

Bouygues Dials the Wrong Number in State Aid Challenge

Bouygues SA, Bouygues Télécom v Commission of the European Communities (Case T-475/04), Judgment of 4 July 2007 (CFI)

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Background

On 6 June 2000, the French Government announced its intention of allocating four licences for the operation of third generation ("3G") mobile phones in France. On 18 August 2000, the Autorité de régulation des télécommunications ("ART") published the procedure by means of which the licences would be awarded. Rather than conducting an auction, as in other Member States including the United Kingdom, the ART instead proposed that each successful operator should pay the same fixed sum of 4.95 billion euros over the lifetime of a 15-year licence.

On 31 January 2001, the ART revealed that only two bids had been received: from Société française du radiotéléphone ("SRF") and France Télécom, later Orange France SA ("Orange"). At the same time, it announced that a further round of tenders would be necessary in the interests of ensuring proper competition between operators.

In response to this announcement, the heads of both France Télécom and Vivendi (the parent company of SFR) wrote to the relevant French Government departments drawing attention to the need to respect the principles of equality and effective competition in deciding how future licences should be allocated. On 22 February 2001 the French Government replied noting that it shared these dual objectives and confirming that the arrangements for the further call for tenders would guarantee equitable treatment for those operators to whom a licence was finally allocated.

3G licences were awarded to SFR and Orange on 18 July 2001 in accordance with the proposals originally set out by the ART. On 14

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December 2001, the terms of the second round of tenders were announced; and on 29 December 2001, the payments for the 3G licences were reduced from 4.95 billion euros to 619 million euros plus a percentage of revenues gained from their use.

At the close of the second round on 16 May 2002, only one candidate had come forward: Bouygues Télécom ("Bouygues"). It was awarded the third 3G licence on 3 December 2002 for a period of 20 years. At the same time, the licences already awarded to SFR and Orange were extended from 15 to 20 years and the payment obligations reduced to bring them into line with the licence awarded to Bouygues. In the absence of any further applicants, the fourth 3G licence was not awarded.

The Commission's Decision

On 4 October 2002, Bouygues complained to the Commission about a package of aid measures allegedly granted to France Télécom, including the modification of the 3G licence terms in respect of SFR and Orange. On 20 July 2004, the Commission adopted State Aid Decision NN 42/2004 ("the Decision"), in which it declared that the measures complained of did not constitute aid within the meaning of Article 87(1) of the Treaty. It considered that under the framework of the relevant Community law, namely Directive 97/13/EC of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services ("Directive 97/13") and Decision No. 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the co-ordinated introduction of a third-generation mobile phone and wireless communications system in the Community ("Decision No. 128/1999"), the French authorities could determine both the conditions under which 3G licences would be awarded, provided that an open, non-discriminatory and transparent procedure was followed, as well as any related payments. In this regard, the French authorities were fulfilling a regulatory function that was not comparable to a transaction in the open market. Furthermore, the subsequent modification of the 3G licences for SFR and Orange did not constitute a selective advantage.

Bouygues and its parent company challenged the Commission's Decision before the Court of First Instance. SFR, Orange and the French Government intervened.

Grounds of challenge

Bouygues argued the Commission's Decision was defective because of a lack of sufficient reasoning, but its main complaint concerned the incorrect application of Articles 87(1) and 88(1).

It also considered that the reduction in the payment obligations of SFR and Orange constituted a state aid within the meaning of Article 87(1). First, the foregoing by the French authorities of debt owing to it under the first two 3G licences that had been awarded constituted a transfer of state resources. Second, the modification of those licences conferred a selective advantage on SFR and on Orange. This was not justified under the terms of Directive 97/13, which did not require that all licence conditions should be identical; in any case, two distinct and separate competitive processes had been organised; and this selective advantage had been conferred in the absence of any competitive process. The alteration in payments due from SFR and Orange had the potential to affect competition, since those companies could invest the funds that would otherwise have been required to meet those obligations.

Consequently, and in light of the alleged infringement of the principle of non-discrimination and the serious difficulties that were apparent, Bouygues maintained the Commission should have opened an Article 88(2) procedure.

The judgment of the CFI

The CFI noted that Bouygues' challenge essentially arose under two headings. First, it alleged that the relevant measure comprised a selective advantage, in particular of a temporal nature, because the French authorities had chosen to forego collecting what was for SFR and Orange a straightforward charge corresponding to the market value of the 3G licences. Second, it maintained

that the alteration in the payment obligations could not be justified in the light of the principle of non-discrimination because, on the contrary, it was discriminatory to Bouygues.

Selective advantage

At the heart of Bouygues' case was the argument that SFR and Orange had been given a temporal advantage because Bouygues had paid an identical price for a licence that did not take effect until after those of its competitors. In awarding 3G licences, the French authorities were not acting in a purely regulatory fashion, but were engaged in economic activity, attempting to secure the best price available, which SFR and Orange had initially been willing to pay. The national authorities' subsequent willingness to forego payments due to them represented a transfer of state resources to the benefit of those companies.

