

# COMMISSION

## COMMISSION DECISION

of 2 August 2004

on the State aid implemented by France for France Télécom

(notified under document number C(2004) 3061)

(Only the French text is authentic)

(Text with EEA relevance)

(2005/709/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

- (2) The opening decision was notified to France on 31 January 2003. After a number of substantive errors had been corrected, a corrigendum was notified to France on 7 March 2003.

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

- (3) France communicated additional information to the Commission by letters dated 4 April 2003, 15 May 2003 and 29 January 2004.

Having called on interested parties to submit their comments pursuant to the provisions cited above <sup>(1)</sup> and having regard to those comments,

- (4) The Commission's decision to open the procedure was published in the *Official Journal of the European Union* <sup>(3)</sup>. The Commission invited interested third parties to submit their comments on the aid measures in question.

Whereas:

### I. PROCEDURE

- (1) By letter dated 31 January 2003, the Commission informed France of its decision to open the formal investigation procedure provided for in Article 88(2) of the EC Treaty (hereinafter called the opening decision) in respect of financial measures introduced by the French authorities for France Télécom (hereinafter called FT or the company) and in respect of the business tax scheme applicable to that operator. A description of the facts which led to the procedure being opened is not included in this Decision <sup>(2)</sup>.

- (5) The Commission received the following comments on the subject from interested third parties:

- 21 March 2003: comments from Cable and Wireless plc and Cable and Wireless SA
- 11 April 2003: comments from Cegetel
- 10 April 2003: comments from AFORS Telecom
- 11 April 2003: comments from LDCOM

<sup>(1)</sup> OJ C 57, 12.3.2003, p. 5.

<sup>(2)</sup> See paragraphs 1 to 8 of the opening decision, which are to be considered an integral part of this Decision.

<sup>(3)</sup> OJ C 57, 12.3.2003, p. 5, hereinafter called 'decision to open the procedure' or 'opening decision'.

- 11 April 2003: comments from A <sup>(4)</sup>
  - 10 April 2003: comments from Tiscali
  - 11 April 2003: comments from WorldCom France
  - 11 April 2003: comments from B <sup>(4)</sup>
  - 11 April 2003: comments from Bouygues SA and Bouygues Telecom (BT) <sup>(5)</sup>
  - 14 April 2003: comments from Telecom Italia
  - 14 April 2003: comments from C <sup>(4)</sup>
  - 29 April 2003: comments from B
  - 30 April 2003: comments from LDCOM <sup>(6)</sup>.
- (6) The Commission transmitted the comments to France on 16 May 2003, giving it the opportunity of commenting on them.
- (7) The French authorities submitted their comments by letters dated 30 June and 29 July 2003.
- (8) The Commission received further information and documents from the third parties listed below:
- 23 June 2003: letter from LDCOM
  - 25 June 2003: letter from D <sup>(4)</sup>
  - 27 October 2003: letter from MCI
  - 16 October 2003: letter from ECTA
  - 25 June 2003: letter from E <sup>(4)</sup>
  - 7 January 2004: letter from BT
  - 16 January 2004: letter from LT
  - 19 March 2004: letter from FT
  - 5 April 2004: letter from Tiscali
  - 17 May 2004: letter from LDCOM
  - 26 May 2004: letter from BT
- 22 June 2004: letter from FT
  - 30 June 2004: fax from FT
  - 2 July 2004: fax from FT
  - 16 July 2004: fax from BT.
- (9) The Commission requested additional explanations from the French authorities by letters dated as follows:
- 11 September 2003 (answer given by the French authorities on 20 October 2003)
  - 11 November 2003 (answer given by the French authorities on 4 December 2003)
  - 12 January 2004 (answer given by the French authorities on 21 January 2004)
  - 2 February 2004 (answer given by the French authorities on 16 February 2004)
  - 1 June 2004 (answer given by the French authorities at the meeting on 16 June 2004)
- (10) The Commission forwarded the letters referred to in paragraph 8 to the French authorities on 3 May and 14 June 2004.
- (11) The Commission heard representatives of third parties at various meetings during the course of the procedure.
- (12) The Commission met the French authorities and FT on 22 January and 16 and 23 June 2004.
- (13) By fax dated 5 July 2004, the French authorities submitted to the Commission new calculations concerning the special business tax scheme. On 13, 15 and 16 July 2004, the French authorities submitted additional comments to the Commission.

## II. DESCRIPTION

<sup>(4)</sup> Party wishing that its identity be kept confidential.  
<sup>(5)</sup> To which a complaint lodged by the same companies dated 22.1.2003 was annexed.  
<sup>(6)</sup> LDCOM sent the Commission a corrigendum, which was forwarded to the French authorities on 16.6.2003.

(14) Only the special business tax scheme applicable to FT, as referred to in the opening decision, is the subject of this Decision.

(15) Inasmuch as the measure under scrutiny has already been described in detail in the opening decision<sup>(7)</sup>, a description will be included in this Decision only as far as is necessary.

