Judgment in Joined Cases C-399/10 P and C-401/10 P
Bouygues SA, Bouygues Télécom SA v Commission

The Court of Justice quashes the judgment of the General Court annulling the Commission's decision classifying the French State's declarations of support and shareholder loan in favour of France Télécom as State aid

Although this loan was not implemented by France Télécom, it conferred an advantage granted through State resources that could potentially have burdened the State budget

France Télécom SA, an operator and supplier of telecommunications networks and services, was formed in 1991 as a legal person governed by public law, and since 1996 has had the status of a public limited company. France Télécom has been listed on the stock exchange since October 1997. In 2002, the French State's participation in France Télécom's capital was 56.45%, the remainder being divided between the public (32.25%), France Télécom itself (8.26%) and employees of the company (3.04%). France Télécom's half-yearly accounts confirmed that, as at 30 June 2002, its consolidated own funds had become negative to the amount of €440 million, and that its net debt reached €69.69 billion, including €48.9 billion of bond debt falling due for repayment during the period from 2003 to 2005. At the same time, France Télécom's share prices fell significantly.

In the light of France Télécom's financial situation, the French Minister for Economic Affairs, Finance and Industry, in an interview published on 12 July 2002 in the daily newspaper *Les Echos*, stated that if France Télécom were to face any financing problems, the French State would take whatever decisions were necessary to overcome them. Then, in a press release of 13 September 2002 on France Télécom's financial situation, the French authorities stated, in essence, that the French State would contribute to the strengthening of France Télécom's capital base and would, if necessary, take steps to prevent France Télécom from being faced with any financing difficulties.

On 4 December 2002, at the presentation by France Télécom's board of directors of the action plan entitled '*Ambition France Télécom 2005*' aimed at redressing the operator's financial situation, the French State announced in a press release that it planned to participate, in the form of a draft shareholder loan contract, in the €15 billion strengthening of France Télécom's capital base in proportion to its share in the capital, giving an investment of €9 billion.

On 20 December 2002, the draft shareholder loan contract was sent to France Télécom, but it was neither signed nor implemented by France Télécom. The operation to strengthen the capital base was launched on 4 March 2003. France Télécom ended the 2002 financial year with a loss of €21 billion and a net financial debt of close to €68 billion. Its accounts for 2002 showed a rise in turnover of 8.4%.

By decision of 2 August 2004, the Commission concluded that the shareholder loan granted by France to France Télécom in the form of a €9 billion credit line, placed in the context of the declarations from July 2002, constituted State aid incompatible with European Union law. However, as the impact of this aid could not be evaluated with precision, the Commission did not order the recovery of the aid.

The decision was annulled by the General Court by a judgment delivered on 21 May 2010. [1] It held that the declarations by the French authorities from July 2012 had conferred an advantage on France Télécom which resulted from restoring the confidence of the financial markets and improving the terms of its refinancing. However, that advantage did not lead to a corresponding reduction of the State budget, so that the condition relating to financing through State resources was not fulfilled. As the Commission had based its finding of the existence of State aid on an overall examination of the declarations from July 2002, together with the shareholder loan offer, the General Court held that, for each State intervention, the Commission should have individually examined whether it conferred a specific advantage through State resources or by creating a sufficiently concrete economic risk of burdens on that budget, closely linked and corresponding to the advantage identified.

Bouygues SA and Bouygues Télécom SA and the Commission submitted two separate appeals asking the Court of Justice to set aside that judgment.

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

The Court of Justice points out that the General Court erred in law in holding that it was necessary to identify a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget, closely linked and corresponding to a specific advantage deriving either from the announcement of 4 December 2002 or from the shareholder loan offer. It follows that **the General Court wrongly required a close connection between the advantage and the commitment of State resources**, which led it to exclude immediately the possibility that those State interventions might, depending on their links with one another and their effects, be regarded as a single intervention.

State intervention capable of both placing the undertakings which it applies to in a more favourable position than others and creating a sufficiently concrete risk of imposing an additional burden on the State in the future, may place a burden on the State's resources. [2] In particular, advantages given in the form of a State guarantee can entail an additional burden on the State.

Consequently, when determining the existence of State aid, the Commission must establish a sufficiently direct link between the advantage given to the beneficiary and a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget. However, contrary to what the General Court found, it is not necessary that such a reduction, or even such a risk, should correspond or be equivalent to that advantage, or that the advantage should have as its counterpoint such a reduction or such a risk, or be of the same nature as the commitment of State resources from which it derives.

In those circumstances, **the Court of Justice sets aside the judgment of the General Court and refers those cases back to the General Court** for judgment on the arguments raised before it by France and France Télécom on which it did not give a ruling. The Court of Justice, however, gives final judgment itself on the arguments that were dealt with by the General Court.

In that regard, the Court of Justice points out that it is clear that the announcement of 4 December 2002 is inseparable from the shareholder loan offered in the form of a €9 billion credit line which the announcement expressly mentions. Furthermore, that announcement was made on the actual day the Commission was notified of the shareholder loan. In addition, the Commission rightly considered that the shareholder loan, announced and notified on 4 December 2002, conferred **an advantage** on France Télécom by enabling it 'to increase its means of financing and to reassure the market as to its capacity to meet its maturities'.

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[1] Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others* v *Commission,* see also Press Release No 48/10.

[2] Case C-200/97 *Ecotrade*.

In that regard, it can be seen from the contested decision that between March and July 2002, Moody's and S & P downgraded France Télécom's rating for credit notes to the lowest investment grade, with a negative outlook, stating that this grade had been maintained only as a result of the comments from the French State. Moreover, from 9 December 2002 at the latest, the markets could consider that the intervention of the State had ensured France Télécom's liquidity with respect to its debts for the following 12 months.

As for the condition relating to **the commitment of State resources**, the Court of Justice finds that the shareholder loan concerns the opening of a credit line of €9 billion. While it is true that France Télécom did not sign the loan agreement sent to it, the company could nevertheless have signed it at any time, thereby acquiring the right to obtain immediate payment of the sum of €9 billion.

In addition, as was pointed out by the Commission, France Télécom, in a presentation to investors on 5 December 2002, described the French State 'back-up facility' as immediately available, on the same day S & P announced that the French State would immediately grant a shareholder loan, it was indicated to the French National Assembly that the shareholder loan 'has already been made available to France Télécom', and Moody's announced on 9 December 2002 that it was confirmed that 'the €9 billion loan facility has been put in place'.

Having regard to the potential additional burden of €9 billion on the State's resources, **the Commission rightly found that the announcement of a shareholder loan was an advantage granted through State resources**.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355