only as a quotation of the Minister's remarks; the interpretation of the Minister's remarks by the agency which follows the quotation is different ([128]). Nor is it taken up by the press releases of other rating agencies such as Moody's, which in any event see in the ministerial declarations an indication of the State's firm commitment to support France Télécom by whatever means. Affirming one's intention to behave like a prudent investor is not enough when it comes to complying with the rules on state aid, and in particular with the prudent private investor principle. Otherwise, all Member States would have to do in order to comply with the rules is maintain that they have complied with them, and the Commission's monitoring activity would be entirely superfluous. Moreover, it is not for the Member States to judge whether the prudent investor test has been met, but for the Commission under the watchful eye of the Community courts. Despite what they maintain, the French authorities do not seem to have behaved like a prudent investor (see point 5.5). France Télécom has, moreover, indicated that the phrase 'appropriate steps' does not mean *a priori* that the State has committed itself to adopting financial measures. The Commission would stress the clear contradiction in the French authorities' arguments. On the one hand, the State maintains that it will behave like a prudent investor. In view of the Company's financial situation, the financial analyses and the private shareholder resources, this suggests that the State intends to give France Télécom financial support (a change of management could by no means be considered sufficient, as was subsequently confirmed by the content of the Ambition 2005 plan). On the other hand, when the French authorities maintain that the measures are not financial, this suggests that they intended to act in their capacity as a public authority.

(211) As to the French authorities' argument based on the Compagnie nationale Air France judgment ([129]), according to which the remarks at issue cannot imply a firm and unconditional commitment on the part of the State as they are not sufficiently precise, this argument is based on a confusion between the question of the date of the commitment and the assessment of that commitment in the light of the prudent private investor principle. As far as the date of the commitment is concerned, the Commission would point out that the case law does not rule out the possibility that a firm commitment may exist prior to all the precise implementing arrangements being known. On the other hand, what the Court of First Instance of the European Communities stresses is that a private investor in general would not take an irrevocable investment decision as long as the final details of the investment have not been fixed.

(212) The other relevant circumstances surrounding the said declarations confirm the clarity and firmness of the Minister's message and the will of the State to commit itself in full knowledge of all the facts. Thus, in July 2002, the State did not simply issue public declarations; it also contacted the main market operators in order that they might act as go-betweens with investors ([130]). The urgency due to the Company's financial situation confirms the existence of a firm decision by the State to support France

Télécom. During the first half of 2002, France Télécom saw its credit rating downgraded following publication of its 2001 annual accounts. The lowest point in the downgrading of France Télécom's credit rating was reached on 24 June 2002 when Moody's downgraded the Company's rating to just above that of junk bond, thereby making it very difficult for it to refinance its debt ([131]). This downgrading caused considerable concern on the financial markets about France Télécom's financial situation (and in particular about its capacity to refinance its EUR 15 billion debt falling due at the end of 2003), and the markets expected a reaction from the State designed to reassure them. These circumstances show, in the Commission's opinion, that the State had to act urgently to reassure the market and to prevent any further downgrading of France Télécom's credit rating to that of *junk bond* status, as this would have had a highly negative impact ([132]) on the Company's financial situation. The State thus retained this trust through successive declarations. In fact, the State's intervention had the effect of preventing any downgrading of the Company's credit rating to that of junk bond status, as is, moreover, clearly stated in S & P's press release of 12 July 2002, where the assurances provided by the State are hailed as being a key factor in France Télécom's not being reduced to *junk bond* status.

(213) In conclusion, while each of these declarations taken separately might not suffice to prove the existence of a decision by the State to support France Télécom, taken together they do seem to suggest that such a decision exists (being embodied in the offer of the shareholder loan to France Télécom upfront of the State's participation in a future recapitalisation). Such was at all events the view taken by the markets. The firm character of that decision would be confirmed in the event of its being established that the declarations are binding under domestic law and are capable of placing the State's credibility on the line.

(214) First of all, the Commission has studied the question whether, under domestic law, a private investor who has made the same declarations as the State would be obliged to keep his promises. In view of the fact that, in the present case, the investor is the State, the study of domestic law also included administrative law.

(215) The Commission commissioned an expert report on the subject and it also received several reports from third parties. On the basis of this information, the Commission cannot rule out at this stage that the declarations in question may have binding force under French administrative, civil, commercial and criminal law ([133]), as well as under the law of the State of New York.

(216) The main criticism levelled by the French authorities is that, under domestic law, unilateral commitments are the exception, and that letters of intent, which do not form a homogeneous category, are treated as equivalent to a unilateral commitment only in exceptional circumstances. But the question is not whether French law is unequivocal on this matter, but whether there is any basis in private law for concluding that there exists a unilateral commitment in circumstances such as those of the present case. The fact that there exists a usable body of case law of the Court of Cassation ([134]), of which the French authorities are trying simply to minimise the scope ([135]), is incontestable.

(217) It is entirely likely that such repeated and concordant declarations, emanating as they do from the Minister responsible for managing the State's shareholdings and representing the Company's majority shareholder, will be considered credible by the market, and as a result they create an expectation on the part of the latter that the State will do everything necessary to resolve any financial difficulties that France Télécom may face. Any failure by the State to fulfil that expectation would have directly affected its reputation in its capacity as owner, shareholder or manager of companies, whether quoted or not, and in its capacity as issuer of bonds to finance the public debt ([136]). Thus, the declarations by the French Government, starting from those of July 2002, are the expression of a strategy based on the reputation of the State. This strategy consists in entering into credible commitments in the short and the long term. A majority shareholder in or an owner of companies (or, more generally, a manager) who does not conduct himself in the manner he had publicly announced and an issuer of bonds who does not keep his word risk logically, irrespective of any legal obligation, losing their reputation. This loss of reputation will involve almost certain economic costs for the same operator when he tries to borrow again on the capital markets (assuming he still finds someone prepared to grant him a loan) or when he acts as owner or manager of a company ([137]). In the present case, the majority shareholder is the French State. The French State is a major economic operator, active in the economy as owner, shareholder or, more generally, manager of a large number of public undertakings ([138]). It is also a major borrower on the capital markets with a view to financing its public debt ([139]). A loss of credibility would therefore have not negligible consequences both for its reputation as a major economic operator and issuer on the international markets and for its reputation as a major political actor.

(218) Taken as a whole, these factors 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). The argument to the effect that the French authorities' declarations as from July 2002 are aid is therefore innovative, but probably not without foundation.

(219) Nevertheless, the Commission is not of the opinion that it can establish irrefutably the existence of aid on this basis. It does, on the other hand, consider that it can demonstrate the presence of aid elements in a more conventional manner taking as a basis the December 2002 measures which were the subject of the notification. In this respect, it is sufficient to establish that the prior declarations had a

real impact on the perception of the markets in December, without having to characterise these prior declarations as being in themselves state aid.

(220) In the present case, the market's reaction and the comments by financial analysts confirm that the market regarded these declarations as a credible strategy of commitment by the State to support France Télécom.

(221) As to the market's reaction, NERA states that the event study carried out of the announcement of 12 July 2002 shows that that announcement led to an abnormal and not negligible increase in the value of France Télécom's shares and bonds. Thus, compared with a set of telecom indexes representative of the market, France Télécom's share price rose by between 37,8 % and 43,8 %. The abnormal increase in bond prices amounted, for its part, to between 3,2 % and 9,7 %. This reaction implies that the market believed that, by the announcement, the State was committing itself to offering France Télécom greater support ([140]) and that the market placed great store by the announcement. As to the comments by financial analysts, Deutsche Bank, for example, mentioned several times in a report published on 22 July 2002 that the State's support was decisive in preventing a crisis ([141]) and that the market was convinced, in the light of the Government's declarations, of the state support that would be provided by the Government to France Télécom ([142]) (even if the market did query the scope and modalities of that support) ([143]). Similarly, S & P considered the Government's declarations to be credible to the point of influencing the Company's credit rating. On 12 July, S & P thus downgraded France Télécom's rating to BBB- but maintained its investment-grade rating with a stable outlook ([144]), stating that 'The French state — which owns 55 % of France Télécom — has clearly indicated to Standard & Poor's that it will behave as an aware investor and would take appropriate steps if France Télécom were to face any difficulties … Indeed S & P believes that the company could face certain difficulties refinancing its debt obligations coming due in 2003. Nevertheless, the State's indication underpins France Télécom's investment-grade credit quality' ([145]). The fact that the State's support, proclaimed as from July 2002, was credible to the point of enabling France Télécom's credit rating to remain at investment-grade quality is also corroborated by France Télécom itself ([146]). This evidence confirms the Commission's opinion that the French Government was obliged, in order to keep its reputation intact on the financial markets, to respect the promises it had made (there is nothing on file to suggest that this was not always the Government's intention).

(222) The Commission notes that the declarations had a major impact on the market. A study of the comments and documents submitted by the French authorities and of the available parliamentary debates shows that the State's declarations helped to restore the financial markets' confidence ([147]). In fact, ever since S & P's press release of 13 July 2002, the rating agencies were all agreed that the support shown by the State since July 2002 was decisive in maintaining France Télécom's investment-grade credit quality. The maintenance of France Télécom's investment-grade credit quality thus enabled the Company to avoid additional financial costs ([148]) on the funds it had already borrowed owing to the existence of step-up clauses ([149]) in some bond issues and on future borrowings. The maintenance of investment-grade rating enabled the Company, moreover, to put its finances back on to a sound footing through a recapitalisation operation carried out under optimum conditions in March/April 2003. Back in September 2002, one of the conditions imposed by the banks for their participation in the operation was 'the maintenance of at least the current ratings {investment-grade quality} of the company's long-term debt by the Moody's and Standard & Poor's rating agencies; this condition will be included in the guarantee and investment contract' ([150]). In so far as the shareholder loan is made by way of an upfront prepayment by the State towards France Télécom's recapitalisation, it follows that it cannot be examined without regard to the effects of these declarations. A downgrading of France Télécom's credit rating would have rendered any shareholder loan improbable or at the very least more costly.

(223) The Commission would note that, inasmuch as they seek to show that the shareholder loan taken in isolation and disregarding the events preceding it satisfies the prudent investor test, the French authorities' comments might seem at first sight not to be altogether without foundation. However, this impression fades after more detailed analysis. The Commission would stress that, for the reasons given below, the decision to act upfront of the capital increase operation by granting a shareholder loan cannot be analysed independently of the above-mentioned declarations.

(224) In this connection, the Commission would recall that the State had declared in July 2002 that it wished to take the necessary steps to enable the Company to overcome its financing difficulties. The French authorities remained vague initially about the arrangements for putting these declarations into practice. They then fleshed them out in successive statements by announcing, in September, the decision to participate in an operation to strengthen the capital base, by announcing, in December, the provision to the Company of a EUR 9 billion credit line, and by putting in place the necessary conditions for that provision.

(225) The fact that the measures notified in December (including the decision to act upfront of a future recapitalisation by granting a shareholder loan), viewed separately, may create

the illusion of perfectly rational transactions does not alter the fact that the behaviour of economic operators in December was clearly influenced by the actions and declarations made by the State beforehand, notably from July 2002, signalling the State's intention to mitigate the Company's financing problems. The Commission would point out in this connection that the State's declarations were decisive in maintaining the Company's investment-grade credit quality and that a junk bond rating would have made the shareholder loan more unlikely and certainly much more costly.

(226) In this sense, the State's decision to act upfront of the Company's recapitalisation by granting a credit line ultimately constitutes a concretisation of the State's announcements.