(16) Until 1990 inclusive, FT's business activities were conducted by a Directorate in the Ministry of Posts and Telecommunications. As an administrative public service of the State, the former Directorate-General for Telecommunications was subject to none of the following taxes: (i) business tax; (ii) property tax on buildings and unbuilt land; and (iii) corporation tax<sup>(8)</sup>. It was endowed with a budget annexed to that of the State which was largely in surplus and which was subject to a payment to the general budget under the heading of operating surpluses as well as to certain levies for financing specific activities.

(17) Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service transformed the former Directorate-General for Telecommunications into two separate public-law entities (La Poste and FT) endowed with financial autonomy and governed by commercial law. The conferment of legal personality on these two entities should have resulted in the ordinary rules of taxation being applied to them. Under the terms of Article 1654 of the General Tax Code (*Code général des impôts*, hereafter called CGI), 'public establishments, industrial or commercial state concerns, and companies in which the State or local authorities have shareholdings shall pay under the conditions of ordinary law the duties and taxes of all types to which private companies carrying on the same operations are subject'. Consequently, FT should have been subject to the ordinary rules of taxation as from the date of its formation on 1 January 1991 (Article 1 of Law No 90-568 of 2 July 1990). However, contrary to this principle — which is enshrined, moreover, in Law No 90-568 itself<sup>(9)</sup> — the legislator introduced taxation rules derogating from the ordinary rules for FT (Articles 18-21 of Law No 90-568) in the form of two schemes: a 'transitional' scheme applicable from 1 January 1991 to 1 January 1994,

followed by a 'definitive' scheme applicable indefinitely with effect from 1 January 1994:

— 1991 to 1993: Article 19 of Law No 90-568 laid down the principle that, for a period lasting from 1 January 1991 until 1 January 1994, FT would be subject only to the duties and taxes actually borne by the State. Consequently, during that period, FT, like the State, did not have to pay taxes such as business tax, property tax or corporation tax. During that same period, and under the terms of the same article, FT had to make contributions to the State budget (in particular the civil research and development budget) 'by way of the levy for the benefit of the general budget'. These contributions were fixed annually by the Finance Acts up to a certain amount<sup>(10)</sup>.

— 1994 to 2003: Pursuant to Law No 90-568 (Article 18) and Article 1654 CGI, FT was subject to the ordinary tax system as from 1 January 1994, except for local direct taxation (property tax, business tax), with respect to which Law No 90-568 laid down special conditions concerning the rate, the basis and the taxation arrangements. According to an initial estimate by the French authorities, the advantage derived by FT from the special business tax scheme that was applicable to it amounted to approximately EUR 198 million a year<sup>(11)</sup>. On the basis of figures provided subsequently by the French authorities, the amount is said to be lower (see recitals (54) *et seq.* below). This special open-ended business tax scheme was abolished by the 2003 Finance Act<sup>(12)</sup>.

<sup>(10)</sup> Article 19 of Law No 90-568 provided as follows: 'Until 1 January 1994, La Poste and France Télécom shall be subject only to such duties and taxes as are actually borne by the State at the time of publication of this Law by reason of the activities transferred to the public operators. Until that same date, the contributions paid by France Télécom into the civil research and development budget and by way of the levy for the benefit of the general budget shall be fixed each year by the Finance Acts up to an annual amount calculated by applying to a basic amount, set for 1989 at 13 700 million francs, the consumer price index established by the National Statistical Institute and economic studies'.

<sup>(11)</sup> The report submitted to Parliament by the Directorate-General for Taxes in November 2001 on the normalisation of the taxation of France Télécom states that 'the immediate normalisation of the conditions of taxation of France Télécom in relation to business tax would involve, assuming that the rate remains unchanged [i.e. independently of decisions taken by local authorities], an over-taxation of almost 198 million euros for the company'; see the 'Report to Parliament on the normalisation of the local taxation of France Télécom', Directorate-General for Taxes, November 2001, p. 16.

<sup>(12)</sup> Article 29 of the 2003 Finance Act completely normalised the arrangements for subjecting FT to business tax as from 1.1.2003. See in this connection the report submitted by Mr Gilles Carrez on behalf of the Committee on Finance, the General Economy and the Plan on the draft Finance Act, 2003, distributed at the National Assembly on 14.10.2002.

<sup>(7)</sup> See paragraphs 25 to 33 of the opening decision.

<sup>(8)</sup> It had been subject, on the other hand, since 1988 to VAT; see the 'Report to Parliament on the normalisation of the local taxation of France Télécom', Directorate-General for Taxes, November 2001, p. 6.

<sup>(9)</sup> Although Article 18 of Law No 90-568 laid down the principle of the subjection of La Poste and FT to ordinary duties and taxes, it provided that this application of the ordinary rules had to be effected 'subject to the provisions of Articles 19, 20 and 21 of this Law'.

### III. COMMENTS FROM INTERESTED PARTIES

- (18) The comments sent by interested parties merely repeat the arguments presented by the Commission in the opening decision. Consequently, they will not be reproduced in this Decision.

