

# ***CJEU 30 November 2016, Case C-486/15 P Commission v France and Orange - when should the private investor test be applied?***

*State aid - private investor test - France Télécom*

**Fay Kartner**, Legal Advisor - ICTRecht (post written when acting as Lecturer at Radboud University Nijmegen), 10 February 2017

## ***Introduction***

On 30 November 2016, the CJEU gave its judgment in the case regarding alleged State aid to France Télécom (FT).<sup>[1]</sup> The situation regarding this telecom company had received attention by the Commission since 2002. The French minister for the economy had, in a newspaper interview, made a number of statements:

*"We are the majority shareholder, with 55% of the capital ... The State shareholder will behave like a prudent investor and would take appropriate steps if [FT] were to face any difficulties ... I repeat, if [FT] were to face any financing problems, which is not the case today, the [French] 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 ..."* (cited in par. 6 of the judgment)

It soon proved that the minister would indeed regard this necessary. A notice was published that indicated that a credit line of 9 billion euros would be opened in the form of a loan contract. This specific offer had not been accepted, but it had an effect on the financial markets: FT's shares became more valuable because confidence was restored. The Commission decided to investigate the case; according to the Commission, there was State aid. It stated that: *'it is unlikely that a prudent private investor in the same position as the French State would, in the light of [FT]'s economic situation and the unavailability of any clear, comprehensive information thereon, have made any declarations of support for [FT] in July 2002'. It was even less likely that a prudent private investor 'would have granted a shareholder loan, taking on himself alone a very substantial financial risk'* (cited in par. 36).

In May 2010, the General Court annulled this first Commission decision. The main argument for this was that no State resources had been conferred upon FT. The CJEU, however, reasoned that the State budget was potentially burdened by the credit line. The case was referred back to the General Court, and the General Court considered the private investor test incorrectly applied by the Commission.

On 30 November 2016, the CJEU upheld this judgment. It was, according to this Court, correct to also take into account a situation in July 2002 (when the minister for the economy made the declarations) and relevant declarations made after that, instead of only at the time the proposal for the shareholder loan was made (December 2002).

### **Status quo**

The CJEU thus dismissed the appeal against the General Court decision annulling the Commission decision finding State aid. The reasoning of the General Court is upheld that *"(...) there had been a selective taking into account of the available evidence and that that evidence was not such as to substantiate the conclusions drawn therefrom by the Commission (...) the Commission's assessment was vitiated by a manifest error."* (par. 92) The Commission was of the opinion that the General Court had distorted the evidence, but did not specify which evidence was distorted.

The Commission was of the opinion that the General Court erred in law when determining the moment to which the prudent private investor criterion had to be assessed. It argued that this test had to be applied to the situation in July 2002, instead of December 2002, as the General Court held. The CJEU dismisses the Commission's argument. Importantly, it emphasizes that in State aid cases such as this one, when applying the private investor test to the facts, all relevant circumstances should be taken into account: *"In the present case, the declarations from July 2002 and the shareholder loan offer are inextricably linked, since in December 2002 the state of the market was distorted by those declarations, without which the offer would not have materialised or produced its effects."* (par. 114)

According to the CJEU, the General Court was right to hold that the private investor test had to be applied to the entire context of the shareholder loan offer made in December 2002. The declarations made in July 2002, in light of statements made in September, October and November 2002, further confirmed that the French authorities would support FT if there would be financial difficulties.

The CJEU considered that the moment that an investment decision is made, and the moment the investment is actually made, are not necessarily the same (par. 141). This also holds true in the current case.

The fact is relevant that a concrete shareholder loan offer was not made until December 2002; the declaration made in July 2002 was not a firm commitment (par. 142). Moreover, *"deciding in advance in July 2002 the time when the prudent private investor criterion fell to be assessed would have necessarily excluded from that assessment relevant factors that occurred between July 2002 and December 2002"* (par. 143).

The CJEU dismisses the appeal in its entirety.

### ***Discussion***

The CJEU judgment of 30 November 2016 marks the end of an extremely complicated discussion on whether France acted correctly in declaring support for its national telecom company. The Court makes it very clear that all relevant circumstances have to be taken into account when assessing whether there is State aid, in particular when applying the prudent private investor criterion. How should it take into account whether there has been a selective use of the evidence available? When is an advantage actually given to a company? Many different types of events have an influence on the way businesses operate. In this case, the statements made by the French minister for the economy, and following statements later in 2002 declaring support for France Télécom if this would become necessary (also in light of the resignation of the CEO and the appointment of a new CEO of FT, as a consequence of FT's deteriorated financial situation). The remarks made by the minister restored confidence on the capital markets, preventing a downgrading of the rating of FT's shares. If this would not have happened, a shareholder loan offer would have more costly and less likely (par. 32).

The binding offer for a credit line of 9 billion euros was only made in December 2002. In my view, the CJEU correctly stated that the declaration by the French minister for the economy has to be assessed in light of circumstances between July and December 2002) – so not the hypothetical situation of a market not influenced by declarations made that the state would save FT. After all, as the Court explains, the statements made by the minister had a particularly large influence on the financial markets and thus on the financial position of France Télécom. It is not necessary for each of the

events to lead to State aid, but it should be acknowledged how the events influence each other.

Of course, in a concrete case it can often be debated whether a prudent private investor could have taken the same decision (to give aid). This case does not provide for more clarity on when this is true; the General Court had already stated that it cannot be ruled out that a private investor would have acted in a similar manner.<sup>[2]</sup>

The outcome is that the Court assessed the situation in December 2002, in light of the declarations made earlier that year. This approach by the Court is realistic; it is however important that the Commission remains critical about declarations by a State official such as a minister causing the public to expect that a company will receive aid.<sup>[3]</sup> These statements have to be examined thoroughly. The current judgment does not change anything about the content of the test applied, only the points in time that are relevant. The declaration made in July 2002 does not constitute a State aid measure in itself, but it is part of the context of a later aid measure. The aid has been granted at a particular point in time, namely December 2002, but it has to be assessed in light of factors preceding that time.

### **Conclusion**

The CJEU case of 30 November 2016 concerning alleged State aid to France Télécom resolved a dispute that had been going on for many years. It is sometimes difficult to define which specific events, at which moment in time, have to form the framework of reference when answering the question whether the State acted as a prudent private investor would. This judgment again places an extensive responsibility upon the Commission: it has to take into account all relevant circumstances. The decision to open a credit line, which could potentially burden State resources, has to be seen in light of earlier statements and their consequences, for example on financial markets. It remains important, however, that the Commission remains critical about statements by public officials announcing potential State aid.

[1] CJEU 30 November 2016, Case C-486/15 P *Commission v France and Orange*, ECLI:EU:C:2016:912.

[2] On the market economy investor principle, see for example: James Kavanagh, Gunnar Niels and Simon Pilsbury, 'The market economy investor: an economic role

model for assessing State aid', in: Erika Szyszczak (Ed.), *Research Handbook on European State Aid Law* (Edward Elgar 2011), p. 90-104.

[3] On the tensions that can occur between different roles of the State when it is a shareholder, see for example: Leigh Hancher, 'Case C-124/10P *EDF v Commission*: Putting the market investor test to the test?', *Ars Aequi* 2013, p. 201-207.