JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
4 July 2007 *

In Case T-475/04,

Bouygues SA, established in Paris (France),

Bouygues Télécom SA, established in Boulogne-Billancourt (France),

represented by L. Vogel, J. Vogel, B. Amory, A. Verheyden, F. Sureau and D. Théophile, lawyers,

applicants,

v

Commission of the European Communities, represented by J.L. Buendia Sierra and C. Giolito, acting as Agents,

defendant,

* Language of the case: French.

supported by

French Republic, represented by G. de Bergues and S. Ramet, acting as Agents,

Société française du radiotéléphone — SFR, established in Paris (France), represented by C. Vajda QC and A. Vincent, lawyer,

and

Orange France SA, established in Montrouge (France), represented by A. Gosset-Grainville and S. Hautbourg, lawyers,

interveners,

APPLICATION for annulment of the Commission decision of 20 July 2004 (State aid NN 42/2004 — France) regarding the modification of payments due from Orange and SFR for UMTS licences (Universal Mobile Telecommunications System),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, I. Wiszniewska-Białecka and E. Moavero Milanesi, Judges,

Registrar: E. Coulon,

having regard to the written procedure and further to the hearing on 14 March 2007,

gives the following

Judgment

Legal background

1 Under Article 87(1) EC:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

2 The secondary legislation applicable at the time of the facts in the case was 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 tele-communications services (OJ 1997 L 117, p. 15) and Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third generation mobile and wireless communications system (UMTS) in the Community (OJ 1999 L 17, p. 1).

3 Article 3(3) of Directive 97/13 provided that:

'... Member States may issue an individual licence only where the beneficiary is given access to scarce physical and other resources or is subject to particular obligations or enjoys particular rights ...'

4 Article 8(4) of Directive 97/13 stated that:

'Member States may amend the conditions attached to an individual licence in objectively justified cases and in a proportionate manner. When doing so, Member States shall give appropriate notice of their intention to do so and enable interested parties to express their views on the proposed amendments.'

5 Article 9(2) of Directive 97/13 provided that:

'Where a Member State intends to grant individual licences:

— it shall grant individual licences through open, non-discriminatory and transparent procedures and, to this end, shall subject all applicants to the same procedures, unless there is an objective reason for differentiation, ...'

6 Article 10(3) and (4) of Directive 97/13 laid down that:

'3. Member States shall grant such individual licences on the basis of selection criteria which must be objective, non-discriminatory, detailed, transparent and proportionate. Any such selection must give due weight to the need to facilitate the development of competition and to maximise benefits for users.

Member States shall ensure that information on such criteria is published in advance in an appropriate manner, so as to be readily accessible. Reference to the publication of this information shall be made in the national official gazette of the Member State concerned.

4. Where, on its own initiative or following a request by an undertaking, a Member State finds, either at the time of entry into force of this Directive or thereafter, that the number of individual licences can be increased, it shall publish this fact and invite applications for additional licences.'

7 Article 11(2) of Directive 97/13 provided that:

'... Member States may, where scarce resources are to be used, allow their national regulatory authorities to impose charges which reflect the need to ensure the optimal use of these resources. Those charges shall be non-discriminatory and take into particular account the need to foster the development of innovative services and competition.'

8 Decision No 128/1999, which according to Article 1 thereof aimed '... to facilitate the rapid and coordinated introduction of compatible UMTS networks and services in the Community ...', stated in Article 3(1) that:

'Member States shall take all actions necessary in order to allow, in accordance with Article 1 of Directive 97/13/EC, the coordinated and progressive introduction of the UMTS services on their territory by 1 January 2002 at the latest ...'

9 In France, the version of Article L. 33-1 of the Code des postes et télécommunications (Postal Services and Telecommunications Code) in force at the time of the facts in the case provided as follows:

'I — Establishment and operation of networks accessible to the public shall be authorised by the Minister for Telecommunications.

Authorisation may be refused only in so far as is necessary to safeguard public order or the requirements of defence or public security, on grounds of technical

constraints imposed by the availability of frequencies or if the applicant lacks the technical or financial capacity to fulfil on a lasting basis the obligations stemming from the conditions for the performance of its activity or has been the subject of one of the penalties mentioned in Articles L. 36-11, L. 39, L. 39-1, L. 39-2 and L. 39-4.

Authorisation shall be subject to the rules set out in a specifications document and relating to:

...

(h) the use of the allocated frequencies and the fees payable in that respect and for the cost of their operation and control.

...

Authorisation shall be granted for a period of 15 years.

...