### IV. COMMENTS FROM THE FRENCH AUTHORITIES

- (19) The French authorities' arguments focus on a fundamental point, namely that the specific scheme established by the State for FT did not confer any advantage on the company. The French authorities acknowledge that FT was subject to a special scheme in relation to business tax from 1991 to 2002 inclusive, but they consider that the scheme gave it no edge and in no way affected public resources, resulting in an overtaxation of FT compared with the ordinary-law situation. The French authorities base this conclusion on the following three points:

- between 1991 and 1993 inclusive, FT was subject to a levy for the benefit of the general budget which, according to the French authorities, was equivalent to payment of business tax and included (*inter alia*) the amount of the business tax itself;
- the French authorities stress that Law No 90-568 established 'once and for all' a single tax scheme applicable to FT from 1991 to 2003. They consider that an overall calculation should be made of any advantage conferred by the scheme on FT throughout the period 1991 to 2003. In their opinion, an overtaxation of FT one year might 'offset' an undertaxation of FT another year;
- according to the French authorities, the arrangements for taxing the company under the headings of business tax and corporation tax are inseparable; consequently, it is necessary to study together the various elements of taxation of FT throughout the period 1991 to 2003. As business tax enters into the calculation of the taxable result, the correction of any undertaxation under the heading of business tax should be accompanied by a downward correction of the amount of corporation tax.

- (20) Secondly, the French authorities maintain that the measure in question should be considered existing. Lastly, at the meetings with the Commission on 16 and 23 June 2004, the French authorities questioned

the validity of the calculations which they themselves had previously submitted to the Commission concerning the difference between the business tax paid by FT and that which it would have had to pay had it been subject to the rules of ordinary law. According to the French authorities, it was impossible to calculate for certain the undertaxation of FT under the heading of business tax from 1994 onwards. Consequently, in the French authorities' opinion, the Commission should not rule on this issue. By letter dated 5 July 2004, the French authorities submitted to the Commission new calculations (prepared by FT itself), which they by no means claimed to be more accurate or more precise than those submitted previously but which were intended simply to illustrate the impossibility of estimating with any degree of accuracy the advantage enjoyed by FT under the special business tax scheme from 1994 onwards.

### V. ASSESSMENT OF THE AID

- (21) Article 87(1) of the EC Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market. In the opening decision, the Commission noted that all the constituent elements of State aid within the meaning of Article 87(1) of the EC Treaty were *prima facie* present. Only the main findings of that analysis are reproduced in this Decision <sup>(13)</sup>:
- FT received special treatment in relation to business tax (introduced by Articles 18-21 of Law No 90-568);
  - this special treatment conferred on it an advantage (according to the estimates of the French authorities themselves);
  - the special provisions on business tax applicable to FT were introduced by Parliament by means of a law promulgated by the President of the French Republic, which leaves no doubt as to the imputability of this measure to the State;
  - in so far as FT paid fewer taxes than companies subject to the rules of ordinary law, there is a use of public resources;

<sup>(13)</sup> For more details see Chapter III of the opening decision.

- since FT operates in a very competitive sector, that of telecommunications, the advantages from which FT benefits distort or threaten to distort competition;
- since FT operates in markets which were gradually opened to competition from the end of the 1980s, any advantage granted to FT by the State is likely to affect trade between Member States.

### 1. The years 1991 to 1993

- (22) To analyse the business tax scheme for the period 1991 to 1993, it is necessary to examine the first argument advanced by the French authorities, according to which the levy for the benefit of the general budget paid by FT from 1991 to 1993 was in the nature of a tax and can be considered equivalent to payment of business tax according to specific procedures. On this point, the Commission would observe that, according to case law, the existence of aid cannot be denied by reason of the fact that a company benefiting from an advantageous tax arrangement is subject under a different head to heavier taxation<sup>(14)</sup>. Each tax follows a different logic and is based on different presuppositions.
- (23) As for the levy being in the nature of a tax, the Commission would first of all observe that the levy is not expressly linked by law to the business tax. There is nothing in law that says that the levy was payable in lieu of business tax. Nor was the amount of the levy defined according to the parameters which determine the amount of the business tax.
- (24) Moreover, in the opening decision, the Commission pointed out that the amount of the lump sum paid by FT to the State by way of contribution to the general budget was equivalent to the profit which the PTT paid to the State in 1989 and 1990. It considered, therefore, that the payment of this sum was akin more to a levy on FT's operating results than to individual taxation by way of business tax.

<sup>(14)</sup> The Court of Justice has held that a reduction in social charges pertaining to family allowances could not be 'made good' through an additional charge under unemployment insurance. See judgment of the Court of Justice of 2 July 1974, Case 173-73, *Italian Republic v Commission of the European Communities*, [1974] ECR 709, point 34: 'The argument that the contested reduction is not a "state aid", because the loss of revenue resulting from it is made good through funds accruing from contributions paid to the unemployment insurance fund, cannot be accepted'. See also the Commission Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy, according to which 'A selective measure might be justified by the specificity of the activity covered by it, but not by the presence of other selective measures.' (OJ L 184, 13.7.2002, p. 27, recital (35)).

