STATE AIDS (TELECOMS): THE FRANCE TELECOM CASE

Subject: State aids

Industry: Telecommunications

Parties: France Telecom

Source: Commission Statement IP/03/150, 30 January 2003

(Note. Two points of particular importance to traders competing with France Telecom in the relevant markets are raised in this case. The first concerns the extent to which state aid may be granted for commercial purposes in circumstances comparable to the process for obtaining private capital. The second concerns the extent to which a special tax regime may legitimately apply to a trader competing in an open market. The result of the Commission's investigation will be important, not least because of the large sums involved, and, if unfavourable to France Telecom, may well be challenged by the French Republic in the Court of Justice.)

Reason for the investigation

The Commission has decided to begin a formal investigation into the granting to France Télécom (FT), via a public institution, of a shareholder's advance in the form of a maximum credit line of €9 billion to cover its debts. In view of the fact that the state support is provided through a complex financial transaction, the Commission will examine in detail the way in which the shareholder's advance is granted. The procedure also covers the business tax scheme applicable to FT. A formal investigation procedure does not prejudge the final decision. One of its aims is to give the Member State concerned and FT's competitors the opportunity to make their views known.

The Commission's doubts about the possible presence of aid in the two measures, the shareholder's advance and the business tax, were not dispelled after it had examined the information presented by France. Nor can it conclude from the information in its possession whether the aid, if any, is compatible with the proper functioning of the internal market. To obtain all the information necessary for a detailed assessment of the measures, the Commission has decided, in accordance with the Treaty, to initiate the formal investigation procedure.

Financial measures put in place by the State in support of FT

At the beginning of December 2002, the French authorities officially informed the Commission that FT was facing financial difficulties. To remedy the situation, the French authorities notified the Commission that they planned to increase the firm's capital by means of a rights issue to which the State and private shareholders would subscribe in proportion to their current stakes.

As the French authorities considered that it would not be possible to recapitalise FT in the near future, they announced that a shareholder's advance in the form of a credit line not exceeding €9 billion would be granted ahead of their participation in the rights issue. According to the French authorities, the advance would carry interest at market rates. On the basis of the information in its possession, the Commission cannot rule out the possibility that the financial measures put in place by the State for FT contain elements of state aid.

First, the Commission wonders whether the French authorities are providing FT with funding that it could have obtained under normal market conditions. Second, a formal investigation procedure is being carried out to determine whether the State has acted like a private investor. Inasmuch as an advance anticipates a stake to be acquired by the State in a later rights issue, such a public measure taken in the absence of any private investment cannot be regarded as concomitant with a private measure.

As regards a possible advantage conferred on FT outside normal market conditions, it seems that the French authorities themselves admit that FT was in such a parlous financial state that, until the shareholder's advance was announced, it had been unable to raise capital on the market on appropriate terms. At the same time, as the French authorities leave no doubt that the credit line anticipates the State's contribution to boosting FT's own resources, a formal investigation has to be undertaken into whether the credit line enabled FT to bring forward its return to the bond market. This is because, following the announcement and granting of the advance and presentation of the recovery plan, FT has been able to return to the bond market for the first time after 18 months and to raise very large amounts.

In addition, the conditions under which the advance would be remunerated are not sufficiently clear to rule out the possibility that FT is enjoying an advantage not available under normal market conditions. Furthermore, when the French authorities took their investment decision, they appeared to have had no guarantee as regards the confidence of the market and its participation in a rights issue, the banks having made their subscription conditional on prior examination of FT's business plan and its initial results.

Finally, the Commission also needs further proof from the French authorities that the return on the invested capital would have been acceptable to a private investor. On the one hand, FT was heavily indebted and the State's investment according to its own description was exceptional while, on the other hand, the French authorities have not provided the Commission with the full business plan for FT or any adequate evidence of a return acceptable to a private investor.

If the Commission finds in the course of its official investigation that the financial support granted by the State constitutes state aid, it will have to determine whether the rescue and restructuring guidelines apply and whether the support measures are compatible with the proper functioning of the internal market. (The Guidelines were published in the Official Journal, C.288 of 199; see paragraphs

5(a) and 6.) In view of the doubts concerning classification of the measures as aid and their compatibility with the rules on state aid, the Commission, in accordance with the case law of the Court of Justice, has decided to initiate formal investigation proceedings.

Business tax scheme applicable to FT

The investigation into the business tax scheme applicable to FT follows a complaint made in 2001. After requesting the French authorities to supply certain information, the Commission completed its preliminary analysis.
As regards the scheme, French Law 90/568 of 2 July 1990 exempts FT from the ordinary law scheme provided for in the General Tax Code. In practice, there were two schemes: a transitional scheme, then the definitive scheme. The transitional scheme, applicable from 1 January 1991 to 1 January 1994, stipulated that FT was not subject to business tax as such. From 1994, the definitive scheme provided that the business tax would be calculated and recovered according to the rules falling outside the scope of French ordinary law: the basis of assessment used is limited to the place of principal establishment, the basis of assessment for FT is reduced in relation to the tax payable by other firms, and the rate of tax payable by FT is different from the rates applied to other firms.

The business tax scheme appears to meet the criteria for defining a measure as state aid under the Treaty. It appears to be have conferred an advantage on FT inasmuch as it paid a lower business tax than it would normally have had to pay under the rules of ordinary law. The Commission cannot therefore rule out the possibility that the business tax scheme applicable to FT contains elements of state aid and it has serious doubts as to the compatibility of any such aid with the proper operation of the internal market. In view of its doubts, it has decided, in accordance with the case law of the Court of Justice, to initiate the formal investigation procedure provided for in Article 88(2) of the Treaty. ■

The Siemens/Drägerwerk Case

The Commission has decided to open a detailed investigation into a planned joint venture whereby the German company Siemens transfers its medical ventilators, anaesthesia delivery systems and patient monitoring businesses to Dräger Medical, currently wholly-owned by German Drägerwerk. Siemens and Drägerwerk would jointly-control Dräger Medical. The proposed transaction will affect markets for various kinds of hospital equipment: it will combine the two leading suppliers of ventilators and lead to high market shares in anaesthetic delivery systems.

Source: Commission Statement IP/03/100, dated 22 January 2003