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Judgment of the Court of Justice in Case C-431/07 P

*Bouygues SA, Bouygues Télécom SA v Commission, French Republic, Orange France SA,
Société française du radiotéléphone - SFR*

**THE RETROACTIVE REDUCTION OF FEES DUE FROM ORANGE AND SFR FOR
3G LICENCES DOES NOT CONSTITUTE STATE AID**

*The Court of First Instance did not err in law by holding that the Commission was right to find
that the alignment of the fees due from Orange and SFR with those charged to Bouygues
Télécom did not constitute State aid and did not infringe the principle of non-discrimination*

In July 2000, the French Government launched a call for applications for the award of four licences for the introduction of UMTS (Universal Mobile Telecommunications System), so-called 3G, mobile and wireless communications systems in France.

Since only two applications were received and accepted – namely those from SFR and France Télécom, which later became Orange – a further call for applications was launched in order to grant the licences which had not been awarded and to ensure genuine competition.

Without waiting for the launch of the supplementary call for applications, two initial licences were issued to SFR and Orange in return for the payment of fees amounting in total to EUR 4.95 billion.

Following the launch of the supplementary call for applications, a third UMTS licence was awarded to Bouygues Télécom on 3 December 2002. A fourth licence could not be awarded for lack of an applicant.

In addition, by two decrees of 3 December 2002 concerning SFR and Orange respectively, the French authorities amended, inter alia, the provisions regarding fees for the provision and operation of the frequencies so as to make them identical to the provisions applied to Bouygues Télécom (20 years instead of 15 years and a financial reduction from EUR 4.95 billion to EUR 619 million plus a percentage of turnover).

In January 2003, Bouygues Télécom complained to the Commission about the retroactive application of the new conditions to Orange and SFR, claiming that it constituted State aid.

By decision of 20 July 2004, the Commission rejected Bouygues Télécom's complaint on the ground that no evidence had been provided that the two other operators had obtained an advantage. In addition, it considered that the alignment of fees was not discriminatory and that the French authorities had complied with an obligation flowing from Community law.

Bouygues Télécom contested that decision before the Court of First Instance, which, by judgment of 4 July 2008, essentially confirmed the validity of the Commission's decision.

Bouygues Télécom appealed to the Court of Justice against the judgment of the Court of First Instance. It argued in particular that the licences had a commercial value and that by reducing the fees, the French State had waived its right to a part of State resources and, accordingly, had granted a selective advantage to Orange and SFR.

In today's judgment, the Court of Justice essentially upholds the judgment at first instance, inasmuch as the Court of First Instance held that, by amending the level of the fees due from Orange and SFR for the first UMTS licences, the French authorities had not granted those operators any State aid for the purposes of the Community rules on State aid.

The Court of Justice points out, first, that the French authorities decided to award the UMTS licences by way of a comparative selection procedure. As the Court of First Instance pointed out, it was only because of the partial failure of the first call for applications, which did not enable enough licences to be awarded to ensure genuine competition in the market for UMTS telecommunications services, that those authorities considered it necessary to seek further applications.

In those circumstances, waiver of the claims at issue as a result of the retroactive alignment of the UMTS licence fees due from Orange and SFR with those charged to Bouygues Télécom was inevitable, given the general scheme of the system of Community telecommunications law.

First, that solution reduced the risks of a late launch of UMTS services, since it ensured that at least two of the licences had been awarded by 1 January 2002, the deadline fixed by Community law for the launch of the UMTS system.

Secondly, it also excluded the possibility that the three operators might suffer discrimination, since the very purpose of the alignment of the fees was to take account of the fact that, at the time that the licence was awarded to Bouygues Télécom, none of the three operators had entered the market – for reasons not of their own choosing – with the result that their situation was, for that reason, comparable.

It follows that the Court of First Instance did not err in law by holding that the waiver of State resources did not constitute State aid.

The Court of Justice went on to confirm that the Court of First Instance had not erred in law by holding that there was also no discrimination since the three operators concerned were in the same situation in relation to the objective of Directive 97/13¹, which is to ensure that operators have access to the UMTS market under the same conditions.

¹ Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15).

Although it is true that a licence has an economic value, that value depends on the time when each of the operators concerned entered the market. As the Court of First Instance held, as of 3 December 2002, the date on which the licence was awarded to Bouygues Télécom, Orange and SFR had not yet been able to launch their UMTS services, hence to make use of their licences, for reasons beyond their control, namely, problems related to the UMTS technology and an economic context unfavourable to its development.

Consequently, the economic value of the licences granted to Orange and SFR could not, by dint merely of being awarded earlier, be higher than that of the licence awarded to Bouygues Télécom.

The appeal brought by the Bouygues Télécom group is therefore dismissed.

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Languages available: DE, EN, ES, EL, FR, IT, NL, PL

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-431/07>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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