V — The number of authorisations may be limited on account of the technical constraints associated with the availability of frequencies.

In that case, the Minister for Telecommunications shall publish, upon the proposal of the Autorité de régulation des télécommunications (Telecommunications Regulatory Authority), the terms and conditions for the award of authorisations.

The allocation of frequencies must in all cases ensure conditions of effective competition.'

Background to the dispute

10 In France under Law No 96-659 of 26 July 1996 regulating telecommunications (JORF of 27 July 1996, p. 11384), which was in force at the time of the facts in the case, the establishment and operation of networks accessible to the public were initiated upon a proposal from the newly created Autorité de régulation des télécommunications (Telecommunications Regulatory Authority; the 'ART'), which examined applications for authorisation that were then approved by the Minister for Industry, Postal Services and Telecommunications.

11 On 6 June 2000 the French Government announced its intention to grant four licences for the introduction of third generation mobile and wireless communication systems (UMTS, Universal Mobile Telecommunications System). In accordance with the provisions then in force, the Minister for Industry, Postal Services and Telecommunications published in the JORF of 18 August 2000 Decision No 00-835 of the ART of 28 July 2000 proposing to him the terms and conditions for the award of authorisations for the introduction of third generation mobile systems in metropolitan France, thereby launching the call for applications. It is evident from the annexes to that publication that the award of authorisations, as a result of which a small number of operators are granted an advantage through the occupation of the public airwaves, was to give rise to the payment of a fee totalling FRF 32 500 000 000 (EUR 4 954 593 000) payable over the lifetime of the licence, which was set at 15 years. Secondly, the final date for lodging applications was set at 31 January 2001, and applicants could withdraw their applications until 31 May 2001.

12 On 31 January 2001 the ART announced in a press release that only two applications had been received, namely those from Société française du radiotéléphone — SFR ('SFR') and France Télécom mobiles (which a few months later became Orange France ('Orange')) and that it considered a supplementary call for applications to be necessary to ensure genuine competition.

13 In the light of that information, the chairman and managing director of France Télécom and his counterpart at Vivendi Universal (of which SFR is a subsidiary) drew the attention of the Minister for the Economy and Finance and of the Secretary of State for Industry to the need to comply with the principles of equality with respect to public contracts and of effective competition between operators when deciding the terms on which to grant future licences.

14 By two identically worded letters dated 22 February 2001, the Minister for the Economy and Finance and the Secretary of State for Industry replied to the managers of the undertakings in question that the government shared with them this dual objective (compliance with the principles of equality with respect to public contracts and effective competition between operators) and that the 'terms of the call for further applications which [would] be proposed by the ART and the government [would] ensure equal treatment of the operators who [would] ultimately be granted a licence'.

15 Without waiting for the launch of the supplementary call for applications, two initial licences were issued in July 2001. In two decrees dated 18 July 2001 (published in the JORF of 21 August 2001), the Secretary of State for Industry (who at that time was also responsible for telecommunications) authorised Orange and SFR to establish and operate a third generation radioelectric network accessible to the public conforming with the UMTS standard and to provide the telephone service to the public, the authorisation being granted for a period of 15 years. The specifications annexed to the decrees laid down, in particular, that the fees for the provision and operation of the UMTS frequencies would be paid, in accordance with Article 36 of

the Finance Law for 2001, in the amount of EUR 4 954 593 000 (FRF 32 502 000 000), (Finance Law published in the JORF of 31 December 2000). According to Article 36 of that law, the first payment was due on 31 September 2001 and the last on 30 June 2016.

16 The supplementary call for applications, the aim of which was to issue the two authorisations that had not been allocated, was launched with the publication by the Minister for Telecommunications of Decision No 01-1202 of 14 December 2001 of the ART proposing to him the terms and conditions for the award of authorisations for the introduction of third generation mobile systems in metropolitan France. In that decision, the ART indicated, inter alia, that 'the terms for [this second] procedure constitute[d] a continuation of those for the first call for applications and [were] designed to ensure, in particular, compliance with the principle of equality between the operators'. It also recommended amending the financial charge payable by the licence holders and extending the duration of the licences.

17 The financial terms applicable to the authorisations were revised by Article 33 of the Finance Law for 2002 (published in the JORF of 28 December 2001), which amended Article 36 of the Finance Law for 2001, mentioned in paragraph 15 above, in order to provide that the fee payable for the advantage derived from occupation of the public airwaves would be divided into a first component of EUR 619 209 795.27 paid on 30 September of the year in which the authorisation was awarded or at the time of award if that date fell after 30 September, and a second component paid annually before 30 June of each year for the use of the frequencies during that year, calculated as a percentage of the turnover generated by the use of those frequencies.