(227) The Commission would stress first of all that it is aware that the operation to recapitalise France Télécom carried out in April 2003 was a success and that the shareholder loan was never actually made. It would point out also that, in applying the prudent private investor test, the Commission generally enquires whether a prudent private investor of a size comparable to that of the public investor would have acted in a similar manner to the public investor. According to well established case law, the analysis of the prudent private investor principle is based on the information the investor has at his disposal at the time he takes his investment decision. The success of the operation in March-April 2003 cannot therefore be taken into account in assessing the State's conduct in December 2002. The Commission would stress, moreover, that, in applying the concomitance criterion it cannot base the assessment of the State's conduct on the conduct of other economic operators in so far as their conduct and the market were influenced by the State's declarations. The State's declarations, made in July and then repeated, to the effect that it would take the necessary steps to enable the Company to overcome its financing difficulties distort the concomitance test in so far as private investors cannot be considered to have made up their minds on the sole basis of the Company's situation. This holds true irrespective of whether those declarations contain state aid or not ([151]). What is more, the application of the principle of the prudent private investor in a market economy cannot be based on the market situation in December, but must logically be based on the situation of a market uncontaminated by prior declarations and interventions.

(228) It seems logical, therefore, to examine the decisions in question from the angle of the situation prior to July 2002. If the decisions in question are thus analysed in the context of the situation prior to July 2002, it would appear that they do not satisfy the prudent private investor test. As already indicated, in 2002 France Télécom was operating in a difficult economic context. The debt-reduction plan announced by the management and centred on a major assets sale had been judged unworkable by the Moody's rating agency, which had downgraded the Company's credit rating by two notches on 24 June 2002 ([152]). As a result, France Télécom had then lost the markets' confidence. At that time, the Government had not yet taken any steps to improve the Company's operation and results ([153]) or commissioned any in-depth audit. In particular, the Government had not yet appointed a new management team and no recovery plan was yet in place or even on the drawing board ([154]). The support announced by the French Government beginning with its July 2002 declarations was therefore in the nature of a unilateral move by the State at a time when the market was somewhat sceptical about the Company's capacity to redress its financial situation ([155]) and when financial analysts were recommending caution over participating in a possible operation to strengthen the Company's capital base ([156]).

(229) In the light of the Company's financial situation as described in this Decision, the overall context of loss of market confidence at the time and the lack of any credible and realistic debt-reduction plan until December, the Commission considers it improbable that a private investor would, from July 2002, have made declarations similar to those made by the French Government, likely as they were, from a purely economic point of view, to seriously place his credibility and reputation on the line and, from a legal point of view, to even oblige him from that date to support the Company financially come what may. In so doing, any investor would have assumed a very considerable risk vis-à-vis the Company, without being indemnified by the Company or its other shareholders and without any compensation being envisaged in return for his support. It is likely that even a reference shareholder in possession of the same information on the Company's economic situation as that which the French authorities had at their disposal at the time ([157]) would not have taken such a step without first carrying out a thorough audit of the Company's financial situation ([158]) and taking the measures necessary to ensure its recovery in order to gain a fairly precise idea of the risk he was about to take and of the associated remuneration prospects. Such a reference shareholder would in any case have needed the financial markets' help in setting the company to rights, and the markets did not at that time seem prepared to invest in or grant much in the way of credit to France Télécom. It is unlikely that a prudent private investor in the same position as the French State would, in the light of France Télécom's economic situation and the unavailability of any clear, comprehensive information thereon, have made any declarations of support for the Company in July 2002. It is

even less likely that he would have granted a shareholder loan, taking on himself alone a very substantial financial risk. The argument advanced by France Télécom and the French authorities to the effect that 'it may be objected that any show of support by the State would have an implicit guarantee effect in view of the "unlimited" means at the State's disposal', which 'would be tantamount to making it impossible to apply the principle of the prudent private investor — whose resources are always limited — and to treating the conduct of the State shareholder differently from that of the private investor' ([159]), and that this would prevent any public declaration by the State, cannot be accepted by the Commission. There is no question of preventing the State from behaving like a prudent private investor and making, if necessary, declarations of support which a prudent private investor would make (such as declaring its intention to take part in a possible recapitalisation scheme where the operation is based on a serious and credible recovery plan) or of obliging the State to notify any declaration. The Commission would point out that an explicit reservation to the effect that any subsequent intervention would be notified in advance to the Commission and implemented only after it had been approved would render the declarations conditional and would thus make it possible to examine the subsequent intervention by the State on the basis of the market situation existing at the time of its adoption.

(230) It follows from all of the above considerations that the test of the prudent private investor in a market economy is not satisfied. Consequently, the advantage conferred on France Télécom by the proposal to grant a shareholder loan — examined in the light of the prior declarations and interventions of the French authorities — constitutes state aid, even if the scale of the advantage is difficult to calculate.

## 9. COMPATIBILITY OF THE AID

(231) As to the compatibility of the aid in question, the Commission would point out first of all that its analysis as set out in paragraphs 122 and 123 of the opening decision is still applicable in the present case. Consequently, the aid's compatibility with the common market may be analysed in accordance with the criteria applied in the Guidelines.

(232) The Commission would observe that France Télécom was a firm in difficulty within the meaning of the guidelines, as can be seen from Table 10. More particularly, a firm is regarded as being in difficulty where 'more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months ([160])'.

*Table 10*

**France Télécom**

*Consolidated balance sheet*

*(Amounts in EUR million)*

(1998 data, EUR 1 = FRF 6,55957)

| | Financial year ended 31 December | | |
|---|---|---|---|
| **LIABILITIES** | 2000 | 2001 | 2002 |
| Share capital | 4 615 | 4 615 | 4 761 |
| Additional paid–in capital | 24 228 | 24 228 | 24 750 |
| Reserves | 2 748 | 4 682 | –5 434 |
| Group's share of net result | 3 660 | –8 280 | –20 736 |
| Conversion reserve | 59 | 844 | 3 315 |
| Own shares | –2 153 | –5 002 | –9 977 |
| **Shareholders' equity** | **33 157** | **21 087** | **9 951** |
| **Minority interests** | **2 036** | **8 101** | **9 780** |
| **Non–reimbursable funds and the like** | — | — | — |
| Long– and medium–term debt | 30 547 | 54 543 | 46 898 |
| Other long–term liabilities | 5 220 | 8 663 | 14 978 |
| **Total long–term liabilities** | **35 767** | **63 206** | **61 876** |

*(Amounts in EUR million)*

(1998 data, EUR 1 = FRF 6,55957)

| | Financial year ended 31 December | | |
|---|---|---|---|
| **LIABILITIES** | 2000 | 2001 | 2002 |
| Current portion of long– and medium–term debt | 7 542 | 1 596 | 13 495 |
| Bank overdrafts and other short–term borrowings | 25 165 | 11 365 | 10 490 |
| Trade accounts payable | 7 618 | 8 631 | 8 503 |
| Accrued expenses and other payables | 7 729 | 7 259 | 7 395 |
| Other current liabilities | 8 113 | 2 481 | 1 712 |
| Deferred income taxes | 512 | 374 | 87 |
| Deferred income | 1 946 | 3 258 | 3 200 |
| **Total current liabilities** | **58 625** | **34 964** | **44 882** |
| **Total liabilities** | **129 585** | **127 358** | **106 587** |

*Source:* France Télécom Annual Reports 1999, 2002, 2003.

(233) According to the letter of the Guidelines, which refer to the registered capital, the relevant indicators for the purposes of characterising France Télécom as a firm in difficulty do not include all the elements constituting the own capital but are limited to the share capital and the additional paid-in capital.

(234) On 31 December 2001, according to this definition, the registered capital came to EUR 28,8 billion (corresponding to EUR 4,6 billion of share capital plus EUR 24,2 billion of additional paid-in capital).

(235) On 31 December 2002, the registered capital came to EUR 29,5 billion (corresponding to EUR 4,8 billion of share capital plus EUR 24,7 billion of additional paid-in capital). For the 2002 financial year, the group's net loss came to EUR 20,7 billion, which corresponds to a 70 % loss of registered capital (EUR 20,7 billion/EUR 29,5 billion). If account were taken of the negative reserves of EUR 8,9 billion, the result would be a loss of the entire registered capital.

(236) Hence it must be concluded that France Télécom was a firm in difficulty within the meaning of the Guidelines.

(237) This finding is borne out by an analysis of point 6 of the Guidelines. This point mentions a number of signs illustrating the financial difficulties of a firm. They include qualitative criteria such as increasing losses, diminishing turnover, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value ([161]).

(238) As to the French authorities' arguments concerning the growth in the operational elements, the Commission would point out that a company's balance sheet, operating results and future cash flow forecasts are elements forming an integral part of a company's assessment. The debt in a company's balance sheet has an effect on its future *cash flow* even if it is due to past events. The Commission would stress that, although it is aware of the growth in the Company's turnover and of the fact that its *cash flow* was both high and growing faster than its turnover, it cannot ignore the real market position of a company burdened with a colossal debt. Nor can it dissociate the strategic decisions taken by a company from its operational decisions. Thus, contrary to what the French authorities maintain, the Company's *cash flow* growth cannot be viewed in isolation. The above-mentioned HSBC report states, moreover, that, even with the TOP plan, the Company's financing requirement would be for EUR 21,9 billion in 2004 and 2005; without the TOP plan, the requirement would be for EUR 33 billion over the same period.

*Table 11*

**France Télécom**

*Consolidated balance sheet*

*(Amounts in EUR million)*
(1998 data, EUR 1 = FRF 6,55957)

| | 2001 | 2002 |
|---|---|---|
| Turnover | 43 026 | 46 630 |
| Cost of services and products sold | (17 619) | (18 558) |
| Selling and administrative expenses | (12 520) | (12 579) |
| Research and development expenses | (567) | (576) |
| **Operating income/loss before amortisation of fixed assets and of actuarial adjustments in the early retirement plan *(EBITDA)*** | **12 320** | **14 917** |
| **Operating income/loss *(EBIT)*** | **5 200** | **6 808** |
| Interest expenses, net (excluding perpetual bonds redeemable for shares — TDIRA) | (3 847) | (4 041) |
| Interest expenses on TDIRA | — | — |
| Foreign exchange gain/loss, net | (337) | 136 |
| Discounting of early retirement plan | (229) | (216) |
| **Current income/loss from integrated companies** | **787** | **2 687** |
| Other non-operating income (expense), net | (5 904) | (12 849) |
| Corporation tax | 2 932 | (2 499) |
| Employee profit-sharing | (131) | (148) |
| **Net income/loss from integrated companies** | **(2 316)** | **(12 809)** |
| Equity in net income/loss of affiliates | (890) | (367) |
| Goodwill amortisation | (2 531) | (2 352) |
| Exceptional goodwill amortisation | (3 257) | (5 378) |
| **Net income/loss of the consolidated group** | **(8 994)** | **(20 906)** |
| Minority interests | 714 | 170 |
| **Résultat net (Part du groupe)** | **(8 280)** | **(20 736)** |

*Source:* Rapports Annuels France Telecom 2001, 2002.

(239) Analysis of the various criteria mentioned in paragraph 237 shows that France Télécom was incurring growing losses in 2001 and 2002. Moreover, France Télécom's net financial liabilities (see Table 12) came to EUR 63,5 billion on 31 December 2001, EUR 69,7 billion on 30 June 2002 and EUR 68,0 billion on 31 December 2002.

