

Joined Cases T-427/04 and T-17/05

French Republic and France Télécom SA

v

Commission of the European Communities

(State aid — France Télécom's business tax regime for the years 1994 to 2002 — Decision declaring the aid incompatible with the common market and ordering its recovery — Advantage — Limitation period — Legitimate expectations — Legal certainty — Breach of essential procedural requirements — Collegiality — Rights of the defence and procedural rights of other interested parties)

Judgment of the Court of First Instance (Third Chamber), 30 November 2009 II - 4322

Summary of the Judgment

1. *Commission — Principle of collegiality — Scope — Possibility for the Commission to empower one of its members to adopt specific categories of administrative or management measure*
(Arts 219 EC and 253 EC)
2. *State aid — Examination by the Commission — Administrative procedure*
(Art. 88(2) and (3) EC)

3. *State aid — Examination by the Commission — Administrative procedure — Obligation on the Commission to put the parties concerned on notice to submit their observations*
(Art. 88(2) EC)
4. *State aid — Concept — Special tax regime of an undertaking*
(Art. 87(1) EC)
5. *State aid — Commission decision — Assessment of legality by reference to the information available at the time the decision was adopted*
(Art. 87 EC)
6. *State aid — Concept — Selective nature of the measure — Derogation from the common tax regime — Justification based on the nature and economy of the system — Burden of proof*
(Art. 87(1) EC)
7. *State aid — Recovery of unlawful aid — Aid granted in breach of the procedural rules of Article 88 EC — Possible legitimate expectation on the part of the beneficiaries — Protection — Conditions and limits*
(Arts 87(1) and 88 EC; Council Regulation No 659/1999, Art. 14)
8. *State aid — Commission decision finding aid incompatible with the common market and ordering its repayment — Possibility for the Commission to leave it to the national authorities to calculate the exact amounts to be repaid*
(Art. 88(2) EC)
9. *State aid — Recovery of unlawful aid — Ten-year limitation period of Article 15 of Regulation No 659/1999 — Point at which time starts to run for the purposes of the limitation period*
(Art. 88(2) EC; Council Regulation No 659/1999, Art. 15)

1. Under Article 219 EC, the Commission acts by a majority of the number of its members. The principle of collegiality thus established is based on equality in the decision-making process as between the members of the Commission and signifies that decisions must be deliberated on jointly and that all the Members of the

College bear collective responsibility at political level for all decisions adopted.

Although the Commission may, without necessarily acting in breach of the principle of collegiality, empower one of its

members to adopt specific categories of administrative or management measure, the decisions by which the Commission rules on the existence of State aid, on its compatibility with the common market and on the need to order its recovery involve an examination of complex factual and legal issues and cannot, in principle, be categorised as administrative or management measures. It follows that, since the enacting terms and rationale of such decisions, for which reasons must be stated pursuant to Article 253 EC, constitute an indivisible whole, it is for the College alone, in accordance with the principle of collegiality, to adopt them both. In principle, therefore, it is for the College of Commissioners alone to adopt the definitive version of decisions ruling on the existence of State aid and on its compatibility with the common market. After that adoption, only small corrections of spelling or grammar may still be made to the text of that decision, since any further alteration is the exclusive province of the College.

However, it is possible for the College of Commissioners to instruct one or more of its Members to adopt the definitive text of any decision the substance of which has already been determined in discussion. Where the College exercises that power, it is for the Community judicature, when considering the question of the irregularity of the exercise of that power, to ascertain whether the College may be regarded as having adopted

all the factual and legal elements of the decision in question.

(see paras 116-119)

2. Respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law. That principle requires that the person against whom the Commission has initiated an administrative procedure must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law.

In State aid matters, the Commission cannot be required to present a complete analysis on the measure in question in its notice of intention to initiate the formal investigation procedure. The Commission must, however, define sufficiently the framework of its investigation in order to enable the Member State against which the procedure is opened to put forward its comments on all the matters of law or fact constituting the grounds of the final decision by which the Commission rules on the compatibility of the measure in question with the common market.

Accordingly, the mere fact that, in the contested decision, the Commission altered its analysis as regards the nature of the State measure at issue cannot entail, with regard to the Member State concerned, infringement of the rights of the defence unless the information contained in the decision initiating the formal investigation or, subsequently, provided during the exchange of arguments during the administrative procedure, had not enabled the national authorities to discuss properly all the matters of law or of fact contained in the contested decision. On the other hand, the differences between the contested decision and the decision initiating the formal investigation, arising as a result of the Commission's review, on its own initiative, of the arguments, in whole or in part, put forward by the said Member State, cannot give rise to an infringement of that Member State's rights of defence.

(see paras 136-138)

3. In the context of the administrative procedure regarding State aid, undertakings which receive aid are considered only to be 'interested parties' in that procedure. It follows that the undertaking which received aid, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, has only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case.

Moreover, whilst the Commission cannot be required to present a complete analysis of the aid at issue in its notice of intention to initiate the procedure under Article 88(2) EC, it must define sufficiently the context of its investigation so as not to render meaningless the right of interested parties to submit their comments. For that reason, the right of the interested parties to information does not go beyond the right to be heard by the Commission. In particular, it cannot extend to the general right to comment on all the potentially key points raised during the formal investigation procedure.

(see paras 146-149)

4. The concept of advantage for the purposes of Article 87(1) EC extends to any measure which exempts an undertaking from a charge which it would otherwise have to bear. The concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without being subsidies in the strict sense of the word, are therefore similar in character and have the same effect. Accordingly, a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid for the purposes of Article 87(1) EC.