- (25) Before 1990, when FT's business activities were still being conducted by a Directorate in the Ministry of Posts and Telecommunications, the budget of that Directorate was in surplus. To make up the deficits in the general budget of the State, this annexed budget was subject to a levy for the benefit of the general budget under the heading of 'operating surpluses', to which were subsequently added other levies intended to finance specific activities. In 1988, the Government committed itself to stabilising until 1992 the contribution from the budget annexed to the general budget at FRF 13,7 billion for 1989 and FRF 14 billion for 1990. It is this amount that was taken as a basis by Law No 90-568 when it fixed the levy imposed on FT for the benefit of the general budget for the years 1991, 1992 and 1993<sup>(15)</sup>.

- (26) More generally, the characteristics of the levy (lump-sum payment, amount fixed in the light of the company's past operating surpluses) are not those of traditional taxation.

- (27) In view of its origins and how it is defined, the levy therefore resembles more a participation in the operating results.

- (28) However, even if the levy is not expressly linked by law to the business tax, it is linked to the specific tax scheme applicable to FT. Law No 90-568 provided, in the same chapter entitled 'Taxation' and in the same article, that FT did not have to pay any taxes (other than those paid by the State) and that it had to pay a levy for the benefit of the general budget, these two provisions being applicable during the same period (from 1 January 1991 to 1 January 1994).

- (29) Additionally, the levy possesses features which are typically those of a tax, namely a pecuniary payment collected definitively, without any counterpart and through authority by the State or another public entity. Lastly, it procures resources for the State.

<sup>(15)</sup> FT had to pay into the general budget an amount fixed each year by the Finance Acts 'up to an annual amount calculated by applying to a base, fixed for 1989 at 13 700 million francs, the consumer price index established by the National Institute for Statistics and Economic Studies' (Article 19 of Law No 90-568).

(30) It would seem, therefore, that the objective of Article 19 of the Law was to establish a three-year transitional period during which FT would continue to pay to the State the same amounts as in the past by way of participation in the operating results and at the same time would be exempted from payment of all taxes (other than those paid by the State). The immediate subjection of FT to the ordinary rules of taxation would have involved, *inter alia*, the payment of local taxes (benefiting local authorities and not the general budget of the State, such as, for example, business tax) — which might have led to a reduction in FT's contribution to the national budget (in so far as a new form of participation in the operating results was not immediately introduced).

(31) In conclusion, it would appear that the levy for the benefit of the general budget to which FT was subject from 1991 to 1993 inclusive was of a mixed nature, being partly in the nature of a tax and partly in the form of participation in the operating results, in so far as it was intended to ensure that, during a three-year transitional period, the company paid to the State an amount equivalent to that which it would have paid had it paid tax under the conditions of ordinary law, plus an additional amount corresponding to a levy on the operating results. In other words, the special levy which FT paid to the State between 1991 and 1993 inclusive performed a dual function: it was tantamount in part to the payment of various taxes and — for the remainder — to participation by the State as owner of the company in the latter's results.

(32) In the light of the above (and in particular of the partly tax-like nature of the levy and of the link between the levy and the specific tax scheme applicable to the company), even in the absence of explicit textual indications to the effect that the levy has to be considered a specific method of payment of business tax, the Commission concludes that during the years 1991 to 1993 inclusive the levy in question was tantamount in part to the payment of taxes, including the payment of business tax, and — for the remainder — to participation by the State as owner of the company in the latter's operating results.

(33) In this connection it should be added that, according to the information submitted by the French authorities for the years 1991 to 1993 inclusive, the levy in question was larger than the taxes FT would have had to pay had it been subject to the ordinary business tax and corporation tax arrangements. It follows from this that, during that period, FT gained no advantage from the business tax exemption. However, the Commission

would point out that, during the years 1991 to 1993 inclusive, FT was subject only to the duties and taxes actually borne by the State (in particular it did not pay any property tax). Consequently, to make sure that the exemption from business tax and its replacement by the levy in question had not conferred any tax advantage on FT, the Commission asked the French authorities whether the levy was higher than all the other taxes FT would have paid had it been taxed under conditions of ordinary law (and not just higher than the sum of business tax and corporation tax)<sup>(16)</sup>. At the meetings with the Commission on 16 and 23 June 2004, the French authorities confirmed that the levy was indeed higher than the sum of all the other taxes. Consequently, the Commission considers that FT did not benefit from any advantage during the period between 1991 and 1993 inclusive in so far as it was subject to a special levy of a mixed nature, being tantamount in part to the payment of various taxes and — for the remainder — to a levy on the operating results, which special levy was higher than the sum of the duties and taxes from which FT was exempted.