*Table 12*

*(EUR billion)*

| | 31.12.2001 | 30.6.2002 | 31.12.2002 |
|---|---|---|---|
| Total long-term liabilities | 63,2 | 64,3 | 61,8 |
| Current portion of liabilities | 1,6 | 9,2 | 13,5 |
| Bank overdrafts and other short-term borrowings | 11,4 | 13,8 | 10,5 |
| **Gross liabilities** | **76,2** | **87,3** | **85,8** |
| Marketable securities | (1,1) | (0,1) | (-) |
| Cash | (2,9) | (2,3) | (2,8) |
| Other long-term liabilities | (8,7) | (15,2) | (15,0) |
| **Net financial liabilities** | **63,5** | **69,7** | **68,0** |

*Source:* France Télécom annual reports and consolidated balance sheets as at 30 June 2002

(240) The Commission would also stress the growth in net interest expenses from EUR 2 billion in 2000 to EUR 3,8 billion in 2001 and EUR 4 billion in 2002.

(241) The net asset value which corresponds to the share capital value fell from EUR 33,2 billion on 31 December 2000 to EUR 21 billion on 31 December 2001 and reached minus EUR 10 billion on 31 December 2002.

(242) It follows, therefore, that, of the six criteria mentioned in point 6 of the Guidelines as being signs of a company's poor health, four are satisfied.

(243) Finally, the Company's financial difficulties are confirmed by the difficulties it had in 2002 in refinancing itself on suitable terms on the capital market. Contrary to what the French authorities maintain, France Télécom did not have access to the financial markets in 2002 on suitable terms prior to the series of declarations of support by the State from July until December of that year ([162]).

(244) The difficulties which France Télécom would have had in refinancing itself on suitable terms without the State's support are illustrated by the financial analysts' reports.

(245) For example, one analyst has stated that, in July 2002, with a Baa3 rating the Company would have had difficulty solving its debt problem through the acquisition of new capital: 'FT's Baa3 rating meant that it was hard to say who would buy a potential bond issue. The negative outlook increases the possibility of the company becoming a fallen angel, if it is unable to solve its debt problem' ([163]).

(246) A report by JP Morgan dated 2 December 2002 also seems to confirm that, without the State's support, France Télécom would not have been capable of obtaining fresh capital on the market in order to refinance its debt. The report states: 'We continue to view FT's risk/reward profile as unattractive pending the outcome of a strategy review. … Although we see significant scope for FT to cut costs and deliver a compelling yield and even though the CEO has strong track record execution, the government role in giving FT the flexibility it requires is pivotal. In the meantime, liquidity risk remains and in our view, a right issue is a matter of when not if. … The government's role will again be pivotal in refinancing and reducing this debt. However it is liquidity or refinancing risk that is the near-term focus of FT and rating agencies alike, with a daunting refinancing schedule ahead in 2003. […] This would be

impossible without government intervention — even FT acknowledged this in its Q3 conference call' (emphasis added).

(247) Two reports by Goldman Sachs and SG Equity Research confirm that it was only after the series of declarations by the State that the capital market allowed France Télécom to refinance itself on suitable terms. Global Equity Research stated on 20 February 2003 that: '[the] immediate liquidity issues are solved: since the government's upfront prepayment of its €15bn equity offering in the form of a €9bn standby facility, FT has been able to re-access the debt capital markets to solve its immediate liquidity challenges'.

(248) The financial analysts' views are borne out by statements by the Company's then CEO, Mr Bon, as reported in several press articles ([164]), and by the French authorities themselves at the time of their December 2002 notification ([165]). Although the French authorities maintain that the opinion of France Télécom's former CEO is irrelevant in view of the circumstances in which it was formulated, it nevertheless remains that that opinion was borne out by the new CEO appointed in October 2002 when, at his hearing on 5 December 2002 before the Senate finance committee, he also stated that the group was in a worrying situation: 'Despite being faced with huge debts, the company did not seem to have woken up to the fact that its credit rating was being downgraded, that it no longer had access to the capital markets ...' ([166]).

(249) Similarly, the documents furnished by the French authorities to illustrate France Télécom's access to the markets are unconvincing. The exchange offers proposed by […] and […] to replace the short-term bonds by longer-term ones do not bear out the French authorities' argument as to France Télécom's access to the capital market. The exchange offer by […], which was dated July 2002 and which is said to have been made to France Télécom on the 17th of that month, thus contains only preliminary remarks on a possible exchange transaction ([167]) and mentions only an indicative price of Euribor + 380 base points and a coupon of 8,50 % ([168]). The September 2002 offer by […] was not signed by the parties and contains no refinancing rate. In the Commission's opinion, inasmuch as the offers were not formalised and only one of the two offers mentions an indicative rate, which was higher than the average of France Télécom's issue rates in 2002 ([169]), these two offers are irrelevant. At all events, the offers seem to postdate the State's explicit declarations of support of July 2002 and hence cannot serve as evidence that France Télécom had normal access to the capital market.

(250) As to the various operations mentioned by the French authorities ([170]), and in particular the issuance by France Télécom of ordinary bonds and mandatory convertible bonds ('ORA') in the course of 2002 ([171]), the Commission would point out that they likewise do not prove that France Télécom had access to the market on suitable terms. The total amount of the issues is far below ([172]) the average for France Télécom over the period 1997-2003 ([173]). Only the ORA issue is of any significant size ([174]), but this is precisely an instrument that is used where the risk is high and the cost of an ordinary bond issue would be too great.

(251) As to the French authorities' assertion that they preferred to resort to a syndicated loan than to the bond market for the purpose of refinancing France Télécom, this is not indicative of the Company's capacity to refinance itself on suitable terms. The syndicated loan to which the French authorities refer in their comments of 22 January 2004 dates from 14 February 2002, that is to say, from before the downgrading of France Télécom's credit *rating* by the rating agencies. On the other hand, the use for several months of this short-term credit instrument instead of a longer-term bond issue which would have made it possible to refinance part of the Company's debt ([175]) seems rather to confirm that France Télécom's access to the capital market was not easy. This situation was confirmed, moreover, by the French authorities in their comments of 22 January 2004, when they stated that recourse to the syndicated loan was less costly for France Télécom than access to the bond market.

(252) In the light of all the above considerations, the Commission is of the opinion that France Télécom must be considered, during the first half of 2002, to have been a firm in difficulty within the meaning of the Guidelines ([176]).

(253) However, the measures at issue cannot be characterised as aid for rescuing and restructuring firms in difficulty as they do not fulfil the conditions for authorisation laid down in the Guidelines. The Commission would point out first of all here that the French authorities have not advanced any argument along these lines and have never asserted that the measures at issue had as their purpose the rescuing and restructuring of France Télécom. On the contrary, the French authorities have always denied that France Télécom should be characterised as a firm in difficulty and have stressed the Company's good operational health.

(254) The measures at issue cannot constitute rescue aid. The Guidelines provide that the loan must be remunerated, which is not the case here. Similarly, the aid must be justified by serious social reasons, but the Commission has no evidence in its possession to suggest that, in the absence of such aid, a situation of social distress would have been

brought about. In so far as its assets were healthy from an operational standpoint, had France Télécom been obliged to dispose of assets to meet its financing requirements there would in all probability have been no serious social difficulties. The Guidelines also provide that rescue aid must be restricted to the amount needed to keep the firm in business for the period during which the aid is authorised. In the present case, however, the Commission has seen no evidence to the effect that the State's commitment to support France Télécom was limited to keeping the Company in business. Moreover, the French authorities have not formally notified the measures in question as rescue aid, or affirmed that the measures are aimed at rescuing France Télécom. Rescue aid must be repaid within 12 months of the date of the last payment; however, repayment in France Télécom shares cannot constitute repayment within the meaning of the Guidelines, being instead a mere capital injection as there is no guarantee that the shares' nominal value will correspond to the aid amount. The Guidelines provide, furthermore, that rescue aid may be granted for a maximum period of six months. Inasmuch, therefore, as the credit line was opened for a period of 18 months, the period authorised has been exceeded.

(255) Nor can the measures at issue constitute restructuring aid. In response to a request made by the Commission at the time of the opening decision, the French authorities submitted the Ambition 2005 plan. A perusal of the plan has confirmed that France Télécom was entering upon a phase of in-depth restructuring, both industrially and financially. The Commission accordingly considers that the financial measures granted by the French authorities in support of France Télécom were capable of constituting restructuring aid within the meaning of the Guidelines. That being so, the Commission cannot consider the measures compatible with the common market under Article 87(3)(c) of the Treaty and under the Guidelines. According to the Guidelines, 'aid for restructuring raises particular competition concerns'. Consequently, such aid may be granted 'only if strict criteria are met, and if it is certain that any distortions of competition will be offset by the benefits flowing from the firm's survival … and, where appropriate, there are adequate compensatory measures in favour of competitors'. In the present case, however, the information furnished by the French authorities is silent on this point, and the authorities have not transmitted to the Commission certain information referred to in Annex I to the Guidelines, such as a detailed description of the aid (proposing compensatory measures) and market studies, which is essential if the Commission is to be able to rule on the scale of the distortions of competition involved and hence of the compensatory measures needed in order to verify the compatibility of the aid.

(256) The Commission concludes that the financial measures granted by the French authorities in support of France Télécom are incompatible with the common market within the meaning of the Treaty's Article 87(3)(c) and of the Guidelines.

## 10. RECOVERY OF THE AID

(257) In the light of the above, the shareholder loan of December 2002 constitutes state aid incompatible with the common market. Article 14 of Regulation (EC) No 659/1999 requires, therefore, in principle that the Commission should demand its recovery.

(258) A precondition for carrying out that obligation is either that the amount of the aid should be fairly precisely quantified in the Decision or — if that is not possible — that the parameters should be included whereby the Member State, in cooperation with the Commission, might subsequently carry out such a calculation.

(259) In this respect, the Commission is not able at this stage to precisely quantify the aid in question.

(260) While it is true that the analysis based on the market situation before the July 2002 declarations suggests the existence of a considerable advantage conferred on France Télécom, the Commission does not consider it appropriate to rely on this factor alone in quantifying the aid. Although reference to the market situation before the July 2002 declarations makes it possible to factor in the effect on the markets of the prior declarations of the French authorities, it does not make it possible to isolate that effect from any other effects of events such as the change of France Télécom's management or the Ambition 2005 plan. Such an assessment offers, therefore, only a 'gross' view which is probably not strictly equivalent to the advantage enjoyed by France Télécom.

(261) Despite all its efforts, the Commission has been unable to arrive at a reasonable assessment of the notified measures' 'net' financial impact, which ought to be established on the basis of a theoretical calculation isolating the effects of the declarations and actions attributable to the State from any other event which may have exerted an influence on France Télécom's situation or on the perception of that situation by the markets. Nor does it seem possible to incorporate in the Decision calculation parameters which are sufficiently precise to be able to carry out the final calculation during the Decision's implementing phase. In these particular circumstances, respect for the Member State's rights of defence might constitute an obstacle to recovery pursuant to Article 14(1) of Regulation (EC) No 659/1999, according to which 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'.

(262) This conclusion also seems to follow from the principle of legitimate expectation. Although France has not presented to the Commission any argument based on the existence of a legitimate expectation on the part of the aid recipient, it follows from the case law of the Court of Justice ([177]) that

the Commission is required to take automatically into consideration any exceptional circumstances which justify, in accordance with Article 14(1) of Regulation (EC) No 659/1999, its refraining from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Community law, such as respect for the legitimate expectations of the recipients.

