General Court of the European Union
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Press and Information

Judgments in Cases T-79/10
Colt Télécommunications France v Commission; T-258/10 Orange v Commission and T-325/10 Iliad and Others v Commission

The General Court confirms the Commission's decision approving €59 million in public funding for the project for a very high speed broadband network in the Hauts-de-Seine department

The project is consistent with the 'Altmark' case-law

The Hauts-de-Seine department is a French administrative area immediately bordering Paris (France). In order to compensate for the heterogeneous nature, in economic, sociological and infrastructural terms, of the municipalities in that department, the French authorities decided to proceed with the deployment of a very high speed (fibre-optic) broadband electronic communications network, known as 'the THD 92 project'.

The project envisaged granting €59 million in compensation for the public service costs for the establishment and operation of that network to a group of undertakings, Sequalum SAS, chosen following a competitive tendering procedure. In order to comply with the European State aid rules, the French authorities notified the project to the European Commission on 27 June 2008.

In the months that followed, several electronic communications operators active in the Hauts-de-Seine department, including Colt Télécommunications France, Orange (formerly France Télécom), Iliad, Free infrastructure and Free, sent letters to the Commission challenging the compatibility of the project with the State aid rules. The Commission and the French authorities exchanged several letters with a view to supplementing the project file with additional information and enabling the French authorities to respond to the arguments and observations made by the electronic communications operators concerned.

By decision of 30 September 2009[1], the Commission found that the project notified did not constitute State aid. The five companies in question brought an action for the annulment of that decision before the General Court.

By today's judgments, the General Court dismisses the three actions and confirms the Commission's decision.

First of all, while observing that the Commission's new guidelines[2] were not applicable at the time the decision cited was adopted, the General Court decides to refer to them because they codify the Commission's practice concerning the application of the criteria of the Altmark judgment[3] and provide useful guidance on the application of those criteria in the very-high-speed electronic communications sector.

The General Court rejects, first, the companies' argument alleging infringement of the applicants' procedural rights by the Commission because the formal investigation procedure laid down in the Treaties was not initiated.

[1] Commission Decision C(2009) 7426 final of 30 September 2009 concerning the compensation for public services costs for the establishment and operation of a very-high-speed broadband electronic communications network in the Hauts-de-Seine department (State aid N 331/2008 – France).
[2] Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (OJ 2009 C 235, p. 7).
[3] Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg. See also Press Release No 64/03).

The General Court recalls that, in the context of the procedure for reviewing State aid, the preliminary stage of that procedure, which is intended merely to allow the Commission to form a *prima facie* opinion on the measure notified, must be distinguished from the formal investigation stage, which is designed to enable the Commission to be fully informed of all the facts of the case. As a rule, it is at that latter stage that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments. According to the case-law of the Court of Justice, **the formal investigation stage is obligatory if the Commission experiences serious difficulties in establishing whether or not a measure constitutes State aid.**

In order to prove the existence of such serious difficulties, the companies in question must put forward a body of consistent evidence concerning, first, the circumstances and the length of the preliminary examination procedure and, second, the content of the contested decision. In the present case, the companies take the view, in particular, that the periods involved in the preliminary examination phase show that there were serious difficulties. They observe, in particular, that the Commission adopted the contested decision at the end of a formal preliminary investigation lasting fifteen months which, in the companies' view, is an extremely long time.

The General Court recalls that **the duration of the preliminary examination must be calculated as from the date of receipt by the Commission of the complete notification by the Member State, the Commission having a maximum period of two months for the preliminary examination.**

In addition, the General Court points out that **when additional information is requested, the notification must be regarded as complete when the last information requested is received, the two-month period beginning to run only as from that date.** In the present case, the Commission had requested the French authorities to provide such additional information. Since the last additional information was sent on 10 August 2009 and the decision was adopted on 30 September 2009, the General Court finds that as the Commission adopted the contested decision with the two months laid down by the EU legislation, it did not err in law.

The General Court rejects, second, the argument of the companies Orange, Iliad, Free infrastructure and Free, alleging infringement by the Commission of the criteria laid down in Altmark. That judgment states that public service compensation may escape classification as State aid, if four cumulative criteria are met:

1. The recipient undertaking must actually have clearly defined public service obligations to discharge.
2. The parameters on the basis of which the compensation is calculated must be established beforehand in an objective and transparent manner.
3. The compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit.
4. Where the undertaking is not chosen in a public procurement procedure, the level of compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have to incur (taking into account the receipts and a reasonable profit for discharging its obligations).

As regards the first criterion, the Court finds that, since it pursues an objective of general interest and has been established on account of a market failure, the THD 92 project may be classified as a **service of general economic interest (SGEI)**.

Contrary to the arguments put forward by the companies, the General Court recalls that **the Member States have a wide discretion when determining what they regard as an SGEI, as long as its mission satisfies certain minimum criteria such as, inter alia, the universal and compulsory nature of such a mission.** The Member States must also indicate the reasons why they consider that the service in question, because of its specific nature, deserves to be characterised as an SGEI and to be distinguished from other economic activities. The General Court concludes that those criteria are met in the present case because access to very high speed

broadband services by all the public services and the population of the Hauts-de-Seine department thereby meets a general need and exhibits a particular general interest as compared to the interests of other economic activities.

In addition, the General Court finds that, in respect of the Hauts-de-Seine department, no commercial operator had deployed a very high speed broadband network serving domestic and professional users as a whole. Consequently, the Commission had not erred in law in finding that **there was a market failure, which is a prerequisite for classifying an activity as an SGEI, and therefore in finding that there was no State aid.**

As regards the third criterion, the General Court examines whether the burdens arising from the public service obligations have been overcompensated to the advantage of the concessionary, the Sequalum SAS group of undertakings.

The General Court recalls that the Member State also has discretion when assessing the additional costs incurred in discharging the SGEI mission. That assessment depends on complex economic facts, and the Commission's review as to possible overcompensation must therefore be confined to ascertaining whether there has been a manifest error.

In that regard, the General Court holds that the Commission correctly ascertained that the public service delegation agreement sought to ensure that the concessionary would not receive more than was necessary to cover the costs incurred as a result of the public service in question, plus a reasonable profit.

Since the second and fourth criteria have also been met, the General Court therefore dismisses the actions brought against the Commission's decision.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355