18 The Minister for Telecommunications published in the JORF of 29 December 2001 a notice relating to the payment of the fees for the use of the frequencies allocated to the licence holders, incorporating the new financial terms laid down in the Finance Law.

19 At the deadline for making applications, 16 May 2002, a single application, that of Bouygues Télécom ('Bouygues Télécom'), a subsidiary of the Bouygues group, had been lodged. The ART conducted the investigation procedure, at the end of which the third licence would be delivered to Bouygues Télécom (see paragraph 21 below). The fourth licence could not be awarded for lack of an applicant.

20 In parallel, on 4 October 2002, Bouygues and Bouygues Télécom lodged a complaint with the Commission about a series of aid measures allegedly adopted by the French authorities in favour of France Télécom, including the amendment of the fees payable by Orange and SFR, which had been announced by the government during the debate on the Finance Law for 2002.

21 By decree of 3 December 2002 (published in the JORF of 12 December 2002, p. 20490), the Minister for Industry authorised Bouygues Télécom to establish and operate a third generation radioelectric network accessible to the public in accordance with the UMTS standard and to provide the telephone service to the public. The authorisation, which was granted for a period of 20 years, is based on the financial terms as regards fees for the provision and operation of frequencies indicated in paragraphs 17 and 18 above.

22 In addition, in two further decrees of 3 December 2002 (which were also published in the JORF of 12 December 2002) concerning Orange and SFR respectively, the Minister for Industry amended the decrees of 18 July 2001 mentioned in paragraph 15 above and the specifications annexed thereto, in particular, to extend the period of the authorisation to 20 years and to replace the provisions regarding fees for the provision and operation of frequencies by provisions identical to those applied to Bouygues Télécom, that is to say the amended financial terms described in paragraph 17 above, which were therefore substantially lower than the initial terms set out in the decrees of 18 July 2001 (see paragraph 15 above).

23 On 31 January 2003 the Commission notified the French Republic of its decision to initiate the procedure laid down in Article 88(2) EC in respect of two aid measures concerning respectively the business tax regime applicable to France Télécom and financial measures put in place by the State in support of that undertaking (OJ 2003 C 57, p. 5). These measures are among the ones to which the applicants' complaint mentioned in paragraph 20 above related. They had also been the subject of a complaint lodged on 13 March 2001 by an association of French local authorities.

24 By letter of 12 November 2003, the applicants served notice on the Commission, in accordance with Article 232 EC, to initiate the procedure laid down in Article 88(2) EC in relation to the objection to the amendment of the fees payable for the award of the UMTS licences, which also formed part of their complaint. The Commission sent them a holding letter on 11 December 2003.

25 By application lodged at the Registry of the Court of First Instance on 21 February 2004, the applicants brought an action based on Article 232 EC (Case T-81/04).

26 On 20 July 2004 the Commission adopted the decision 'State aid NN 42/2004 — France' (the 'contested decision'), which was notified to the French Republic, relating to the amendment of the fees payable by Orange and SFR for the UMTS licences, which were among the measures referred to in the complaint brought by the applicants on 4 October 2002. In that decision, which is the subject of this application, the Commission indicates that it decided not to raise objections to the measure to which the complaint referred, concerning the amendment of the fees in question, on the ground that that measure did not entail aid elements within the meaning of Article 87(1) EC.

27 As a preliminary matter, the Commission considers that, taking into account the limited nature of the Community framework, the French Government could lay

down the terms for the award of UMTS licences, subject to following an open, non-discriminatory and transparent procedure, and set the fee at an appropriate level so as to achieve objectives defined in accordance with that framework, the amendment of the fee in question meeting the stated objective of awarding the largest possible number of licences (recitals 20 to 24 of the contested decision).

28 In analysing the disputed measure, the Commission considers, first, that the alignment of the terms of the licences of the three operators involved (leading to a downward revision of fees to the benefit of Orange and SFR) followed implicitly from the terms initially agreed, because imposing stricter terms on Orange and SFR was only hypothetical, since they could withdraw (recital 27 of the contested decision).

29 Secondly, the Commission holds that the French authorities were merely complying with an obligation under Community law, laid down in Directive 97/13, namely the application of non-discriminatory terms (recital 28 of the contested decision).