(263) The Commission has taken the Government's declarations into account in its assessment of the compliance of the measure at issue with the state aid rules. Viewed in isolation, the shareholder loan proposal would probably have been considered not to constitute aid under the Treaty. However, the Commission has come to the conclusion that the declarations had the effect of restoring confidence to the market as far as the Company was concerned, thereby ruling out the application of the prudent private investor principle and turning the shareholder loan proposal into the concretisation of the aid granted to France Télécom. The Commission recognises that this is the first time it has had to examine whether this type of conduct constitutes aid. In so far as the aid depends, as a result, on conduct which preceded the notification of the shareholder loan proposal, a diligent operator could have had confidence in the lawfulness of the conduct of the Member State concerned, which, for its part, had duly notified the loan proposal. As Advocate General Darmon stated in his Opinion in Case C 5/89 ([178]), 'the doubts with which some undertakings may be assailed, when faced with "atypical" forms of aid, as to whether notification is necessary should not be made light of'.

(264) In conclusion, the Commission finds that France Télécom could legitimately have confidence in France's conduct not constituting state aid. In the light of the above, the Commission considers that, in the present case, ordering the aid's recovery would be contrary to the general principles of Community law.

## 11. CONCLUSIONS

(265) The Commission finds that, placed in the context of the declarations made from July 2002, the shareholder loan granted by France to France Télécom in December 2002 in the form of a EUR 9 billion credit line constitutes state aid,

HAS ADOPTED THIS DECISION:

*Article 1*

Placed in the context of the declarations made from July 2002, the shareholder loan granted by France to France Télécom in December 2002 in the form of a EUR 9 billion credit line constitutes state aid incompatible with the common market.

*Article 2*

The aid referred to in Article 1 does not have to be recovered.

*Article 3*

This Decision is addressed to the French Republic.

Done at Brussels, 2 August 2004

*For the Commission*

Frederik BOLKESTEIN

*Member of the Commission*

**Notes**

(1) OJ C 57, 12.3.2003, p. 5.

(2) See paragraphs 1-8 of the opening decision, which are to be considered an integral part of this Decision.

(3) See footnote 1.

(4) Party wishing that its identity be kept confidential.

(5) Also called MCI for the purposes of this Decision.

(6) Party wishing that its identity be kept confidential.

(7) To which a complaint lodged by the same companies dated 22.1.2003 was annexed.

(8) Party wishing that its identity be kept confidential.

(9) LDCOM sent the Commission a corrigendum, which was forwarded to the French authorities on 16.6.2003.

(10) The French authorities sent a corrected version of one of the annexes by email dated 30.7.2003.

(11) 2003/S 103-091487.

(12) Party wishing that its identity be kept confidential.

(13) Containing a consultation carried out by Mr Sureau.

(14) Containing three reports prepared by three experts appointed by France Télécom (Mr C.D. Ehlermann, Mr Y. Galmot and Mr J. Studzinski of HSBC).

(15) This letter contains studies the authors of which wish to remain anonymous. They include an economic study, a study on English law, a study on American law and a study on French law concerning the binding force of declarations by the State.

(16) Containing the expert reports described in point 4.13.

(17) The State still holds the majority of France Télécom's capital. See paragraph 60.

(18) Paragraphs 9-12 of the opening decision. According to the 2003 report *l'État actionnaire*, France Télécom has 240 000 employees in 39 countries.

(19) Hearing of Mr Thierry Breton, France Télécom's CEO, before the commission of enquiry into the management of public undertakings, sitting of 4.6.2003.

(20) 'Credit ratings are used by investors as indications of the likelihood of repayment in accordance with the terms on which they invested. Thus, the use of credit ratings defines their function: "investment grade" ratings (international long-term "AAA" — "BBB" categories; short-term "F1" — "F3") indicate a relatively low probability of default, while those in the "speculative" or "non-investment grade" categories (international long-term "BB" — "D"; short-term "B" — "D") may signal a higher probability of default or that a default has already occurred' (Fitch Rating's Internet site: http://www.fitchratings.com/).

(21) Moody's: 'Moody's places France Telecom and Orange's long-term debt ratings on review for downgrade — Approximately EUR 60 billion of Debt Securities Affected… The France Telecom ratings under review for possible downgrade relate to the following: Convertible global bonds, Euro MTNs, Eurobonds, Floating Rate Euro MTNs, Floating Rate French Franc Bonds, French Bonds, Swiss Franc Bonds, its issuer rating and bank loan rating…. any resulting rating action should not exceed more than one notch'.

(22) 'France Telecom's Long-Term "BBB+" Rating Placed on CreditWatch Negative; A-2 Rating Affirmed… The action follows news that the German stock-exchange regulatory authority will investigate a possible agreement between France Telecom, the main shareholder — Gerhard Schmid — of France Telecom's 28,5 % -owned German associate Mobilcom AG, and a consortium of European banks regarding the conditions for a change in control of Mobilcom'.

(23) 'Moody's Investors Service has today placed the Prime-2 short-term rating of France Telecom (FT) on review for possible downgrade as a result of the rating agency's decision to expand the scope of the ongoing review of FT. The ongoing review for downgrade of the Baa1 long-term debt ratings of both FT and Orange plc will continue. Although Moody's has revised its guidance, indicating that a downgrade of up to two notches is now possible for the long-term ratings, the rating agency expects the ratings to remain investment grade. The review of FT's Prime-2 rating reflects Moody's increasing concerns about FT's ability to execute its debt reduction strategy. The rating agency noted that FT's slow progress in finalising asset sales, coupled with continuing deterioration in capital market conditions in this sector, could further limit FT's ability to improve its financial flexibility and meet its debt reduction targets'.

(24) 'Standard & Poor's said today that the ratings on France Telecom (BBB+/Watch Neg/A-2) remain unchanged, including the group's short-term corporate credit rating. In its CreditWatch placement of France Telecom's long-term ratings on March 28, 2002, Standard & Poor's indicated that any long-term rating downgrade would be limited to one notch and that its short-term ratings were affirmed. This indication is still valid today'.

(25) '… Despite expectations that FT's EBITDA will grow to around €14 billion in 2002, FT's substantial interest and capex requirements means the company is not expected to generate material free cashflow for deleveraging in the near term. FT is dependant upon asset disposals and its treasury stock to make any significant inroads into reducing its debt:

— Moody's regard FT's ability to reduce debt within a relatively short period as having become increasingly constrained by the fall in its equity value, which reduces the potential value of the treasury stock FT holds, reducing the probability of conversion of numerous convertible bonds and potentially implying a lower realizable value for expected non-core asset disposals, although Moody's acknowledges that it is possible this may change. Additionally, the positive impact of expected asset disposals is expected to be partly offset by various contingent liabilities adversely impacting upon FT;

— The negative outlook attached to the Baa3 rating reflects the execution risks associated with FT's high debt refinancing needs of this highly leveraged company. Although Moody's does not have any immediate liquidity concerns, the rating agency notes that FT faces around €15 billion of total long-term debt maturities in 2003'.

(26) 'Standard & Poor's said today that it has lowered its long- and short-term corporate credit ratings on France Telecom (FT) to triple-"B"/"A-3" from triple-"B"-plus/"A-2". The downgrade primar-

ily reflects Standard & Poor's expectations that FT will acquire the 71,5 % stake it does not already own in German wireless operator Mobilcom, as well as FT's inability to reduce debt sufficiently and rapidly enough to maintain credit measures consistent with the previous ratings. Standard & Poor's also lowered to triple-"B" from triple-"B"-plus its long-term corporate credit rating on Orange S.A., FT's majority-owned wireless subsidiary. The long-term ratings on both companies remain on CreditWatch with negative implications, where they were placed on March 28, 2002, reflecting FT's challenging refinancing needs, including €15 billion of financial obligations in 2003'.

([27]) Fitch reduced France Télécom's rating on 5 July 2002 and S & P reduced it on 12 July. In its 12 July press release, S & P stated that: 'FT could face certain difficulties refinancing its debt obligations coming due in 2003'.

([28]) Hearing of Mr V. de la Bachelerie, France Télécom's auditor, before the above-mentioned commission of enquiry: 'By law, we have to put into effect the alert procedure as soon as a number of criteria and indicators appear. The procedure was not applicable before mid-2002, at which time a signal given out by the market came to our attention, namely the downgrading of France Télécom's rating. As part of our auditor's duties, we thus had to deal with the question within the audit committee and the board of directors, demanding that board members be provided with a short-term liquidity plan in order to cope with the "liquidity wall" problem. It must be said that this constraint appeared at a late stage, in so far as the company had, up to that time, the means with which to refinance itself and had, moreover, introduced substantial financing measures, including jumbos. Consequently, when the liquidity wall appeared with the downgrading of the rate, we ask for an update of the cash flow forecasts. At the time of the half-yearly accounts, which were adopted at the beginning of September 2002 and finalised at the board meeting on 12 September 2002, a review was carried out of the liquidity situation in the short term — liquidity visibility being assessed over the short term, that is to say, less than a year. The situation, which was by then critical, was made official in the notes annexed to the financial statements on 30 June 2002'.

([29]) The wording of the French Government's declarations is reproduced in paragraph 204 below.

([30]) Goldman Sachs: 'FT was on the brink of "junk" status with both Moody's and S & P's'.

([31]) *Off Watch; Outlook Stable; Teleconf 3:30PM BST Today*, Standard & Poor's Ratings Direct (12.7.2002)

([32]) Hearing of Mr Thierry Breton, France Télécom's CEO, before the National Assembly's Economic Affairs Committee on 11.12.2002: 'He pointed out that the financing plan that had been implemented had not been adhered to and matters had grown worse at the beginning of 2001 with the result that a liquidity crisis was foreseeable by the summer of 2003 … Mr Breton stated that, threatened with a suspension of payments, the company was in a state of shock … owing to the scale of its debt, as it had to find enough liquidity to reimburse EUR 15 billion in 2003 and again in 2004, and EUR 20 billion in 2005'.

([33]) Senate, 21.11.2002, opinion presented on behalf of the Committee on Economic Affairs and the Plan (1) on the draft Finance Act, 2003, adopted by the National Assembly.

([34]) These figures have been taken from the annex to the French authorities' letter of 3.12.2002. Even so, on p. 25 of their letter, the French authorities estimate at EUR 15 billion the amount of outstanding bonds coming due in 2003. A similar difference is to be found in the estimate of the amount of bonds coming due by the end of 2004, which is put at EUR 18,8 billion in Annexe 2 and at EUR 23,9 billion on p. 20 of the letter.

([35]) See the report drawn up on behalf of the commission of enquiry into the management of public undertakings with a view to improving the decision-making system, registered at the office of the President of the National Assembly on 3.7.2003 ('the commission of enquiry report', or 'commission of enquiry' for short): 'The commission wished to carry out a precise analysis of the strategy and procedure with regard to the international acquisitions engaged in by France Télécom and EDF in view of their serious consequences for both companies' accounts (in the case of France Télécom, the losses attributable to the exceptional provisions and amortisations relating to acquisitions during the period 1998-2002 amounted to EUR 28,5 billion for 2001 and 2002). Pretty much the same factors are at play: haste in carrying out huge acquisitions (in one year, from 1999 to 2000, France Télécom devoted EUR 65 million to this), insufficient attention to the economic, political or geopolitical risks, particularly imprudent financing arrangements … In this climate of disquiet, urgency and doubt, the company embarked as from 1999 upon an ambitious and disorganised external growth programme, according priority to access to the UK and German markets'.