## 2. The years 1994 to 2003

(34) In order to analyse the business tax scheme for the period 1994 to 2003, it is necessary to examine the second and third arguments advanced by the French authorities.

(35) The French authorities stress that Law No 90-568 established 'once and for all' a single tax scheme applicable to FT from 1991 to 2002 inclusive. In their view, an overall calculation should be made of any advantage the scheme may have conferred on FT throughout the period 1991 to 2002. In their opinion, an overtaxation of FT one year might 'offset' an undertaxation of FT another year. More precisely, the French authorities maintain that the undertaxation of FT for the 'definitive' period (1 January 1994 to 1 January 2003) is offset by an overtaxation (due to the payment of the levy) during the 'transitional' period (1 January 1991 to 31 December 1993). This is claimed to be because the amount paid by FT to the State by way of the levy for the years 1991, 1992 and 1993 was so much higher than under the ordinary rules of taxation that it exceeded any advantage derived by FT from the specific arrangements for fixing the business tax during the 'definitive' period.

<sup>(16)</sup> In view of the fact that the procedure was initiated in respect only of business tax and not of property tax and corporation tax, this Decision covers only business tax. In any event, for the period concerned, any other exemption from other taxes by the French State for FT's benefit would be time-barred on the date of this Decision within the meaning of Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

(36) This argument cannot be accepted. Law No 90-568 established two clearly distinct taxation schemes:

— a 'transitional' scheme lasting from 1991 to 1994, during which time FT was exempted from all taxes other than those paid by the State and had to pay to the State a lump sum by way of a 'levy for the benefit of the general budget';

— as from 1994, a scheme intended to be definitive (the Law did not lay down any end date for this scheme and in 2003 a new law was needed to abolish it); under this scheme, FT was subject under ordinary-law conditions to all taxes except property taxes and business tax, for which special conditions were laid down.

(37) According to case law, aid given to a company cannot be offset by a specific charge imposed on the same company on another score. The Court of Justice has thus held that a reduction in social security contributions pertaining to family allowances which benefits certain companies cannot be 'made good' through an additional charge imposed on those same companies under the heading of unemployment insurance<sup>(17)</sup>.

(38) In the light of this case law, the Commission cannot agree that the 'undertaxation' of FT under the heading of business tax from 1994 onwards could be offset by the special levy paid by the company between 1991 and 1994, a levy which was not specifically connected with business tax. As the Commission has already observed, Law No 90-568 does not provide that the special levy was due instead of business tax. Moreover, the amount of this levy was defined, not according to the parameters which determine the amount of business tax, but by reference to the profit which the PTT paid to the State in 1989 and 1990. In view of its origins and the way it is defined, the levy is akin more to a levy on operating results than to individual taxation under the heading of business tax. This ought normally to have led the Commission to rule out any set-off and to consider that the non-payment of business tax during the 'transitional' period also constituted a specific advantage conferred on the company.

(39) It is by way of exception that the Commission has accepted that the levy paid by the company between 1991 and 1993 inclusive was also tantamount to payment of business tax. In view of the ambiguous

nature of the levy, which seems to be connected with the specific tax scheme applicable to FT<sup>(18)</sup>, the fact that the levy exceeded the amount which would have resulted from the application of the ordinary-law tax system and the transitional character of the scheme in question, the Commission has decided to give the company the benefit of the doubt and has agreed to recognise the partly tax-like nature of the levy and the fact that it was tantamount also to payment of taxes. Nevertheless, any part of the levy which exceeded the normally applicable tax burden under the ordinary law could be understood only as a remuneration on capital, which rules out any legal basis for an offsetting mechanism. Any offsetting between the amounts paid by FT by way of levies on operating surpluses and the undertaxation of FT under the heading of business tax would involve a confusing of levies of different types (tax credits with pecuniary gains), which is not admissible.

(40) Lastly, the Commission notes that Law No 90-568 did not provide for any offsetting of the undertaxation of FT from 1994 onwards by an overtaxation for the years 1991 to 1994. An overall calculation, such as that proposed by the French authorities, would involve, however, reclassifying *ex post* the surplus tax allegedly paid by FT during the 'transitional' period as a tax advance payment (tax credit) to be deducted from future years, which was not at all the aim of Law No 90-568 when it established the two schemes. If the French authorities now propose to offset different types of levy (the special levy of a mixed type – being in the nature both of a tax and of a dividend – and the undertaxation of FT on the score of business tax) applicable to two separate periods, this is not at all due to the application of the normal taxation rules of French law, but involves an *a posteriori* rationalisation aimed at avoiding the recovery of the aid from which FT benefited.

(41) In conclusion, the Commission cannot accept the French authorities' second argument according to which an overall calculation should be made of the advantage conferred by the scheme on FT throughout the period 1991 to 2002.

(42) This means that the difference between the business tax actually paid by FT and that which should have been due under the ordinary law from 1 January 1994 to 1 January 2003 constitutes State aid inasmuch as it represents an advantage for FT granted through resources which would otherwise have been incorporated in the budget of the State.