30 Thirdly, the Commission considers that Community law does not require that the fees payable for UMTS licences be set at a level corresponding to a supposed market value, that the Member States exercise their regulatory functions and that the award of licences cannot be assimilated to a market transaction. In examining whether the amendment of the fee constitutes a selective advantage, the Commission holds that the French authorities applied the same terms to operators obtaining the same licence, on the basis of the same specifications, at the end of two procedures forming a continuum and that there was no discrimination in the mere fact that some operators obtained their licence a year earlier (recitals 29 to 33 of the contested decision). Furthermore, it observes that the new system of charging, under which a high fixed fee is replaced by a reduced fixed fee combined with an annual duty in

proportion to turnover, makes it possible to take account of the operators' differing situations over time (recital 34 of the contested decision).

31 The Commission concludes that the French authorities did not give an advantage to Orange and SFR but complied with the requirements of Community law relating to the objective and non-discriminatory treatment of the operators (recital 35 of the contested decision).

32 By order of 14 February 2005 in Case T-81/04 *Bouygues and Bouygues Télécom* v *Commission* (not published in the ECR), the Court of First Instance ruled that there was no need to proceed to judgment on the claim that the Commission had not ruled on the part of the applicants' complaint relating to the amendment of the fees for UMTS licences and dismissed as inadmissible the alternative plea for annulment of the decision contained in the Commission's letter of 11 December 2003, mentioned in paragraph 24 above.

Procedure and arguments of the parties

33 By application lodged at the Registry of the Court of First Instance on 24 November 2004, the applicants brought the present action under Article 230 EC.

34 By three orders of 9 June 2005, the President of the Fourth Chamber granted the French Republic, Orange and SFR leave to intervene in support of the forms of order sought by the Commission.

35 In response to a request from the Court of First Instance dated 12 February 2007, the parties produced, on 20 February 2007, a copy of the applicants' complaint submitted to the Commission on 4 October 2002.

36 The parties presented oral argument and answered the questions put by the Court at the hearing on14 March 2007.

37 Bouygues and Bouygues Télécom claim that the Court should:

— annul the contested decision;

— order the defendant and the interveners jointly and severally to pay the costs.

38 The Commission claims that the Court should:

— dismiss the application as unfounded;

— order the applicants to pay the costs.

39 The French Republic claims that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

40 Orange claims that the Court should:

— dismiss the application as unfounded;

— order the applicants to pay the entire costs of the case.

41 SFR claims that the Court should:

— dismiss the application as unfounded;

— order the applicants to pay the entire costs of the case.

Law

42 The applicants put forward pleas of three kinds. First, they claim that the contested decision is vitiated by the absence of an adequate statement of reasons. Secondly, they maintain that the Commission infringed Article 87(1) EC, because the amendment of the fees payable by Orange and SFR constitutes State aid within the

meaning of that provision. Thirdly, in the alternative, they claim that the contested decision reveals a breach of Article 88(2) EC, in that the Commission should have initiated the formal procedure since the case raised serious difficulties.

43 The procedural plea alleging the absence of an adequate statement of reasons must be examined first, and then, together, the pleas in law alleging infringement of Article 87(1) EC and Article 88(2) EC.

The first plea, alleging the absence of an adequate statement of reasons for the contested decision

Arguments of the parties

44 The applicants maintain that the contested decision lacks an adequate statement of reasons, first because it does not enable them to understand the logic of the Commission's reasoning with regard to the link between the alleged possibility for Orange and SFR to withdraw their applications and the difficulties for the French authorities to impose stricter terms on them. Secondly, they assert that the delay suffered by the two competing operators was not a valid reason to conclude that there was no advantage likely to affect competition. Thirdly, in their view the contested decision did not answer the objections raised by the applicants in their complaint but merely stated that the complainants relied on a false premiss, namely that the fee should correspond to the commercial value of the licence. Fourthly, they maintain that the lack of an adequate statement of reasons for the decision was also the result of the lack of diligence with which the Commission treated the applicants' complaint.

45 The Commission contends that an adequate statement of reasons was given for the contested decision and that the applicants' complaints stem from their fundamental disagreement with the reasons for that decision. First, in the Commission's view, the link between the possibility for Orange and SFR to withdraw their applications and the amendment of the fees was obvious, given the circumstances of the sector in question. Secondly, as regards the alleged absence of an adequate statement of reasons concerning the absence of an impact on competition, the Commission points out that the contested decision is not based on that reason. Thirdly, the Commission maintains that its response to the objections set out in the applicants' complaint was sufficiently explicit. Fourthly, emphasising that the applicants' complaint related to 11 measures, the Commission contends that the accusations of inertia or lack of diligence are unfounded and that, moreover, these complaints form part of the third plea.

