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Court of First Instance of the European Communities

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Judgment in Joined Cases T-427/04 and T-17/05
France v Commission and France Télécom v Commission

The Court of First Instance confirms the Commission decision ordering the recovery of aid granted to France Télécom

The Commission rightly took the view that France Télécom had received State aid each year from 1994 to 2002

France Télécom is a public limited company incorporated under French law whose object is, *inter alia*, to provide all electronic communications services, where necessary to provide universal public service for telecommunications and mandatory services, and also to establish and operate all networks distributing radio, television or multimedia broadcasting services.

France Télécom was established, in the form of a *sui generis* public law corporation on 1 January 1991. On 31 December 1998, France Télécom was converted into a national undertaking, in which, at the material time, the State held directly or indirectly more than half of the share capital.

Business tax is a local tax payable each year in France by natural or legal persons regularly carrying on a self-employed business. By way of derogation from the business tax regime, two successive taxation schemes were set up in favour of France Télécom, namely a transitional scheme, applicable from 1 January 1991 until 31 December 1993, followed by a definitive scheme, which applied from 1 January 1994 onwards. The latter scheme was abolished with effect from 31 December 2002.

Under the transitional scheme (1991-1993) France Télécom was not liable, in particular, to corporation tax or local taxes including business tax. In exchange, France Télécom had to pay a levy fixed annually by legislation.

The definitive scheme (1994-2002) provided that France Télécom was subject to the ordinary tax system from 1 January 1994, with the exception of direct local taxes (including business tax). With respect to those direct local taxes, special conditions were laid down regarding the rate, the base and the taxation arrangements.

Those two schemes were examined by the Commission which adopted a decision¹ on 2 August 2004, according to which the transitional scheme did not constitute State aid. However, the Commission took the view that the difference between the business tax actually paid by France Télécom and that which should have been paid between 1 January 1994 and 31 December 2002 constituted State aid incompatible with the common market. The exact amount to be recovered was not fixed in the decision, which held that the relevant amount was to be somewhere in a range between €798 million and €1 140 million in capital, to which had to be added interest from the date on which the aid in issue was at the disposal of the recipient until the date of its recovery. The decision stated that, in any event, the exact amount of aid to be recovered would be determined by the Commission, in conjunction with the French authorities, within the framework of the recovery procedure.

¹ Commission Decision 2005/709/EC of 2 August 2004 on the State aid implemented by France for France Télécom (OJ 2005 L 269, p. 30).

Having established that France had not implemented its decision, the Commission brought an infringement action before the Court of Justice. By judgment of 18 October 2007, the Court of Justice found against France on the ground that it had failed to implement the Commission's decision².

The French authorities and France Télécom brought an action before the Court of First Instance seeking annulment of the Commission's decision.

By its judgment today, **the Court of First Instance dismisses the actions**, holding that the Commission was entitled to find that France Télécom had received State aid each year from 1994 to 2002.

The Court of First Instance declares that the existence of such aid, on account of the annual nature of the business tax, could be established only with respect to each year and not as an overall sum from the date of entry into force of the tax scheme specific to France Télécom. In the same way, the Court considers that on the basis of the facts provided by France during the administrative procedure, the Commission could also validly conclude, in the contested decision, that that aid was given and take the view that France and France Télécom could no longer challenge the material facts before the Court.

The Court draws two conclusions in particular from those findings.

First, since France and France Télécom have not managed to prove the existence of a causal link between the introduction of the levy to replace all the taxes normally payable by France Télécom in respect of the years 1991 to 1993, on the one hand and the special tax scheme for France Télécom in respect of business tax for 1994 to 2002, on the other, the amounts paid from 1991 to 1993 do not offset the advantage France Télécom received from 1994 to 2002.

Second, the Court observes that the obligation to notify measures liable to grant State aid to undertakings is specifically intended to remove all doubts as to whether those measures do actually provide for State aid. On the date on which the law which laid down the special tax scheme applicable to France Télécom from 1994 was adopted (that is in 1990), it was not certain whether that scheme would confer an advantage on France Télécom. The Court considers therefore that France should have notified that measure to the Commission. In the absence of such notification before the implementation of the tax scheme at issue, France cannot rely on compliance with the principle of the protection of legitimate expectations, unless it can prove the existence of exceptional circumstances. France has not proved the existence of such circumstances.

Furthermore, the Court reiterates the case-law according to which the calculation of the amount of aid to be recovered must be capable of being carried out without excessive difficulty, in the light of the indications in the Commission's decision. Following the interpretation that the Court of Justice gave the contested decision in the judgment declaring France's failure to fulfil obligations, the Court considers that the amount of aid to be recovered in this case could have been calculated without excessive difficulty and was at least equal to the minimum amount in the range adopted by the Commission.

Finally, the Court provides clarification regarding the procedure for the adoption of Commission decisions on State aid. It had already been held that such decisions must be adopted in their entirety by the College of the Members of the Commission. In the judgment delivered today, the Court acknowledges that, as provided for by the Commission's Rules of Procedure, the College of the Members of the Commission charges certain of its members with the task of adopting the definitive text of a decision, the substance of which has previously been approved collectively. Where that was the case, the Community Court adjudicating on the lawfulness of that decision must verify whether the College may be regarded as having adopted all the factual and legal elements of the decision concerned. The Court finds, in this case, that the formal discrepancies

² Case C-441/06 *Commission v France* [2007] ECR I-8887

between the version of the decision adopted on 2 August 2004 and the text which had been previously approved by the College of the Members of the Commission have no effect on the scope of the decision and, therefore, dismisses the argument put forward by France Télécom alleging breach of the principle of collegiate responsibility.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the Court of First Instance within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the Community institutions that are contrary to Community law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the Court of First Instance. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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