

State aid and the grant of telecoms licences ~

The judgment of the ECJ in the Bouygues case

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Summary

On 2 April 2009, the European Court of Justice (“ECJ”) handed down judgment in Case C-431/07 P **Bouygues SA v Commission**. The ECJ upheld the judgment of the Court of First Instance (“CFI”). The European courts confirmed that the grant of Universal Mobile Telecommunications Systems (“UMTS”) licences have an economic value and constitute a State resource, such that they could constitute a State aid under Article 87(1) EC. However, on the facts of the case, the grant of the UMTS licences to Orange France SA (“Orange”) and Société française du radiotéléphone (“SFR”) failed to fulfil one of the requirements for the definition of a State aid under Article 87(1) EC, namely the granting of an advantage to the beneficiary. The courts held that the grant of the licences in question implemented the requirements of Community telecommunications law, particularly the principle of non-discrimination laid down in Directive 97/13/EC.

Facts

On 28 July 2000, the relevant French Minister launched a call for applications for the award of four UMTS licences. Since only two applications were received – from SFR and Orange – the French authorities decided that a further call for applications was necessary in order to ensure genuine competition. In the meantime, however, two initial UMTS licences were issued to SFR and Orange on 18 July 2001. Those licences were granted for the payment of fees amounting in total to about €4.95 billion.

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Following the launch of the supplementary call for applications, the third UMTS licence was awarded to Bouygues Télécom (“Bouygues”) on 3 December 2002. The fourth licence could not be awarded for lack of an applicant. The third licence was awarded in return for payment of fees consisting of a fixed sum of about €619 million and a variable component calculated as a percentage of the turnover generated through the use of the relevant frequencies. On the same date, the Minister also amended the provisions regarding the fees to be paid by SFR and Orange, so as to replace them with provisions identical to those applied to Bouygues.

Bouygues complained to the Commission that the measure aligning the fees due from SFR and Orange with those fixed for Bouygues was State aid for the purposes of Article 87 EC, which the French authorities had failed to notify to the Commission. On 20 July 2004, the Commission decided not to raise objections to the measure to which the complaint referred, on the ground that it did not entail aid elements within the meaning of Article 87(1) EC. This decision was appealed to the CFI.

Article 87(1) EC

The ECJ confirmed¹ that Article 87(1) EC lays down four cumulative conditions for there to be a State aid: (i) there must be an intervention by the State or through State resources; (ii) the intervention must be liable to affect trade between Member States; (iii) it must confer an advantage on the recipient; and (iv) it must distort or threaten to distort competition.

State resources

The CFI held that UMTS licences, which authorise economic activities (i.e. the provision of mobile telephony services in the wireless spectrum) and confer the right to occupy or use that spectrum, have an economic value². The manager of that spectrum (here, the French authorities) is bound to take that economic value into account when determining the amount of fees to be paid by the operators involved.

The fact that the French authorities were exercising State functions in granting the licences “does not preclude the taking into account of economic facts in connection with the management of a scarce public resource such as the radio frequencies constituting the public airwaves, to which a right of access or a right of usage may be granted. Hence, the Member States simultaneously perform the roles of telecommunications regulator and manager of the public assets that constitute the wireless airwaves”³.

The CFI rejected the Commission’s argument that the assets in question could not constitute a State resource on the ground that they have no market value since there is no equivalent in the hands of private managers⁴.

The ECJ confirmed that the licences had an economic value, which derives, “in particular, from the possibility for the licence holder to make use of the rights attached to the licence which, in the present case, means the possibility of occupying the public wireless space in order to use UMTS technology”⁵.

Grant of an advantage

However, the CFI found that, even though “the national authorities waived their right to a significant part of State resources in the present case”⁶, there was no advantage granted to SFR and Orange so that there was no State aid for the purposes of Article 87(1) EC. The ECJ upheld that finding.

¹ Paragraph 102 of the ECJ’s judgment.

² Paragraph 100 of the CFI’s judgment.

³ Paragraph 104 of the CFI’s judgment.

⁴ Paragraph 105 of the CFI’s judgment.

⁵ Paragraph 119 of the ECJ’s judgment.

⁶ Paragraph 106 of the CFI’s judgment.

The CFI held that the Community framework for telecoms services, as organised by Directive 97/13 and Decision No 128/1999, rests on equality of treatment between operators for the award of licences and the calculation of fees. Although Member States are free to choose the procedure for the award of licences, they must ensure that the principles of freedom of competition and equality of treatment are respected. The CFI stated⁷:

“Hence, although the right to use the wireless space granted to the operators has an economic value, the amount payable as a fee can constitute State aid only if, all other things being equal, there is a difference between the price paid by each of the operators concerned, ... On the other hand, if the national authorities decide as a general principle that licences will be awarded free of charge, or awarded by means of public auctions or awarded at a standard price, there is no aid element, provided these terms are applied to all the operators concerned without distinction”.

The ECJ held⁸ that the CFI was correct when it held that the Community framework for telecoms services and, in particular, the principle of non-discrimination, required the French authorities to align the fees due from Orange and SFR with those charged to Bouygues.

The ECJ confirmed that it is settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations⁹. As a result, it held that, in the present case, the fact that the UMTS licences were awarded to Orange and SFR at an earlier date could justify, or even require, that the related fees be set higher than those charged to Bouygues *only* if the economic value of those licences could be regarded, by dint merely of having been awarded earlier, as being of greater value than the licence awarded to the latter undertaking.

The CFI had found that Orange and SFR had not been able to make use of the licences which had been awarded to them, and that the prior award of licences had given them no advantages in terms of pre-emption of sites, brand image and capture of market share. Those findings were not challenged on appeal. The ECJ therefore held that it was clearly not the case that the economic value of the licences awarded to Orange and SFR were of greater value than the licence awarded to Bouygues¹⁰.

Comment

Although in the present case, the European courts held that the grant of the UMTS licences to Orange and SFR did not constitute State aid, this case does open the door to challenges to the award of telecoms licences by a State body or regulator in the future. The European courts confirmed that such licences do have economic value and are State resources, the grant of which can constitute State aid for the purposes of Article 87(1) EC. Although State regulators have discretion to choose the procedure for the award of such licences, they must be careful to ensure that such awards are non-discriminatory and do not grant advantages to certain operators *vis-à-vis* other operators which could distort competition. If they fail to do so, they could find themselves required to refer matters to the Commission under Article 88 EC, or be faced by challenges in the domestic courts for failure to make such a reference.

Christopher Vajda QC appeared for SFR in the Court of First Instance and the European Court of Justice.

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⁷ Paragraph 110 of the CFI’s judgment.

⁸ Paragraph 98 of the ECJ’s judgment.

⁹ Paragraph 114 of the ECJ’s judgment.

¹⁰ Paragraphs 116-122 of the ECJ’s judgment.