Findings of the Court

46 First, the applicants complain essentially that the contested decision does not include a clear statement of reasons with regard to the link established by the Commission between the supposed right of Orange and SFR to withdraw their applications if they had not obtained from the national authorities, in the letters dated 22 February 2001 mentioned in paragraph 14 above, an assurance that all the operators would be treated equally and the alleged impossibility for the French authorities to impose stricter financial terms on Orange and SFR.

47 In the contested decision, the Commission notes that on 31 January 2001 the ART had recommended issuing a call for additional applications, which should take account of the need for equality, especially in financial terms (recital 9 of the contested decision). It points out (recitals 10 to 12 of the contested decision) that Orange and SFR could withdraw their applications until 31 May 2001 and that the French Government was faced with the following choice: were it not to guarantee the two operators that they would be treated equally if the new call for applications

stated a lower revised price, it ran the risk of their withdrawing their applications, whereas if it gave them such an assurance the two operators would maintain them. The Commission adds that, in order to complete the procedure as quickly as possible, in accordance with their European commitments, the French authorities opted for the second solution.

48 It follows from these considerations that the Commission set out in a clear and detailed manner the facts of the choice which, in its opinion, faced the French authorities, pointing out the risk of seeing the only two candidates for the award of a UMTS licence withdraw their applications if the French authorities maintained stricter financial terms than those that would be granted to other potential candidates. The applicants' first plea must therefore be dismissed.

49 Secondly, the applicants allege that the delay incurred by the two competing operators is not a valid reason for concluding that there was no advantage likely to affect competition.

50 It must be found that such a complaint does not relate to the statement of reasons for the contested decision but to the soundness of its grounds. Analysis of that complaint therefore has its place in the examination of the fundamental legality of the contested decision.

51 Thirdly, the applicants complain that the Commission did not reply to the parts of their complaint relating first to the waiving of a claim, constituting State aid, which the national authorities allegedly permitted, and secondly to the temporal advantage which Orange and SFR allegedly enjoyed.

52 In the contested decision, the Commission does not express an opinion on the first objection relating to the waiving of a claim and dismisses the second relating to the temporal advantage on the grounds first that the complainants' argument is based on a false premiss that the fee should correspond to the commercial value of the licence, which is supposedly higher on account of the temporal advantage in question (recital 29 of the contested decision), and secondly that the existence of such a temporal advantage had not been demonstrated (recital 34 of the contested decision).

53 It must be recalled that, as regards a decision finding that no State aid as alleged by a complainant exists, the Commission must provide the complainant with an adequate explanation of the reasons for which the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid. The Commission is not required, however, to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 64).

54 Furthermore, according to settled case-law, it is not necessary for the statement of reasons for an act to go into all the relevant facts and points of law, as that statement must be assessed with regard to its context and to all the legal rules governing the matter in question (see *Commission* v *Sytraval and Brink's France*, paragraph 63, and the case-law cited). Moreover, a decision rejecting a complaint about State aid is adequately justified on the ground that the measure complained of constitutes an implementation of a directive and not an attempt to grant aid (see to that effect Case T-351/02 *Deutsche Bahn* v *Commission* [2006] ECR II-1047, paragraph 120).

55 First, the complaint alleging the waiving of a claim by the State, which aims to demonstrate the existence of a transfer of State resources within the meaning of Article 87(1) EC, on which the Commission did not rule in the contested decision, is inoperative since the said decision concludes that no State aid existed on the ground that the measure complained of did not produce any advantage for Orange and SFR. As the Commission had concluded that aid elements within the meaning of Article

87(1) EC were not present since one of the cumulative factors defining the concept of State aid within the meaning of that provision was absent, it was not required to give reasons for its rejection of the applicants' complaint as far as the other elements defining that concept were concerned. The plea was in any case secondary within the meaning of the case-law cited above, in that the measure had been justified on grounds which, according to the Commission, took precedence, namely compliance with the requirements of the directive, and in particular compliance with the principle of non-discrimination. In those circumstances, the institution could not be accused of not having replied to this objection, which was both inoperative and secondary.

56 Secondly, in the contested decision the Commission dismissed the argument as to the temporal advantage, for two reasons. First, it considered that it rested on a false premiss on the part of the complainants, namely that the fee should correspond to the commercial value of the licence and that a licence obtained earlier had a higher value. Secondly, the Commission considered that an examination of the facts caused it to relativise or even dismiss this supposed temporal advantage, since Orange and SFR had met with delay in the launch of their UMTS networks and Bouygues Télécom, which could have taken advantage of such a delay, had therefore not suffered on account of the alleged temporal advantage. The Commission added that the new system of fees made it possible to take account of the operators' different situation *ratione temporis*.