Where the Commission examines a measure likely to constitute State aid, it is required to take into consideration all the effects of that measure for the potential beneficiary and, in particular, to determine, if necessary, the specific charges imposed on an advantage. On the other hand, the mere fact that a specific exemption measure is offset, from the recipient's point of view, by an increase in a specific charge which is different from and unconnected with the former does not save the former from categorisation as State aid.

which benefited from an aid cannot argue before the court that the information used by the Commission in the contested decision was unrealistic where the Commission relied on figures communicated to it by the Member State during the administrative procedure.

(see paras 219, 224)

Thus, determination whether over-taxation of an undertaking in a certain period, by reason of a fixed levy, offsets a tax differential from which it benefited in another period therefore depends on the analysis of the objective characteristics of that fixed levy and on whether it may be regarded as a charge which is connected with the advantage for the undertaking concerned as a result, in certain circumstances, of its liability to tax under a special tax regime.

6. For the purposes of applying Article 87(1) EC, the question to be decided is whether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods as compared with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure at issue. However, the concept of State aid does not refer to State measures which differentiate between undertakings and which are therefore *prima facie* selective, where that differentiation arises from the nature or the overall structure of the system of charges of which they form part.

(see paras 195-196, 206-208)

5. The lawfulness of a decision concerning State aid is to be assessed in the light of the information available to the Commission at the time when the decision was adopted. Consequently, the undertaking

The burden of proving the existence of justification in the nature or overall structure of that system lies in principle with the Member State. It follows that an undertaking which has benefited from a State measure cannot, in the context of an action for annulment, rely in support of its arguments on facts of which

the Commission was unaware at the time when it adopted the contested decision.

(see paras 228-229, 232)

7. It follows from the principle of the protection of legitimate expectations, which is especially applicable in relation to the review of State aid pursuant to Article 14 of Regulation No 659/1999 laying down detailed rules for the application of Article 88 EC, that the protection of the legitimate expectations of the recipient of State aid can be relied upon, provided that the recipient has sufficiently precise assurances, arising from a positive action taken by the Commission, which leads him to believe that a measure does not constitute State aid for the purposes of Article 87(1) EC. If the Commission does not give an express opinion on a measure which has been notified to it, on the other hand, its silence cannot, on the basis of the principle of the protection of the legitimate expectations of the recipient undertaking, preclude recovery of that aid.

For that reason, in view of the mandatory nature of the review of State aid carried out by the Commission pursuant to Article 88 EC, recipient undertakings may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the

procedure laid down in the said article. A diligent businessman should normally be able to determine whether that procedure has been followed. Accordingly, a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 88 EC may not plead the legitimate expectations of the recipients in order to justify failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid.

The possibility of a recipient of aid which is granted unlawfully relying on exceptional circumstances on the basis of which it legitimately assumed the aid to be lawful and therefore opposed its repayment cannot however be excluded, if there is evidence to demonstrate the existence thereof.

Moreover, notification of a State measure which may afford an advantage to an undertaking is the mechanism, provided for under the Treaty, which makes it possible for Member States to ensure that they do not grant unlawful aid and for undertakings to ensure that they do not benefit from such aid. However, where a special tax regime constitutes a procedure for imposing business tax which derogates from the general law and relates to two undertakings, the possibility of it being State aid cannot be automatically excluded. In that regard, in the absence of special circumstances, where aid is implemented without prior notification to the Commission, so that it is unlawful under Article 88(3) EC, the recipient

of the aid cannot then have a legitimate expectation that the aid is lawful.

(see paras 261-263, 270, 276)

8. The Commission is not required, in a decision ordering the recovery of unlawful State aid, to state the exact amount of the aid to be recovered. In this area, Community law requires merely that recovery of aid granted unlawfully restore the position to the *status quo ante* and that repayment be made in accordance with the rules of national law, subject to the requirement that they do not restrict the scope and effectiveness of Community law. It is therefore sufficient if it is possible to calculate the amount of the aid to be recovered, without overmuch difficulty, on the basis of the information given in the decision. Accordingly, the Commission may confine itself to declaring that there is an obligation to repay the aid at issue and leave it to the national authorities to calculate the exact amount of aid to be repaid, particularly where that calculation requires tax and social security systems, the detailed rules of which are laid down in the applicable national legislative provisions, to be taken into account.

(see paras 297-299)

9. Under Article 15(1) of Regulation No 659/1999, the powers of the Commission to recover unlawful aid are subject to a limitation period of 10 years. It is apparent from Article 15(2) of the said regulation that the point at which time starts to run for the purposes of the limitation period is the date on which the aid whose recovery is ordered by the Commission may be regarded as having been granted, that is to say, where the grant of the aid depends on the adoption of legally binding acts, the date on which those acts are adopted.

Where a legal act establishes a special tax regime applicable in the future, the limitation period cannot be regarded as starting as from the date on which that act was adopted, on which date it is impossible to determine with certainty whether that special regime confers an advantage which might constitute State aid. By contrast, the date on which a first advantage is actually granted must be taken into account. That is the case with aid which consists not in special tax provisions applicable to the beneficiary, but in a tax differential representing the difference between the amount of the business tax contributions which it would have had to pay if it had been subject to the tax under the general law and the amount which it was actually charged under the special tax provisions to which it was subject.

(see paras 318, 320, 322, 324)