<sup>(17)</sup> Case 173-73, already cited.

<sup>(18)</sup> Law No 90-568 provided, in the same chapter entitled 'Taxation' and in the same article, that FT did not have to pay any taxes other than those paid by the State and that it had to pay a levy for the benefit of the general budget, these two provisions being applicable during the same period.

- (43) Nor can the Commission accept the argument according to which business tax enters into the calculation of the taxable result and that the correction of any under-taxation under the heading of business tax should be accompanied by a downward correction of the amount of corporation tax since the arrangements for taxing the company under the headings of business tax and corporation tax are inseparable.
- (44) This argument has been rejected by the Court of First Instance, which has stated clearly that '... the Commission is not obliged, in its decisions ordering the recovery of State aid, to determine the incidence of tax on the amount of aid to be recovered, since that calculation falls within the scope of national law; it is merely required to indicate the gross sum to be recovered. That does not prevent the national authorities, when recovering the amount in question, from deducting certain sums, where appropriate, from the amount to be recovered pursuant to their internal rules, provided that the application of those rules does not make such recovery impossible in practice or discriminate in relation to comparable cases governed by national law' <sup>(19)</sup>.

#### VI. NEW AID

- (45) Regarding the nature of the aid, the Commission confirms its preliminary conclusion set out in the opening decision that the aid in question has to be considered new. The exceptional business tax scheme was introduced by a law of 1990 (i.e. after the entry into force of the Treaty) precisely to prevent the creation of FT as a public operator from implying its subjection to the ordinary rules of taxation. Moreover, since 1988 the telecommunications sector has been gradually liberalised. Because FT benefited as from 1994 from aid connected with the specific business tax scheme and because at that time the markets in which FT operated were, at least partially, competitive <sup>(20)</sup>, the Commission has to conclude that the measure in question is new aid.

#### VII. PRESCRIPTION

- (46) The French authorities consider that in any event the alleged aid scheme for FT introduced by Law No

<sup>(19)</sup> Judgment of the Court of First Instance of 8 June 1995, Case T-459/93, *Siemens SA v Commission of the European Communities* [1995] ECR II-1675.

<sup>(20)</sup> Judgment of the Court of First Instance of 15 June 2000, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/97, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and Others v Commission of the European Communities* [2000] ECR II-2319, paragraphs 141 *et seq.*; Judgment of the Court of 9 August 1994, Case C-44/93, *Namur-Les Assurances du Crédit SA v Office National du Dueroire and the Belgian State* [1994] ECR I-3829.

90-568 constitutes an existing scheme of aid which cannot be recovered. They note that the scheme was introduced by Law No 90-568 of 2 July 1990 and consider that it was on 2 July 1990 (i.e. the day on which the law was adopted) that the aid was granted to the recipient. The opening of the procedure having been decided on 30 January 2003, i.e. more than 10 years after the aid was granted, the French authorities maintain that, in accordance with Article 15 of Regulation (EC) No 659/1999, the alleged aid for FT was 'covered' by the Community rules on the time-barring of State aid.

- (47) It will be recalled in this connection that Article 15 provides as follows:

'1. The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid'.

- (48) It should be pointed out that the 10-year limitation period provided for in Article 15 of Regulation (EC) No 659/1999 'does not in any way express a general principle whereby new aid is transformed into existing aid but merely precludes recovery of aid established more than 10 years before the Commission first intervened' <sup>(21)</sup>. It follows from this that, pursuant to

<sup>(21)</sup> Judgment of the Court of First Instance of 30 April 2002, Joined Cases T-195/01 and T-207/01, *Government of Gibraltar v Commission of the European Communities* [2002] ECR II-2309, paragraph 130.

Article 15 of the Regulation, the aid which benefited FT under the specific business tax scheme would not lose its character as new aid by reason of the fact that the scheme was set up more than 10 years ago. Quite simply, under the terms of the provision, the Commission would be able to order recovery only in respect of aid which had benefited the company during the 10 years preceding its action. In so far as the aid benefited FT as from the 1994 financial year and the opening decision dates from 30 January 2003, the Commission must order the recovery of the aid in question in its entirety.

- (49) It should also be pointed out that, according to Article 15 of Regulation (EC) No 659/1999, 'The powers of the Commission to recover aid shall be subject to a limitation period of 10 years' and that this period starts to run 'on the day on which the unlawful aid is awarded to the beneficiary ... under an aid scheme'. What matters, therefore, under the terms of the Regulation, is the date on which the individual aid was granted to the recipient under an aid scheme and not the date on which the scheme itself was introduced. In other words, what Article 15 of the Regulation time-bars is the possibility for the Commission to order the recovery of aid granted illegally to the recipient more than 10 years previously and in no way, contrary to what the French authorities claim, the aid schemes themselves. It follows from this that, in the case of aid schemes, the limitation period for recovery starts to run, not on the day on which the scheme was introduced, but on the day on which the aid was actually granted to the recipient. Law No 90-568 introduced an aid scheme for FT <sup>(22)</sup>. Consequently, the limitation period in respect of the aid granted to FT under this specific tax scheme starts to run, not on the day on which Law No 90-568 was adopted, but on the day on which the aid was actually granted to FT, that is to say annually at the time when the business tax was due.