57 It can therefore not be maintained that the contested decision lacks a statement of reasons with regard to the alleged temporal advantage, the existence of which it in fact denies for two reasons, the first conceptual and the second factual. The soundness of the Commission's assessments as to the existence of a temporal advantage does not fall within the ambit of the review of the statement of reasons for the act, as stated in paragraph 50 above, and will therefore be examined in connection with the grounds adduced for denying that the measure was State aid, in the context of the review of the fundamental legality of the contested decision.

58 Fourthly, the applicants maintain that the lack of an adequate statement of reasons for the contested decision should be viewed in conjunction with the lack of diligence attributed to the Commission in the handling of their complaint.

59 Since adequate reasons are given for the contested decision, this plea must be dismissed as inoperative. In so far as the claimed lack of diligence may be linked to the plea based on infringement of Article 88(2) EC, it will be examined in that context.

60 It follows from all of the above that the first plea relating to the statement of reasons for the contested decision must be dismissed.

The second and third pleas, based on infringement of Article 87(1) EC and Article 88(2) EC respectively

Arguments of the parties

61 The applicants maintain that the amendment of the fees payable by Orange and SFR for the UMTS licences constitutes State aid within the meaning of Article 87(1) EC.

62 First, they contend that there was a transfer of State resources, because the French authorities waived their right to collect a payable claim.

63 Secondly, they maintain that the amendment gave the parties concerned a selective advantage.

64 First, in their view the amendment could not be justified in the name of the principle of non-discrimination, as indicated in the contested decision, since Directive 97/13 does not require identical terms for the award of licences to be set and two separate application procedures were arranged.

65 Secondly, they assert that, on the contrary, the amendment discriminated against Bouygues Télécom, whose situation is different from that of Orange and SFR.

66 Thirdly, according to the applicants, this selective advantage was granted for no consideration. First, they maintain that the French Government waived its right to collect a payable claim, whereas the two operators allegedly had the means to pay the amount of fees initially set, which constituted a normal expense for them and a legitimate price corresponding to the market value of the licences; they assert that the withdrawal of their applications, if this amount were kept unchanged, was purely hypothetical. Secondly, they maintain that the State allowed Orange and SFR a temporal advantage, since other competitors would have applied if the fee charged as a result of the amendment had applied from the outset. In the opinion of the applicants, obtaining licences one and a half years before Bouygues Télécom enabled Orange and SFR to choose the best frequency blocks, pre-empt the best sites, benefit from an image as an innovative operator to the detriment of Bouygues Télécom and conquer parts of the market without having to face real competition. The fact that all the operators met with delays in launching UMTS did not, in their view, alter these findings. Furthermore, according to the applicants, in letters dated 22 February 2001 the French authorities had assured Orange and SFR that they would be awarded a licence and would enjoy the more favourable terms of the supplementary call for applications without requiring them to reapply.

67 Thirdly, in the applicants' opinion the amendment of the fees affected competition, a potential effect being sufficient according to case-law. They maintain that the

effect was in fact real, since Orange and SFR could invest sums that should have been used to pay the licence fees. Hence, in the view of the applicants, the two operators had penetrated the UMTS market in a definite manner and at an early stage.

68 In their reply, the applicants dispute in particular the line of argument developed by the Commission in its statement of defence, according to which the French Government exercised State prerogatives in the light of considerations of public interest, which would preclude the existence of a selective advantage and hence of State aid. They maintain first that when the State awards licences it performs an economic activity, seeking to derive profit from the use of the public airwaves, and secondly that, even when it exercises State functions, the State must abide by the rules of competition, and thirdly that the amendment of the fees in question is not justified by the nature and general scheme of the system, in accordance with case-law.

69 In their arguments as to infringement of the principle of non-discrimination and the economic nature of the award of UMTS licences, the applicants assert that Directive 97/13 establishes the principle of the inalterability of the selection criteria or of the terms for the award of contracts laid down in a given procedure and that it does not allow the terms of a call for applications to be amended while the procedure is in progress, which in the present case was the effect of the letters from the French authorities of 22 February 2001. The applicants also rely on the principles and rules applicable to public contracts and concessions, that is to say the principles of transparency and equality of treatment, applicable to comparative tendering procedures, and the principle of the inalterability of the selection criteria or of the terms for the award of contracts under such procedures.