The CFI rejected this claim. It noted that at any point up to 31 May 2001, SFR and Orange could have withdrawn their bids had they not received assurances that they would be treated on an equal footing with other operators. They might also subsequently have chosen to forego the benefit of their licences, and thus cease payments, if they perceived an inequality of treatment with Bouygues. Besides, the Community framework for telecommunications provided by Directive 97/13 and Decision No. 128/1999 was based on equality of treatment for operators in the allocation of licences and in relation to charges, leaving Member States free to choose the procedure by means of which licences would be granted, provided that the principles of free competition and equal treatment were respected. Thus Member States could, as in this case, opt for a process of comparative selection, with operators all being treated alike, in particular in relation to payments.

As far as any temporal advantage was concerned, the CFI conceded that at first sight this argument was not devoid of merit. However, in the event, the potential benefit had not been realised. As a result of problems with 3G technology and an unfavourable economic climate, SFR did not commence services until the middle of 2004 and Orange until the end of that year, some two years after Bouygues had been awarded its own licence. This delay had in effect neutralised any advantage SFR and Orange might have realised from the earlier award of their licences.

Bouygues had also argued that this temporal advantage meant SFR and Orange could secure the best sites, benefit from the image of being an innovative operator and conquer some parts of the market without facing real competition.

Again, the CFI rejected these claims. It found that Bouygues had been unable to demonstrate that, from the moment it obtained its licence, the best sites had already been secured or that it was otherwise constrained in the choice of sites necessary for the development of its services. There was no evidence that the earlier award of a licence to SFR and Orange had harmed Bouygues' image, not least because the various operators had taken different strategic approaches to the 3G market.

In summary, at the date of the contested Decision, the Commission was correct to conclude that SFR and Orange had not, in practical terms, benefited from the temporal advantage potentially conferred by the earlier award of their licences. As a result, the Commission had not been presented with a serious difficulty such as to require the opening of a formal procedure into the alleged aid.

Non-discrimination

Bouygues considered that in order to ensure operators were treated in a non-discriminatory fashion, the French authorities should have maintained the conditions under which licences had originally been awarded to SFR and Orange, in particular those relating to payments, because the two calls for tender represented two distinct and separate processes. In this regard, Bouygues invoked in particular the rules applicable to public procurements, notably the principle of the inability to change selection criteria or the conditions for award, arguing that the national authorities should have aborted the first call for tenders and recommenced the process from the beginning if they considered it impossible to maintain the conditions previously set.

The CFI noted that the process adopted by the French Government constituted, in reality, a single process intended to lead to the award of four licences for the introduction of a 3G system in France. In the context of a single selection process, albeit one organised, as here, in several phases, the principle of non-discrimination needed to be considered globally taking into account both calls for tender. Furthermore, Bouygues' attempts to draw parallels with the procedural rules applicable to public procurement and concessions was not applicable in this case. Concerning the principle of the inability to change criteria that Bouygues invoked, this did not in fact feature in Directive 97/13 nor in any other applicable Community legislation. On the contrary, Article 8 (4) of Directive 97/13 provided that Member States could modify the conditions attached to an individual licence in cases that could be objectively justified, provided it was done in a proportionate manner.

The CFI considered the other options open to the French Government once it was clear that the initial call for tenders would not result in a sufficient number of operators to secure effective competition. The first would have been to abandon the process and begin again, with the payments reduced to the level set in the second call for tenders. This would, however, have been likely to result in the same three operators coming forward. Consequently, all that would have been achieved was a delay to the launch of 3G services in France, in contravention of the timetable envisaged in Decision No. 128/1999.

The second option would have been to continue the competition but without aligning the payments due from SFR and Orange with those from Bouygues. Such a solution would, however, have been likely to breach the principles of non-discrimination and proportionality required by Directive 97/13. In effect, Bouygues would have benefited to the detriment of SFR and Orange.

The option chosen, which involved bringing the level of payments into line before any of the operators had actually entered the market, had ensured equality of treatment between all three operators as was required under Directive 97/13 and had enabled France to avoid any delay in the launch of 3G services as envisaged by that Directive. It followed that the alteration of the payment regime did not confer any discriminatory disbenefit upon Bouygues and that there was consequently no serious difficulty such as to require the Commission to open a formal procedure into the alleged aid.

This case is a good example of how one cannot apply the state aid rules in abstract but must take account of the broader regulatory framework. It also highlights the close relationship between the state aid rules and the public procurement rules, although on the facts of this case, the court held that the public procurement rules were inapplicable. Finally it is worth noting that at the oral hearing Bouygues relied on a more recent decision by the Commission (NN 76/2006), where the Commission had found that the subsequent award of a third mobile phone licence by the Czech Republic at a lower price than the grant of the first two licences did not constitute state aid. The CFI made no reference to that decision in its judgment. But it should not be thought that the judgment of the CFI means that the decision in the Czech case was wrong. The Czech case may be factually distinguishable. Indeed it is trite law that a thorough factual analysis is necessary in any state aid case.

Christopher Vajda QC who was instructed by the Paris office of Denton Wilde Sapte, acted on behalf of SFR, the number two mobile operator in France. He addressed the CFI in French.

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