- (50) Regarding the interruption of the limitation period, contrary to what the French authorities maintain there does not have to be a formal Commission decision for the period to be interrupted. According to Article 15 of Regulation (EC) No 659/1999, 'Any action taken by the Commission ... with regard to the unlawful aid shall

<sup>(22)</sup> Pursuant to Article 1, point (d), of Regulation (EC) No 659/99, 'aid scheme' means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.

interrupt the limitation period'. The Court of First Instance has already held that a simple request for information can interrupt the limitation period provided for in Article 15 of Regulation (EC) No 659/1999 <sup>(23)</sup>. In the present case, the first information request sent by the Commission to the French authorities concerning the special business tax scheme applicable to FT was dated 28 June 2001. It is therefore on that date that the limitation period within the meaning of Article 15 of Regulation (EC) No 659/1999 was interrupted <sup>(24)</sup>.

- (51) Consequently, only aid granted to FT more than 10 years before the first information request (i.e. before 28 June 1991) is no longer recoverable. However, in so far as aid was granted to FT as from the 1994 financial year under the business tax scheme applicable for the period 1994 to 2003, the Commission must order the recovery of the aid in question in its entirety.

#### VIII. COMPATIBILITY OF THE AID

- (52) The French authorities have put forward no specific argument in support of the compatibility of the aid. The Commission would stress that, for the reasons set out in paragraphs 122 and 123 of the opening decision, it considers that the aid is not compatible with the common market within the meaning of Article 87(2) or (3)(a), (c) (with reference to the economic development of certain areas), (d) and (e). In addition, the aid in question is connected with no restructuring project of the company but constitutes rather operating aid. Consequently, the aid cannot be considered compatible on the basis of Article 87(3)(c) (with reference to the development of certain economic activities).

#### IX. CONCLUSION

- (53) In the light of the above, the Commission finds that:
- The business tax scheme applicable during the period 1991 to 1993 does not constitute State aid.

<sup>(23)</sup> Judgment of the Court of First Instance of 10 April 2003, Case T-369/00 *Département du Loiret v Commission of the European Communities* [2003] ECR II-1789, paragraphs 81 *et seq.*

<sup>(24)</sup> As the Court of First Instance has already observed, 'When it addresses a request for information to a Member State, the Commission is informing that State that it has in its possession information concerning aid alleged to be unlawful and, if necessary, that that aid will have to be repaid ... Accordingly, the simplicity of the request for information does not have the consequence of depriving it of legal effect as a measure capable of interrupting the limitation period provided for in Article 15 of Regulation (EC) No 659/1999'; see Case T-369/00, already cited, paragraphs 79 and 82.

— The difference between the business tax actually paid by FT and that which would have been payable under the ordinary law from 1 January 1994 to 31 December 2002 constitutes State aid. This aid is new aid which was implemented illegally by France in infringement of Article 88(3) of the EC Treaty. This aid is incompatible with the common market and, consequently, must be recovered.

(54) According to the estimates in the report submitted to Parliament by the Directorate-General for Taxes in

November 2001, 'the immediate normalisation of the conditions of taxation of FT in relation to business tax would involve, at an unchanged rate (i.e. independently of decisions taken by local authorities), an overtaxation of almost 198 million euros for the company'. However, by letter dated 15 May 2003 the French authorities submitted to the Commission more precise information concerning the undertaxation of FT under the specific business tax scheme (see the table below):

*in EUR million*

Financial year	1994	1995	1996	1997	1998	1999	2000	2001	2002	Cumulation
Ordinary-law taxation simulation	674	786	830	923	1 012	1 092	1 035	1 039	971	8 362
Actual taxation of FT	560	667	694	785	855	914	940	913	894	7 222
Undertaxation	114	119	136	138	157	178	95	126	77	1 140

*Source: French authorities' answer of 15 May 2003.*

— The French authorities made a precise calculation of the business tax FT would have paid in 2000, 2001 and 2002 had it been subject to the ordinary-law arrangements on the basis of a breakdown at local level of equipment and movable property, immovable property and wages after application of the local tax rates.

— They estimated the business tax for the years 1994 to 1999 by reference to the amount of business tax FT would have paid in 2000 had it been subject to the ordinary-law arrangements, corrected by the trend in the taxable base and in tax rates since 1991, given that the data available did not make it possible to carry out a precise calculation for the years prior to 2000 in view of the difficulty of reconstituting the local bases and rates.

— It follows from these estimates that the amount of aid to be recovered is EUR 1 140 million.