70 The applicants also maintain that the Commission was obliged to initiate the procedure laid down in Article 88(2) EC since the case raised serious difficulties, as the Commission allegedly acknowledged.

71 The Commission contends first, with regard to the concepts of selective advantage and State resources, that the applicants wrongly interpret the legal framework applicable, which is based on a logic of market regulation that demands objective, non-discriminatory and transparent treatment when awarding licences taking into account the need to maximise benefits to users, ensure optimum utilisation of scarce resources and facilitate the development of competition. It maintains that the French authorities were exercising State functions, seeking not to maximise benefits but to ensure the development of healthy and fair competition.

72 According to the Commission, the amendment of the fees of Orange and SFR was fully compliant with Directive 97/13 and Decision No 128/1999, as the directive required equal treatment for all undertakings obtaining a licence. Hence, when the French authorities amended the fees by aligning the terms for all the licences, they did not grant a selective advantage to Orange and SFR but adopted measures consistent with the nature and general scheme of the regulatory system. In the absence of a selective advantage, a loss of State resources did not constitute State aid.

73 The Commission contends that Directive 97/13 provides for amending the terms of licences and increasing the number issued, and that the directives on public contracts on which the applicants rely are not applicable to the present case.

74 The Commission also asserts that the amendment of the disputed fees did not produce a temporal advantage for Orange and SFR. First, it considers that the existence of the alleged advantage is far from obvious, as there is nothing to show that the frequency blocks allocated to the first two operators were the best. The so-called pre-emption of the best sites by Orange and SFR would, on the contrary, enable Bouygues Télécom to save on detailed studies into this question. Moreover, despite obtaining their licences in July 2001, Orange and SFR did not launch their

UMTS services until about two years after Bouygues Télécom obtained its licence, a delay which Bouygues Télécom could have exploited. Finally, the alleged adverse effect on the brand image of Bouygues Télécom as a result of its not participating in the first call for applications could not be blamed on the French authorities but stemmed from the strategic decisions of the party concerned.

75 Secondly, according to the Commission, supposing that some apparent advantage existed, it was more than offset in two ways. First, the annual tax in proportion to turnover foreseen under the new method of calculating fees did indeed make it possible to take account of the operators' different situation over time. Secondly, any advantage was the result not of a decision on the part of the national authorities but of the certain risk assumed by Orange and SFR in the first call for applications, when there was no reason to foresee, in particular, the subsequent amendment of the fees.

76 The Commission maintains, secondly, that the alleged fact that the measure adopted by the French authorities had an impact on competition did not affect its analysis in any way, as the declared purpose of measures for regulating an economic sector is precisely to have an effect on competition and in the present case the measure complained of had positive effects in this respect.

77 With regard to the serious difficulties that allegedly justified initiating the formal procedure, the Commission indicates that it is not the objection in the present dispute that raised difficulties but only certain other measures mentioned in the complaint, which led the Commission to initiate the procedure laid down in Article 88(2) EC.

78 The French Republic states that when the competent authority (ART) awards a UMTS licence it performs a regulatory activity in the telecommunications market

and is not acting as an economic agent, the fee demanded in this respect not constituting a price. It maintains that the amendment of the fees of Orange and SFR was carried out in accordance with the principle of non-discrimination laid down in Directive 97/13 in order to ensure equal treatment for all operators, and that it was justified by the nature and general scheme of the system. The letters of 22 February 2001 from the French authorities merely stated that the principle of equality between operators would be respected. The purpose of the two successive calls for applications, which complemented one another, was to award equivalent licences, it being pointed out that Orange and SFR could withdraw their bids and then renounce their licences and that the organisation of a new call for applications would then have delayed the marketing of UMTS services, at the cost of missing the deadlines laid down in Directive 97/13.

79 The French Republic maintains that the amendment of the fees of Orange and SFR did not give these operators an advantage, as the opportunity they had to enter the UMTS services market earlier stemmed from the award of their licences following the first call for applications and not from the amendment. Bouygues Télécom, which had decided not to participate in the first procedure, was in any case able to offset the claimed advantage of its competitors. In that regard, according to the French Republic, the applicants were not able to establish that the frequency blocks allocated were not equivalent, and Bouygues Télécom, which already had the sites needed to implement UMTS, could have taken advantage of the delay suffered by Orange and SFR if it had not made the strategic decision to adopt an alternative to UMTS.