See also the press release of the Ministry of Economic Affairs and Finance of 5.12.2002: '… the company is faced today with an unbalanced financial structure and a need for own funds and refinancing in the medium term. This situation is due to the failure of past investments, which were carried out badly at the peak of the financial bubble, and, more generally, to the reversal of the markets. France Télécom's inability to finance its growth other than through debt has made matters worse'.

([36]) 'According to the information communicated by the French authorities, this level of indebtedness is due to the fact that, since 1999, France Télécom has undergone very considerable external growth, which it has financed entirely by borrowing, without resorting, like its competitors, to mechanisms for increasing capital or exchanging shares owing to the legal obligation aimed at ensuring that France Télécom's capital is majority-held by the State. The French authorities have also referred to the reversal of the markets, which has led to successive debt plans not being implemented … In the course of 2000, the company thus financed its acquisitions massively on the bond and banking markets: France Télécom's total long-term loan issues reached €59 billion in 2000-01, and the "€15 G" credit line is itself no more than the partial refinancing of acquisition financing via bank loans set up in mid-2000 to the tune of €30 billion ...' (paragraphs 20 and 21 of the opening decision, unofficial translation).

([37]) France Télécom press release of 5.12.2002, p. 2. See also hearing of Mr Thierry Breton, France Télécom's CEO, before the Economic Affairs Committee on 11.12.2002: 'during the course of 2000, carried out acquisitions worth a total of EUR 106 billion (purchase of Orange plc, NTL, Equant, TPSA)'.

([38]) Hearing of Mr Thierry Breton, France Télécom's CEO, before the above-mentioned Economic Affairs Committee meeting: 'In total, he observed, out of approximately EUR 100 billion worth of purchases, 75 was used to develop the strategy in the mobiles sector, 10 billion being invested in TPSA, 11,2 billion in Mobilcom and 9 billion in NTL'. See also the report by Goldman Sachs of 26.9.2002, which explained that the debt had been 'amassed through a series of transactions in 2000, mainly the acquisition of Orange and the Mobilcom joint venture'.

([39]) Above-mentioned commission of enquiry: 'In the case of Orange, which contributed decisively to the explosion of the group's debt'.

Senate information report No 274, attached to the minutes of the sitting of 21.2.2002: 'On 29 May 2000, France Télécom and the Vodafone group concluded an agreement whereby France Télécom was to acquire, from Mannesmann, all the shares comprising the capital of Orange plc, the British mobile telecommunications operator. The agreement was executed on 22 August 2000 by the purchase, by France Télécom, of 664 743 658 Orange shares for EUR 21,5 billion in cash and the transfer, from Vodafone to France Télécom, of 544 559 931 Orange shares, paid for by the issue of 129 201 742 France Télécom shares at the price of EUR 140,2 each, with Vodafone agreeing to abstain from exercising the voting rights attached to those shares. Concomitantly, France Télécom granted Vodafone a series of sell options on the France Télécom shares which had been issued to it and Vodafone granted France Télécom a buy option on all or part of its France Télécom shares. France Télécom immediately repurchased from Vodafone 15 355 531 France Télécom shares at their issue price, with the result that Vodafone held no more than 9,9 % of France Télécom's capital … Following the stock exchange listing of Orange SA on 13 February 2001, Vodafone and France Télécom reached an agreement on 28 February 2001 on the arrangements for the sale to France Télécom of the 113,85 million France Télécom shares still held by Vodafone. This agreement laid down the overall arrangements for exercising the sell and buy options on the France Télécom shares held by Vodafone and fixed at approximately EUR 11,63 billion the total price of these shares … The third payment may be subject to a supplement … The supplement might come to approximately EUR 1,5 billion ... On the basis of this agreement, the total cost of acquiring Orange plc comes to EUR 35 472 million'.

See also the report of the above-mentioned commission of enquiry: 'The 43,2 billion purchase (reduced to EUR 35,4 billion in February 2001) was financed half in cash (EUR 21,5 billion) and half by the exchange of shares (EUR 18,1 billion). On this last point, however, France Télécom undertook to repurchase the shares issued at a minimum price of EUR 104. There was scarcely any doubt that the seller would insist on these repurchase options being exercised … And, owing to the autumn 2000 stock market collapse, the risk that the French group might be forced to pay for Orange wholly in cash materialised, with two payments to Vodafone of EUR 6,631 billion and EUR 4,973 billion in March 2001 and 2002'.

(40) Commission of enquiry: 'It was in these difficult circumstances that the idea of buying into Mobilcom's capital got off the ground … Evidently, the acquisition of a very large stake was not the subject of really in-depth thought despite its being fraught with considerable risk. … In March 2000, France Télécom thus invested EUR 3,7 billion in a 28,5 % shareholding, valuing the operator at 80 times its EBITDA (compared with a stock-exchange valuation before rumours of the deal emerged of the order of 65 times EBITDA), or a premium of EUR 570 million. This contribution, which initially took the form of an irrevocable guaranteed loan, was payable by France Télécom even in the event of failure to obtain the UMTS licence.

In addition, as part of a cooperation agreement of which your Rapporteur has become aware, France Télécom undertook to give Mobilcom, without restriction, the financial support necessitated by participation in the bidding mechanism and the development of UMTS activity in Germany ... In return for these commitments, the risks brought by Mobilcom were considerable. The business plan drawn up in support of the operation seems to have been highly imperfect. As regards first of all the development of UMTS, the price of licences was estimated at EUR 2-3 billion, whereas the British auction sales in March and April 2000 highlighted the ongoing licence inflation. In August 2000, the German licences reached EUR 8,4 billion, and still France Télécom did not think of withdrawing despite having invested two months earlier EUR 43 billion in the acquisition of Orange (emphasis added) ... It was not until the summer of 2002 that two auditing exercises were launched to look into the German operator's prospects. These revealed the company's extreme fragility, the weakness of its customer base and the manifest impossibility of obtaining a return on the investment'.

(41) Commission of enquiry: 'It should be pointed out, moreover, that, concurrently with this major acquisitions drive [NTL, Mobilcom, Orange], France Télécom was also forging ahead with opportunistic acquisitions which were merely peripheral to its international strategy. Even if their industrial value was often real, they needlessly increased the operator's exposure to industrial risks and added to its financial commitments ... Once again, even if the investment may have seemed attractive, questions may be asked about its scale (EUR 7,69 billion, to which must be added EUR 1,5 billion for the repurchase option granted to the other party and an investment programme worth EUR 6,7 billion over 7 years, which was, however, supposed to be largely self-financed), at a time when, owing mainly to the acquisition of Orange, the group's financing capacity was very largely saturated (with an indebtedness more than 2,7 times own funds) and when clear signs were appearing of a stock market crisis ... What is one to think, therefore, of Mr Michel Bon's statement before your commission on this transaction: "It would have been preferable to call it off, but it was too late ...".

The TPSA example is enlightening. The French operator bid for the historic Polish operator at the time of its privatisation in September 1999.

(42) Commission of enquiry: 'In July [1999], France Télécom wished to seize the opportunity of penetrating the British market by becoming NTL's reference shareholder. The plan had a sound industrial justification … In all, the French operator committed EUR 8,122 billion to an investment which, as soon as the Orange repurchase became a real possibility, lost almost all strategic interest and over which, moreover, it had only minority control. The lack of seriousness with which the management seems to have analysed the situation does not cease to astound'.

(43) 'The Ministry of Economic Affairs, Finance and Industry denies that Mr Thierry Breton has accepted the chairmanship of France Télécom in place of Mr Michel Bon'. Press release of the Minister for Economic Affairs and Finance of 12.9.2002, Joint Ministerial Technical Committee.

(44) Press release of the Minister for Economic Affairs and Finance of 13.9.2002, *Financial situation of France Télécom*.

(45) 'Moody's changes France Télécom and Orange's outlook to stable from negative and affirms the Baa3 long-term debt ratings and prime-3 short-term rating', MOODY'S INVESTORS SERVICES, 13.9.2002. The relevant part of the press release states: 'Moody's have taken increased comfort from the government's statement, which once again confirmed their strong support for FT. Whilst Moody's concerns regarding the overall level of financial risk and particularly FT's weak liquidity position remain, Moody's has grown more comfortable with expectation that the French government will act in a supportive manner, if FT started to encounter difficulties with its debt repayment schedule' (emphasis added).

([46]) Press release of the Minister for Economic Affairs and Finance of 2.10.2002, *France Télécom*.

([47]) France Télécom press release of 5.12.2002, p. 1.

([48]) P. 27 of the French authorities' letter of 3.12.2002.

([49]) Press release of the Minister for Economic Affairs and Finance of 4.12.2002, *State support for the action plan approved by France Télécom's board of directors*.

([50]) See also France Télécom's annual report for 2002: 'On July 29, 2002, France Télécom issued a bond that is only redeemable in STMicroelectronics shares at a rate of 6,75 % and for a total amount of €442 million and maturing on August 6, 2005. The rates obtained are indexed on those of the money market, increased by a margin'.

([51]) AFP, 13.12.2003: 'France Télécom has launched a new stage in its refinancing plan via the bond market with a EUR 3 billion debenture issue …. The terms will be known before the end of the week'.

According to an article in the *Financial Times* of 15.1.2003: 'FT will today settle investor doubt about its cash flow situation in 2003 by raising €5,5 billion in the bond market … It would now have all the cash it needs to honour €15 billion of debts that falls due for repayment this year … FT also faces €35 billion of debt repayments in 2004 and 2005'.

([52]) Research France Télécom, STANDARD & POOR'S RATINGS DIRECT, 17.12.2002: 'Since July 2002, support from the French state has been a key rating factor, underpinning the group's investment-grade status'. (emphasis added). This statement follows that of 5 December: 'Standard & Poor's rating services said today that it has affirmed its BBB- long term and A-3 short term corporate credit ratings [on FT] … Since July 2002 Standard & Poor's has indicated that expected support from FT's 56 % shareholder, the French State, is a likely factor underpinning the group's investment–grade status. The French State's announcement today that it will immediately grant a €9 billion shareholder loan to help FT face its 2003 debt obligations is viewed by Standard & Poor's as strong evidence of this support' (Standard & Poor's, 5.12.2002) (emphasis added).

([53]) Research France Télécom, STANDARD & POOR'S RATINGS DIRECT, 17.12.2002: 'The state's December 2002 announcement that it will grant a €9 billion shareholder loan, coupled with its commitment to subscribe to a €15 billion capital increase, underscores this support and provides significant credit protection for FT's debtholders. Although the rights issue's timing has not been specified yet, FT and the state's targets in this respect meet Standard & Poor's expectations for the ratings. While market conditions may challenge the operation, the state's commitment to subscribe to the equity injection — so as to at least maintain its stake — strongly mitigates execution risks'.