(55) By letter dated 29 January 2004, the French authorities informed the Commission that the business tax payable by the company in 2003 (the first year of application of the ordinary-law arrangements) amounted to EUR 773 million, a figure appreciably lower than the EUR 971 million simulated for 2002 at a time when the amount of business tax actually due was not yet known. They stressed that the back-calculation of this figure over

previous years confirmed and strengthened their position as it would show the overtaxation of FT in relation to the ordinary-law position.

(56) Lastly, at the meetings with the Commission on 16 and 23 June 2004, the French authorities maintained that the calculations previously submitted to the Commission were imprecise and that it was impossible to estimate for certain the amount of aid from which FT had benefited during the period 1994 to 2003. Accordingly, they called on the Commission not to rule on the aid allegedly granted to FT under the special business tax scheme.

(57) Concerning this last argument, the Commission notes first of all that it is a new argument which contradicts the previous position of the French authorities, which had submitted estimates on 15 May 2003, as confirmed and supplemented on 29 January 2004. Moreover, the French authorities did not question the accuracy of these estimates at any time during the course of the procedure. It was not until the June 2004 meetings, when it became clear that the Commission's investigation was coming to an end, that the French authorities queried the estimates provided previously. In these circumstances, the argument as to the impossibility of calculating with any accuracy the amount of aid from which FT benefited cannot not be accepted.

(58) On 5 July 2004, the French authorities submitted to the Commission new estimates as to the business tax which would have been payable by FT had it been subject to the ordinary law between 1991 and 2002 inclusive. By fax dated 13 July 2004, the French authorities stated that 'these estimates are based only on the actual amount, now known, of business tax paid by FT for the year 2003 in accordance with the ordinary-law arrangements'. By fax dated 16 July 2004, the French authorities outlined the method it had used in making these new estimates:

- the French authorities established that FT's net business tax contribution for 2003 amounted to EUR 773 million;
- they then calculated the business tax contribution FT would have paid under the terms of Law No 90-568

having regard to its declarations for 2003; this amount came to EUR 696 million;

- the French authorities then noted that the new provisions in force (application of the ordinary-law arrangements using the actual rates and real bases) would have had the effect of increasing for the 2003 financial year by EUR 77 million, or 11,06 %, the contribution which would have been due under the previous rules;
- this percentage increase was then applied to the contributions actually paid by FT between 1991 and 2002;
- it follows from these estimates that the undertaxation of FT for the period between 1994 and 2002 amounted to EUR 798 million.

*in EUR million*

Financial year	1994	1995	1996	1997	1998	1999	2000	2001	2002	Total
Ordinary-law taxation simulation	622	741	771	872	949	1 015	1 044	1 014	992	8 020
Actual taxation of FT	560	667	694	785	855	914	940	913	894	7 222
Undertaxation	62	74	77	87	94	101	104	101	98	798

*Source:* French authorities' letter of 5 July 2004.

(59) In view of the discrepant information submitted by the French authorities, the Commission cannot at this stage say exactly how much aid is to be recovered, but what it can say is that FT benefited from State aid the indicative amount of which is somewhere between EUR 798 million and EUR 1 140 million in capital, to which must be added interest from the date on which the aid was at the disposal of the recipient until the date of its recovery<sup>(25)</sup>. The exact amount of aid to be recovered will be determined by the Commission, in collaboration with the French authorities, within the framework of the recovery procedure, at the latest by 1 November 2004.

must be recovered. The Commission calls on the French authorities, in accordance with their duty of honest cooperation, to collaborate with it in determining the exact amount of aid to be recovered,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The State aid granted illegally by France in infringement of Article 88(3) of the EC Treaty to France Télécom under the business tax scheme applicable to that company during the period 1 January 1994 to 31 December 2002 (provided for by Law No 90-568 (Article 18) and Article 1654 CGI) is incompatible with the common market.

#### *Article 2*

1. France shall take all necessary measures to recover from France Télécom the aid referred to in Article 1.

(60) In conclusion, the Commission considers that the specific business tax scheme applicable to FT between 1994 and 2003 procured it an advantage amounting to State aid in that it was undertaxed compared with the ordinary-law situation. This State aid, which was granted by the French authorities in violation of their prior notification obligation, is incompatible with the common market and

<sup>(25)</sup> This is without prejudice to the possibility enjoyed by the French authorities in accordance with case law of, at the time of recovery, 'deducting certain sums, where appropriate, from the amount to be recovered pursuant to their internal rules, provided that the application of those rules does not make such recovery impossible in practice or discriminate in relation to comparable cases governed by national law' (Case T-459/93, already cited).

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision.

3. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipient until the date of its recovery.

4. The interest shall be calculated in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(26)</sup>.

*Article 3*

France shall inform the Commission, within two months of notification of this Decision, of the measures that it proposes to take and that it has already taken to comply with it. For that purpose, France shall use the questionnaire annexed to this Decision.

*Article 4*

This Decision is addressed to the French Republic.

Done at Brussels, 2 August 2004.

*For the Commission*  
Frederik BOLKESTEIN  
*Member of the Commission*

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<sup>(26)</sup> OJ L 140, 30.4.2004, p. 1.