

NEWSLETTER

September 2015

Dear Sirs,

we would like to draw attention to an interesting **judgment of the General Court of the European Union from the 2nd of July 2015 in Joined Cases T-425/04 and T-444/04**. In this judgment the General Court annulled the Commission's decision, by virtue of which loan offer awarded by France (as a shareholder) to France Telecom (now Orange) has been deemed as unlawful State aid.

The General Court of the European Union held that both the publicly announced in the media assurances to provide potential support, as well as loan offer, targeted by the French authorities for France Telecom as the company with the participation of the French state - at a time where that telephone operator undergoes a major crisis - can not be considered as public aid granted by France for this entrepreneur.

The case concerned a situation which took place in 2002, that is when the French Minister of Economy stated in several interviews that if France Telecom as a company with a majority state-owned, were to face financial difficulties, the French authorities would take the appropriate measures to overcome these difficulties.

In December 2002, France as a shareholder presented a loan offer to France Telecom. France Telecom was offered a credit line amounted to €9 billion. The offer was never accepted and France Telecom have never benefited from the credit line offered, there was neither any cash flow nor any burden on the state budget.

Nevertheless, the French government's actions – presenting the loan offer **in the context** of previously publicly made assurances about a possible support from the French government - have been recognized by the European Commission's decision from the 2nd of August 2004 as unlawful State aid. Then, as a result of an appeals filed, the case was successively fought before the General Court of the European Union and the Court of Justice of the European Union. After re-examining the case on the 2nd of July 2015 the EU Court ruled that the European Commission wrongly treated the actions of the French Government as State aid.

The key issue in this case was to assess whether the publicly presented assurances by the representatives of the French authorities about potential support, then offer loan submitted to the France Telecom, were the actions that can be considered as actions fulfilling the so-called **'the private investor test.'** The private investor test is a tool to assess whether the measures taken by public entities constitute State aid, or in fact they are actions that a reasonable investor would have taken in the given circumstances, while keeping in mind the expected return from investment and level of risk. If the entrepreneur receives support from a public entity on similar

conditions which would obtain potentially in the same circumstances from a private operator, there is no grant of State aid in such case.

In this case, the Court held that a public assurance, and afterwards the offer made by France, satisfied the private investor test. **However, it should be noted that this case was being considered while taking into account all the circumstances surrounding the grant of assurances and subsequent submission of the offer - it can not be excluded that, in relation to another company and taking into account other economic circumstances, similar actions of another European government could be treated as those which don't meet the private investor test, and thus for the actions which constitute illegal State aid granted to selected entrepreneurs - even in the absence of any real commitment to launch public funds.**