([54]) This factor was still very important to S & P on 17 December 2002. Likewise, it was crucial as far as Moody's was concerned in February 2003. In its analysis of the Company's fundamentals, the latter agency took into account (i) the fact that France Télécom was the largest French fixed and mobile telephony operator; (ii) the possible privatisation of the Company ('FT's path from Government Entity to Private Corporation'; (iii) in the section entitled 'Government seen As Supportive', the fact that 'the French government has consistently stated its support for FT and its willingness to provide financial support if required, thereby addressing potential liquidity concerns. (emphasis added) This support has been evidenced by ERAP's providing a €9 billion loan facility to FT, which pays cash interest, but is only repayable in FT's equity, upon maturity in 18 months time … Moody's factors government support into the Baaa3 rating'. (emphasis added); and (iv) in the section entitled 'Risks/weaknesses', the fact that 'the financial risk of the highly leveraged FT is not commensurate with investment grade (compensated by strong operational performance/implicit support of French government)'. (emphasis added)

However, after the capital increase, the factor was no longer taken into consideration and the credit rating was based clearly on France Télécom's financial data. For example, on 14 May 2003 S & P wrote: 'On May 14, 2003, S & P raised its long and short term corporate credit ratings on … FT to BBB from BBB- …. The action follows FT's recent €15 billion rights issue and S & P review of the new management's business strategy for the group as well as the debt-reduction potential arising from its plan to boost cash flow generation during the next three years'.

([55]) OJ C 288, 9.10.1999, p. 2.

([56]) Commission Decision 2001/89/EC of 23 June 1999 conditionally approving aid granted by France to Crédit Foncier de France (OJ L 34, 3.2.2001, p. 36).

([57]) Bouygues Telecom mentions, on page 25 of its comments of 22.1.2003, a judgment of the Court of Cassation, Commercial Chamber, of 9.7.2002, No 1414 FP-P.

([58]) Memo from Mr Sureau dated 14.1.2004.

([59]) The author of which wishes that his identity be kept confidential.

([60]) Letter dated 22.7.2003 from the Directorate for the Budget, captioned 'Listing of the implicit or explicit guarantees granted by the State'.

([61]) Bouygues Telecom also refers, in its comments of 11.4.2003, p. 14, to the recourse to ERAP in order to carry out the support operation and to the various laws concerning it, such as, for example, the law on the modification of its statutes or the granting of an explicit guarantee.

([62]) Bouygues Telecom refers to Commission Decision 2000/536/EC of 2 June 1999 concerning state aid granted by Italy to Seleco SpA (OJ L 227, 7.9.2000, p. 24).

([63]) OJ C 71, 11.3.2000, p. 14.

([64]) See Committee on Finance, the General Economy and the Plan, record No 26, sitting of 5.12.2002, hearing of Mr Thierry Breton, France Télécom's CEO.

([65]) Commission Decision 2001/723/EC of 18 July 2001 concerning the recapitalisation of the company Alitalia (OJ L 271, 12.10.2001, p. 28).

([66]) Commission Decision 96/278/EC of 31 January 1996 concerning the recapitalization of the Iberia company (OJ L 104, 27.7.1996, p. 25).

([67]) This figure covers three separate advantages: the increase in France Télécom's rating when resorting to the bond markets; the savings made in the absence of any downgrading of the debt, the latter being dependent on the rating; and the savings made through the choice of timetable.

([68]) 98/490/EC: Commission Decision 98/490/EC of 20 May 1998 concerning aid granted by France to the Crédit Lyonnais group, last paragraph of point 8 (OJ L 221, 8.8.1998, p. 28).

([69]) 'A few words from the State by way of a reminder that France Télécom's risk is ultimately a "quasi-sovereign" risk', *La Tribune*, 3.2.2003.

([70]) Point 17 of the Guidelines.

([71]) Now known as Neuf Télécom.

([72]) LDCOM refers to a report by Deutsche Bank dated 22.7.2002.

([73]) LDCOM refers to the judgment of the International Court of Justice, ICJ Reports (1974) 267.

([74]) Ministry of Finance press release of 12.9.2002.

([75]) Rouen Commercial Court, 10.3.1981, Jurisdata 1982-00382, Soc. Chapelle Darblay.

([76]) *Jurisclasseur commercial, redressement et liquidation judiciaires 1995*, section 3110.

([77]) Judgment of the Court of Justice in Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101. In this case, the press articles did not have probative force because they emanated neither from the company concerned nor from the Government.

([78]) Comments from LDCOM dated 23.6.2003, p. 23.

([79]) Idem.

([80]) LDCOM provides the following definition of 'spread': remuneration of a loan on the bond market. It corresponds to the difference between the interest rate paid by an issuer depending on its characteristics and the reference rate (long-term government bonds). The level and movement of spreads thus make it possible to visualise the risks which the markets associate with a given issuer.

([81]) LDCOM observes also that the announcement, in the TOP plan, of the introduction of a 'mobility' objective with a view to promoting the movement of staff throughout the civil service may contain aid elements.

([82]) LDCOM proposes, among other things: the prohibiting of campaigns to reconquer customers in the voice markets, the placing of a ceiling on marketing spending in the voice and high-speed Internet services markets, and a limiting of the marketing resources placed at the disposal of Wanadoo.

([83]) LDCOM proposes prohibiting the temporal or price squeeze on unbundling, imposing on Wanadoo an obligation to supply third parties for Internet retailing, increasing the profitability of alternative networks by increasing the prices of incoming interconnection and reserving for competitors the benefit of public subsidies within the framework of the deployment of networks in low-profitability areas.

([84]) Only comments relating to the control of state aid are reproduced in this Decision.

([85]) Decree No 2002-1409 of 2 December 2002 amending Decree No 65-1117 of 17 December 1967 organising ERAP administratively and financially.

([86]) Article 80 of Law No 2002-1576 of 30 December 2002 rectifying the 2002 Finance Act.

([87]) The first memorandum is a study by Yves Galmot dated 7.6.2004, the second a study by Claus-Dieter Ehlermann dated 1.6.2004, and the third a study by Michel Jeol accompanied by a memorandum from Pierre Kirch dated 11.6.2004. The economic report is a report by HSBC dated 2.6.2004.

([88]) The French authorities mention, among other things, bond issues, credit lines, treasury bills, short-term loans and securitisation and derivatives operations.

([89]) From 26.7.2002 until the presentation of the Ambition 2005 plan on 4.12.2002, France Télécom made a EUR 70 million bond issue on 26 July 2002 and issued a fungible tranche of EUR 150 million with the EUR 3,5 billion debenture loan issued in March 2001.

(*) Business secret

([90]) See paragraph 39.

([91]) Judgment of the Court of Justice in Case C-482/99 *France* v *Commission* [2002] ECR I-4397.

([92]) Comments from the French authorities of 29.7.2003, p. 8. In their comments of 4.4.2003, the French authorities state that the public shareholder's investment decision dates from 4.12.2002.

([93]) Judgment of the Court of First Instance in Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871.

([94]) Commission decision of 18.7.2001, C54/96 and N318/02, 'Third instalment of aid for the restructuring of Alitalia approved by the Commission on 18 July 2001 and new recapitalisation of €1,4 billion' (OJ C 239, 4.10.2002, p. 2).

([95]) French authorities' comments of 29.7.2003, p. 27.

([96]) See p. 8 of the French authorities' comments of 29.7.2003.

([97]) See p. 9 of the French authorities' comments of 29.7.2003.

([98]) "in the light of market conditions" is in italics in the French authorities' comments of 29.7.2003, p. 8.

([99]) See p. 9 of the French authorities' comments of 29.7.2003.

([100]) Ibid. p. 9.

([101]) OJ L 83, 27.3.1999, p. 1. Regulation amended by the 2003 Act of Accession.

([102]) Judgment of the Court of First Instance in Case T-358/94 *Compagnie nationale Air France* v *Commission* [1996] ECR II-2109. See also Commission Decision 94/662/EC of 27 July 1994 concerning the subscription by CDC Participations to bonds issued by Air France (OJ L 258, 6.10.1994, p. 26).

([103]) The principle of the protection of legitimate expectations is a general principle of Community law laid down in a long line of decisions. See, for example, the judgment of the Court of First Instance of 29 April 2004 in Joined Cases T-236/01, T-239/01, T-244/01, T-245/01, T-246/01, T-251/01 and T-252/01 *Graphite Electrodes*, not yet reported, paragraph 152. See also the judgments of the Court of First Instance of 9 July 2003 in Cases T-220/00 *Cheil Jedang Corp.* v *Commission*, not yet reported, paragraph 33, T-223/00 *Kyowa Hakko Kogyo Co. Ltd* v *Commission*, not yet reported, paragraph 38 and T-224/00 *Archer Daniels Midland Company* v *Commission*, not yet reported, paragraph 62.

([104]) Judgment of the Court of Justice in Joined Cases C-329/93, C-62/95 and C63/95 *Germany* v *Commission* [1996] ECR I-5151, paragraphs 28 and 32.

([105]) In the opening decision, the Commission indicated that these declarations might constitute factors which must be taken into account. In paragraph 70 of that decision, the Commission made a general statement (unofficial translation from the original French): 'It should also be added that an announcement made by the State of its intention to commit itself might — provided that that commitment is irrevocable and thereby breeds an expectation and a feeling of confidence on the part of the market as reflected in an increase in France Télécom's share price and in the positive reaction of the rating agencies — already involve the commitment of state resources'. It then drew a parallel between this assertion and the facts as set out in the notification by affirming that '... The announcement of the State's commitment coupled with the apparent making available of the amount of the loan lead the Commission to find that the aid might be considered as having been granted even before an agreement between France Télécom and ERAP for the provision of the credit line was signed', and it pointed out in a footnote that 'On this point, it will be recalled that in July and more particularly in September 2002 the market had already been reassured by the State's support for France Télécom' (footnote 40). Thus, when the procedure was opened, the Commission already indicated that its investigation might also cover the events of July and September 2002.

([106]) See the judgment of the Court of Justice in Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 25.

([107]) Judgment of the Court of Justice in Case 6/64 *Costa* v *E.N.E.L.* [1964] ECR 1141.

([108]) Judgment of the Court of First Instance in Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267.

([109]) Judgment of the Court of Justice in Case C-323/82 *Intermills* v *Commission* [1984] I-3809, paragraph 31.

([110]) Judgment of the Court of First Instance in Case T-67/94 *Ladbroke* v *Commission* [1998] ECR II-1, paragraph 52.

([111]) Above-mentioned judgment in *Air France*.

([112]) See, for example, 'Moody's now expects that a combination of this facility headroom under the existing EUR 15 billion syndicated facility and the free cash flow will enable debt maturities of EUR 15 billion to be repaid during the next 12 months.' (Moody's, 9.12.2002)

([113]) Judgment in *Stardust*, cited above, paragraph 36. See also the judgments of the Court of Justice in Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and Case C-6/97 *Italy* v *Commission* [1998] ECR I-2981, paragraph 16.

([114]) Judgment of the Court of Justice in Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 43 and judgment of the Court of First Instance in *EPAC*, cited above, paragraph 80.

([115]) Such as the adoption of the law extending the company objects of ERAP or the adoption of the Amending Finance Act granting ERAP a EUR 10 billion state guarantee.

([116]) ERAP 'has already made available to France Télécom a shareholder loan which will be consolidated when the company's capital base is strengthened' (Finance Committee, National Assembly, Record No 28, hearing of Mr Alain Lambert). See also slide 42 of 'France Telecom presentation to investors of December 5th, 2002', where the French state back-up facility is described as being immediately available. The market was convinced that the loan was in place. See, for example, 'The French State's announcement today that it will immediately grant a €9 billion shareholder loan …') (S & P, 5.12.2002); The confirmation follows FT's announcements that a EUR 9 billion loan facility has been put in place via ERAP ….) (Moody's, 9.12.2002).

([117]) According to the French authorities, the draft was sent to France Télécom on 20 December. The draft, however, is undated.

([118]) Judgment of the Court of Justice in Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11.

([119]) Judgment of the Court of Justice in Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289.

([120]) For example, France Télécom has set up a joint venture with Deutsche Telekom and Enel in Italy.

([121]) The importance of declarations by the public authorities for purposes of applying Community law is generally recognised. In a case involving the encouragement by a State of actions presented in an official speech by a representative of the Government but carried out by (legally) independent (but State-controlled) bodies and having effects contrary to the Treaty, the Court of Justice held: '[that] such a practice cannot escape the prohibition laid down by Article 30 of the Treaty solely because it is not based on decisions which are binding upon undertakings. Even measures adopted by the Government of a Member State which do not have binding effect may be capable of influencing the conduct of traders and consumers in that State and thus of frustrating the aims of the Community as set out in Article 2 and enlarged upon in Article 3 of the Treaty' (Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, paragraph 28). Mention may also be made of the recent judgment of the Court of Justice in Case C-1/00 *Commission* v *France* [2001] ECR I-9989, in which the Court punished an infringement (consisting in failing to comply with a decision) evidenced by a refusal mentioned in a press release. More particularly as regards aid, the Court of First Instance has held, for example, that promises made by public authorities are relevant as regards the criterion concerning inducement (Case T-126/99 *Graphischer Maschinenbau GmbH* v *Commission* [2002] ECR II-2427).

([122]) *Les Échos* No 18695, France, Friday 12 July 2002, p. 2, France Télécom interview: 'We shall take appropriate measures when the time comes'.

([123]) See in this connection the *Financial Times* article dated 12 May 2004.

([124]) The link between the declarations is shown, for example, by the phrase 'as has already been indicated' in the October 2002 press release, which refers back to the July and September 2002 declarations.

([125]) '3/In the light of the management's action plan and the investment return prospects, the State will participate in the EUR 15 billion

strengthening of the company's capital base in proportion to its share in the capital, giving an investment of EUR 9 billion. The State shareholder intends to act like a prudent investor.

It will be for France Télécom to work out the detailed arrangements and precise timetable for the strengthening of its capital base. The Government wants the greatest account to be taken during the operation of the situation of individual shareholders and of employees with shares in the company.

To enable the company to launch a market operation at the most opportune moment, the 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 France Télécom's disposal'.

([126]) See Moody's 24 June press release, referred to above.

([127]) See Article 1181 of the French Civil Code, which provides that 'An obligation contracted under a condition precedent is one which depends either on a future and uncertain event, or on an event having presently happened, but still unknown to the parties'. The second definition is clearly not relevant in the present case.

([128]) 'Nevertheless the state's indication underpins FT's investment grade credit quality'. Moreover: 'F. Mer has ruled out any privatisation of the group but has clearly pledged the unfailing support of the State, which owns 54,5 %, in the event of any financing problems. … One trader has said that this is the first time the Minister for Finance has expressed himself so clearly on the France Télécom case. … Everything now turns on the form the State's support takes'. Factiva, Reuters — 12.7.2002, 'Stock exchange — FT takes off after Mer's remarks.' And: 'FT's short term risk has been mitigated by the French government said S & P analyst Guy Deslondes in a conference call. […] Friday's rating action took into account S & P's confidence that the French government will help FT refinance itself, at least for its 2003 obligations. The stable outlook shows that the rating has bottomed out, added Deslondes'. 'France Telecom Avoids Liquidity Crisis Thanks To Gvt'. Factiva, Dow Jones Capital Market Report, 12.7.2002.

([129]) Cited above. See also Decision 94/662/EC, referred to above.

([130]) The State's direct approaching of the rating agencies shows clearly that the declarations were the expression of a clearly defined, well thought-out will. The Standard & Poor's agency states that: 'The French State – which owns 55 % of France Telecom — has clearly indicated to Standard & Poor's that it will behave as an aware investor and would take appropriate steps if France Telecom were to face any difficulties'.) France Télécom LT Rating cut to 'BBB-'; Off Watch; Outlook Stable; Teleconf 3:30PM BST Today, Standard & Poor's Ratings Direct, (12.7.2002).

([131]) See statements by France Télécom's previous CEO, Michel Bon, appearing in the press: article in *La Tribune* dated 16.9.2002 '… the downgrading is preventing the planned refinancing'; article in *Le Monde* dated 16.9.2002 'the downgrading at the end of June of the rating attributed to FT's debt by the Moody's rating agency … has denied us access to the market'; article in the *Financial Times* dated 16.9.2002 'FT cannot continue to survive when no one wants to lend us money and, on the contrary, when everyone wants to be paid on the nail. In the current markets, the refinancing of our debt is simply out of question'.

([132]) Some even take the view that the Company would not have been able to find the necessary liquidity on the market in the event of a downgrading of its credit rating. See, for example, p. 9 of the above-mentioned report by Goldman Sachs of 22.7.2002: 'If these bonds moved from the investment grade segment of the fixed income market, to "junk", i.e. high yield, they would swamp the current European high yield market … [and] we believe it would be difficult for the existing European investor base alone to absorb all France Telecom bonds'.

([133]) According to a French writer on the subject, 'There are a multiplicity of public mechanisms which make it possible to confer on borrowings a level of guarantee equivalent to that of a formal loan guarantee: the feature they have in common is that they increase the risks of uncertainty as to the amount of the State's commitments to a point where they become indefinite, without Parliament having performed in their regard its role of fixing public expenditure in advance' (A DELION, *Les Garanties D'emprunt des Collectivités Locales et de L'État*, Petites Affiches, 17.6.1998 No 72, p. 19).

([134]) See Com, 28.3.2000, D. 2000, cah.dr. aff., p. 210.

([135]) Through the concept of opposability *erga omnes*, derived from a 1985 Act. But the question is, firstly, different from that of the binding nature of the commitment and, secondly, scarcely exceptional since any opposability depends ultimately on a legislative provision.

([136]) A bond may be defined as a fixed-interest security by which the issuer undertakes to pay the lender a fixed capital sum at a specific time in the future and a series of interest payments; in other words, it is a promise to pay the capital plus interest on predetermined dates.

([137]) As indicated by NERA: 'economists and game theorists have studied extensively the importance and value of reputation. In almost any economic relationship there is some degree of uncertainty regarding the nature of the counter party. However, very often a party is involved in not a single but a whole series of similar transactions over a period of time. It is a common observation that one or both parties may seek to establish a reputation for themselves, as this may be beneficial later on'. (David M. Kreps and Robert Wilson, *Reputation and Imperfect Information*, 27 JOURNAL OF ECONOMIC THEORY 253-279 (1982)).

'Economists have studied the phenomenon of reputation acquisition rigorously over the past 25 years, and the list of publications in leading journals is sizeable. Applications of the basic notion to various fields abound, but we confine ourselves to three examples,

i.e. central banking, industrial organization and sovereign debt markets. … The acquisition of reputation is also important in the area of (international) borrowing and lending. A sovereign entity, as well as a private debtor, that fails to pay back a loan will find it difficult to attract new funding in the future. That is why countries sometimes seem to prefer an economic downturn, with all its hardships, to a situation of default'. (Jeremy Bulow and Kenneth Rogoff, *Sovereign Debt: Is to Forgive to Forget?,* 79 AMERICAN ECONOMIC REVIEW 43-50 (1989)).

'In the same vein, the French government benefits from a reputation for honouring the commitment it makes regarding its management of many commercial enterprises, and matters affecting the fiscal position of the government. It would be very costly if its word could not be believed in these matters'.

([138]) See the report by the Minister for Economic Affairs, Finance and Industry entitled *L'État actionnaire 2003*: 'On 31 December 2002, according to the latest available statistics, the State controlled, directly or indirectly, 1 616 undertakings, including 97 blue chip companies. These are undertakings with a registered office in France' http://www.paris-europlace.net/links/doc062197.htm.

([139]) For more information on this point see *La gestion de la dette publique en France: les objectifs, les instruments et la gestion des risques* by Christian Esters, École Nationale d'Administration 2000: 'The French bond market grew during the 1990s. The share of the bond market accounted for by treasury bills increased considerably between 1989 and 1993, remaining thereafter at a level of about 50 %, except in 1995, when the other bond issues on the French market suffered their second consecutive fall with the result that, despite their numbers remaining stable in absolute terms, the share accounted for by treasury bills increased sharply that year … The long-term increase in the State's share of the bond markets is a consequence of the reform of public debt management in France starting in 1986. One of the reforms consisted in changing the debt's structure: negotiable state securities replaced non-negotiable debt, leading to the strong increase in the State's share of the bond market'. http://www.ena.fr/tele/mcil99/master99esters.pdf

([140]) NERA: 'The results of an event study analysing the effect on share and bond prices of the announcement on 12th July 2002. The study shows that there is a strong positive effect: as a result of the statement, market participants believed the cash flows that France Télécom would generate were going to be higher than they would have been otherwise. Moreover the effect is strongly statistically significant: it is not the result of random fluctuations in prices … The market believed that, as a result of the statement, the French Authorities would offer more support to France Télécom than they would do in the absence of any costs of non-performance'.

([141]) Deutsche Bank *France Télécom/Deutsche Telekom Debt Liquidity and possible solution* 22 July 2002, pp. 1, 3, 8.

([142]) Deutsche Bank report dated 22.7.2002 entitled *France Télécom/ Deutsche Telekom Debt Liquidity and possible solution*: '… on July 12, 2002, S & P … downgraded France Télécom's ratings to BBB- ... The agency no longer expects France Télécom to hit the 3,5× net debt/EBITDA target by 2003, but did assign a "stable" outlook to the low triple B ratings. It seems that the stable outlook is anchored by "the French state … [which] has clearly indicated to Standard & Poor's that it will behave as an aware investor and would take appropriate steps if France Télécom were to face any difficulties." … Interestingly, S & P had initially said it was not incorporating any extraordinary support from the French government into its rating when it downgraded France Télécom's ratings to BBB in June. Since then, the agency appears to have taken an about face in stating that the conclusions of the creditwatch status follows an analysis of the company's liquidity position through the end of 2003 and a review of the French state's potential involvement in the French telecommunications market' (p. 19); 'France Télécom benefited from the market's increased confidence that the French government will in one way or another support the credit' (p. 20); 'we cannot ignore the fact that FT is majority owned by the French State and recent comments from the French finance Ministry have reassured investor that liquidity will be provided' (page 54) 'However, as we have consistently mentioned, we expect that the company will ultimately find all the liquidity it needs via the so-called "implicit government support". This could take the form of banks or the government providing the necessary loans at market prices' (p. 21). However 'what is the market price for, say, 10 bn of new debt to a BBB- credit? what is the real price for a Euro 10bn of debt to a company that is not really a BBB- credit, just treaded there because the government support? … we suspect there is no right answer to these questions, because if FT was operating in the real world, it would not be able to refinance without a debt for equity swap, in our view.' (p. 33, along the same lines, see p. 54). And again 'There have been reports in the press that the French government will stand behind France Télécom, implying that it is willing to be the "lender of last resort" to the company. These reports have resulted in a significant rally in both bonds and equity prices, with the equity rallying over 90 % and the bonds 137bp in two weeks, as nervous shorts covered position.' (p. 28); 'It is worth noting that S & P states on its recent conference call on its downgrade of FT's credit that, in general, a company generating free cash flow with debt to EBITDA of four times would qualify as a BBB- credit, the last investment grade rating. FT current BBB- rating appears to be based largely on the promise of government support providing liquidity, rather than on fundamentals' (p. 30). According

to Deutsche Bank's calculations, France Télécom's debt/EBITDA ratio was 4,9 during the second half of 2002 and 5,20 on 31.12.2002.

([143]) Ibid., 'Bonds and convertibles suggest that the market is unsure of the weight of government support' (p. 3). See also p. 22.

([144]) Which indicates that the agency did not expect any subsequent downgrading.

([145]) France Télécom LT Rating cut to 'BBB-'; Off Watch; Outlook Stable; Teleconf 3:30PM BST Today, Standard & Poor's Ratings direct, (July 12, 2002). S & P seems to be referring rather to information supplied by the French Government to the agency itself, but, according to the understanding which the Commission has of the file in view of the evidence in its possession, the content of this information relates substantially to the same commitments as those contained in the announcements made in public.

([146]) *Board meeting presentation*, France Télécom stock-taking exercise, December 2002, p. 36.

([147]) In a covering letter accompanying the financial protocol signed by […] bank on 12 September 2002 concerning the bank's commitment in relation to the Company's planned capital increase, the bank's representative is unambiguous on this point: 'We feel that the planned transaction would be difficult under present conditions and that a favourable reaction by the markets to the declarations and official statements to be published at the end of the week will be a key factor in creating the necessary conditions for carrying out the transaction'.

([148]) See FT form 20-F, March 2003, pp. 15-16: 'a decrease of one notch in its long term debt rating by S & P's and Moody's would automatically increase its annual interest expense by approximately € 75 million.'

([149]) A step-up clause determines an increase in a bond's coupon rate and in the interest rates on credit lines as the credit rating declines.

([150]) Memoranda of understanding signed on 11 and 12 September 2002 between the State and the banks (condition h).

([151]) See in this connection the *Seleco* decision, referred to above, paragraph 84. See also the Opinion of Advocate General Geelhoed delivered on 27.9.2001 in Joined Cases C-328/99 and C-399/00 *Italy* v *Commission* [2001] ECR I-4035, which states (unofficial translation): 'Hence it is conceivable that these private investors were willing to contribute only after the authorities decided to grant new aid. The fact that these private investors were then willing to contribute at the same time is no longer relevant'.

([152]) See point 3.1.1.

([153]) See France Télécom's comments contained in Mr Ehlermann's report of 21.1.2004: '… during the first half of 2002, the market gradually lost confidence in France Télécom's capacity to cope with its debt and in the management team's ability to solve the problem (point 7) … once the first half's figures were known and in view of the management team's inability to reassure the markets, the French State intervened in September 2002 (point 8).'

([154]) The appointment of a new management team and the launching of a study to prepare the ground for a new industrial plan would appear to be the first steps to take in order to regain the market's confidence (see, for example, the above-mentioned HSBC report, p. 6: '… the normal attitude of a prudent investor when faced with such a situation is: (i) to re-establish confidence in the company's future by appointing a management with fresh credibility'. In the same vein, see the Deutsche Bank study of 22.7.2002, referred to above: 'If we assume a management change which would be necessary for any deal ()… With a new management the equity story could then perhaps be sold to the markets', p. 33. During the meeting with the Commission on 22.1.2003, the French authorities explained that their conduct had been comparable to that of a prudent investor as, before acting, they had awaited: the change of management, verification of the Company's financial situation, preparation of the TOP plan, the announcement of the State's support and of its intention to participate in the operation to strengthen the Company's capital base, and, lastly, the recovery of the market's confidence. The Commission agrees with the French authorities that these steps are those which any prudent private investor would have taken before entering into any commitment to support the Company. However, as shown above, the Commission has concluded that the State had committed itself to supporting France Télécom well before any of these steps had been taken.

([155]) As mentioned above, the rating agencies downgraded France Télécom's rating during the months of June and July 2002 to just above that of junk bond, stating in their press release that the rating would have been lower still had it been based solely on France Télécom's fundamentals.

([156]) See the above-mentioned Deutsche Bank study of 22.7.2002: 'In our view the risk reward balance is not currently very attractive for investors to participate in a capital increase'.

([157]) Information which was considered partial by the above-mentioned commission of enquiry. See *inter alia*: 'The State thus comes across as being both very present and too often ineffective ... The State has difficulty in giving public undertakings clear guidelines … Moreover, the State's means of control are considerably weakened by the forms taken by external growth, that is to say, the development of subsidiaries. Decisions that are fundamental to public groups are being taken at the level of subsidiaries, something which, owing to their strong identity (Orange or Equant in the case of France Télécom) and the specific details of their governance (the number of "direct" representatives of the State on their boards is small or non-existent, notwithstanding the State's controlling majority), reduces still further the time available for and the quality of the information transmitted to the public shareholder'. According to the commission of enquiry's analysis, France Télécom's internal malfunctioning was accompanied by a

bypassing of the State shareholder: 'The least that can be said is that, between 1999 and 2000, Finance Ministry officials were kept only very imperfectly informed of the major strategic decisions taken by the operator ... France Télécom's management seems to have practised vis-à-vis its majority shareholder a policy of "selective", at best incomplete and at worst non-existent, and in most cases late and partial, information', which seems to have started to improve only in 2002: 'According to documents furnished by the Ministry of Finance, the precise content of the shareholder pact will be known only when it is transmitted to the Ministry on 19 February 2002 ... the Ministry of Finance asserts that it had knowledge only in February 2002, after Gerhard Schmid mentioned its existence in the press, of the letter sent on 18 April 2000 by Mr Michel Bon to Mobilcom in which France Télécom undertook to place at the German operator's disposal, to the tune of EUR 10 billion, the financial resources needed to introduce UMTS … Certain commitments were simply not mentioned by France Télécom to its majority shareholder … It was only at the time of settlement of the option in early 2002 that the State discovered a EUR 950 million commitment.'

See also certain passages from the hearing of Mr Thierry Breton, France Télécom's CEO, before the Economic Affairs Committee on 11 December 2002, including: 'To Mr Jean Arthuis, chairman of the Finance Committee, who questioned him on the responsibilities of the State as shareholder, with reference in particular to its monitoring function, in the speedy deterioration in France Télécom's situation, Mr Thierry Breton said that, in spite of undeniable progress, the State had not yet fully grasped the modern management rules of internationally quoted companies or understood that decisions were a matter for management, under the supervision of the shareholders.'

In the introduction to its report, the said committee states that '… the "tutelage" exercised over public undertakings is criticised in two, seemingly contradictory, ways … At one and the same time, the State shareholder is insufficiently or belatedly informed and manifestly incapable of exercising effective control over sometimes questionable strategic decisions … "This luxury of precautions" and these sometimes "useless" controls "by dint of their being multiplied" lead in reality, as was stressed before your committee by Mr Francis Mer, to public undertakings "not … being controlled". It cannot but be concluded that, as Mr Elie Cohen said, "both Crédit Lyonnais and France Télécom were subject to control by the State, to the tutelage of the Treasury and to monitoring by the Court of Auditors, that is to say, to a whole series of external controls, which, in the last analysis, failed to work"'.

([158]) Which was, in fact, done only in October after the appointment of Mr Thierry Breton as CEO.

([159]) See France Télécom's comments as set out in Mr Ehlermann's report of 21.1.2004, point 90.

([160]) Point 5(a) of the Guidelines.

([161]) Mention is made here only of criteria applicable to a company in the telecommunications sector.

([162]) Mr Douste-Blazy, chairman of the commission of enquiry, said: 'The downgrading of the company's credit rating denied it access to the bond market and hence compromised its ability to borrow'. The downgrading to which he is referring is that of May 2002.

([163]) Sara Husband, *High Yield Report*, 1.7.2002.

([164]) See the statements by the previous CEO of France Télécom, Michel Bon, reported in the press: article in *La Tribune* of 16.9.2002 '… the fall in credit rating is preventing the planned refinancing'; article in *Le Monde* of 16.9.2002 'the downgrading at the end of June of the rating for FT's debt by the Moody's rating agency … has denied us access to the market'; article in the Financial Times of 16.9.2002 'FT cannot continue to survive when no one wants to lend us money and, on the contrary, when everyone wants to be paid on the nail. In the current markets, the refinancing of our debt is simply out of the question'.

([165]) See also the statement by the French authorities: 'achieving a net debt reduction and a reconstitution of the company capital [is] a sine qua non for the ultimate restoration of the company's reputation in credit markets …', p. 26 of the French authorities' letter of 3.12.2002.

([166]) Committee on Finance, the General Economy and the Plan, record No 26, sitting of 5.12.2002, hearing of Mr Thierry Breton, France Télécom's CEO. See also hearing of Mr Thierry Breton, France Télécom's CEO, before the Economic Affairs Committee on 11.12.2002: '[Mr Thierry Breton] Dwelling on the refound confidence, as witnessed by the very good reception accorded to the EUR 1,5 billion bond issue launched the previous day for the first time since 2001'.

([167]) Barclays' proposal for an exchange offer: 'We provide below preliminary thoughts on such a transaction'.

([168]) Ibid. Indicative pricing of a new 5-year transaction at 380 bp over Euribor and an estimated coupon at 8,5 %.

([169]) See the French authorities' letter of 16.2.2004.

([170]) See the French authorities' comments of 4.12.2003, 22.1.2004 and 16.2.2004.

([171]) The French authorities refer to five bond issues made between 26.7.2002 and 23.12.2002, worth in the case of the bonds issued before the announcement of the Ambition 2005 plan (5.12.2002) a total of EUR 220 million, to which must be added an amount of EUR 442,2 million corresponding to the issuance of ORA.

([172]) Over the period prior to the announcement of the Ambition 2005 plan on 5.12.2002.

([173]) The average is EUR 1,5 billion.

([174]) EUR 442,2 million.

([175]) Such issues were made in December 2002 and January 2003.

([176]) It is worth recalling in this connection certain passages from the hearing before the commission of enquiry of France Télécom's auditors:

'Mr Edouard Salustro: Mr Deputy, allow me to draw attention to something you know better than anyone else. Before expressing his opinion on a set of financial data, the auditor asks himself whether the company is capable of the economically justified pursuit of its business. It is the first question, a basic principle which he goes on to state in the accounts. Afterwards, the question no longer arises ... as it has already been answered.

Mr Xavier de Roux: You considered, therefore, that the continuation of the business went without saying.

Mr Edouard Salustro: No! I mean, of course!… I wasn't there!…

Mr Vincent de La Bachelerie: It did not necessarily go without saying, and we are in fact monitoring …'.

Even clearer on this score is the explanation given by Mr Bon, France Télécom's former CEO, before the same commission of enquiry:

'There is one fundamental point that the black scenario never included: the fact that access to the capital market was closed off to us. We had never entertained that possibility because we thought that the State's presence as majority shareholder would prevent the market for contemplating France Télécom's bankruptcy without its even being necessary for the State to voice its support. This view

was shared by almost all market operators up until the time when one of the three rating agencies — and one only — decided that France Télécom was on the verge of insolvency and reviewed its rating, denying it any market access overnight ... When, in June, that one rating agency delivered its opinion and we were denied market access, I knew that, unable to borrow again, France Télécom would be in payment difficulties a year later, towards the end of the first half of 2003'.

See, along the same lines, the HSBC report of 12.6.2004, page 11: 'all in all, FT was not a firm in difficulty inasmuch as its business was healthy, but it did suffer from an unsuitable financing structure with a lack of capital and excessively short debt-refinancing periods, coupled with a crisis of confidence on the part of the markets born of the uncertainties to which this state of affairs gave rise'.

([177]) Case 223/85 RSV v Commission [1987] ECR 4617.

([178]) Case C-5/89 Commission v Germany [1990] ECR I-3437.