80 Orange maintains that the amendment of the fees was not selective. The French authorities had been required, in order to respect the principle of non-discrimination laid down in Directive 97/13, to align the terms of the first call for applications with those of the supplementary procedure, as Orange, SFR and Bouygues Télécom were in comparable situations as operators wishing to obtain identical licences. According to Orange, the French authorities acted as regulator of the emerging UMTS market, with the aim of permitting the development of a fully competitive market in accordance with the objectives of Directive 97/13.

81 In the view of Orange, the amendment of the fees had not given Orange and SFR an advantage. Orange maintains that it could have withdrawn its application until 31 May 2001 and that it did not do so because it had a guarantee that the French authorities would respect the principle of equality. The alleged temporal advantage had not been established, because Orange and SFR launched their UMTS services more than two years after Bouygues Télécom obtained its licence. Furthermore, Bouygues Télécom, which had not banked on UMTS, was able to position itself in the market at almost the same time as its competitors.

82 SFR contends that the decision of the French authorities not to cancel the first call for applications but to hold a second one enabled all the interested operators to tender and Bouygues Télécom to obtain a licence for a fee with which it was satisfied. Furthermore, as a total of three operators applied for the four licences on offer, they were certain of obtaining a licence. In the view of SFR, Orange and SFR enjoyed no advantage. On the contrary, Bouygues Télécom benefited from its later application, particularly as regards technological advances.

83 Furthermore, according to SFR, the French authorities did not have an irrevocable right to the part of the claim which they waived. Orange and SFR had until 31 May 2001 to withdraw their applications and could at any time thereafter renounce the benefit of the authorisation to occupy the public domain and cease to pay the corresponding fee. Moreover, had the French authorities maintained the initial fees demanded of Orange and SFR, which were almost eight times higher than the amount Bouygues Télécom enjoyed, the latter operator would have had a selective advantage.

Findings of the Court

84 The dispute revolves around the question whether, by amending the fees payable by Orange and SFR for UMTS licences, the French authorities granted these two

operators an advantage that constituted State aid within the meaning of Article 87(1) EC. The contested decision concluded that Orange and SFR derived no advantage from the amendment in question and, since one of the cumulative conditions defining the concept of State aid within the meaning of Article 87(1) EC was not fulfilled, that the measure complained of did not entail aid elements within the meaning of that provision.

85 The applicants rely essentially on two types of argument. They maintain first that the measure of which they complain entails a selective advantage, primarily temporal in nature and granted without consideration, as the French authorities waived their right to collect what for Orange and SFR was a normal expense, corresponding to the market value of the licences. The applicants then maintain that the amendment of the disputed fee could not be justified by the principle of non-discrimination, since on the contrary it discriminated against Bouygues Télécom.

86 From the procedural point of view, the applicants also claim that their complaint to the Commission raised serious difficulties and that, after initial examination, the institution should therefore have initiated the procedure laid down in Article 88(3) EC, under which, if it considers that a plan to grant aid is not compatible with the common market, under Article 87 EC it shall without delay initiate the procedure provided for in Article 88(2) EC.

87 Under the procedure laid down in Article 88 EC, the preliminary stage of the procedure for reviewing aids under Article 88(3) EC, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the formal investigation stage envisaged by Article 88(2) EC, which is designed to enable the Commission to be fully informed of all the facts of the case (Case C-198/91 *Cook* v

Commission [1993] ECR I-2487, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16; and *Commission* v *Sytraval and Brink's France*, paragraph 38).

88 The preliminary review stage established by Article 88(3) EC is intended merely to allow the Commission a sufficient period of time for reflection and investigation so that it can form a prima facie opinion of the aid plans notified to it and then conclude, without any extensive review being called for, whether they are compatible with the Treaty or whether, on the other hand, the content of the aid raises doubts as to its compatibility (Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraphs 53 and 54).

89 The formal investigation stage under Article 88(2) EC, which enables the Commission to be fully informed of all the details of the case before adopting its decision, becomes essential whenever the Commission has serious difficulties in determining whether the aid is compatible with the common market (*Matra* v *Commission*, paragraph 33).

90 The Commission may therefore restrict itself to the preliminary examination foreseen under Article 88(3) EC before adopting a decision raising no objections to new aid only if it is able to satisfy itself after that examination that the plan is compatible with the Treaty.

91 If, on the other hand, that initial examination leads the Commission to the opposite conclusion, or does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the formal investigation procedure provided for in Article

88(2) EC (Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13; *Cook* v *Commission*, paragraph 29; *Matra* v *Commission*, paragraph 33; and *Commission* v *Sytraval and Brink's France*, paragraph 39).

92 Since the contested decision was adopted without initiating the formal investigation stage, the Commission could adopt it legally only if the initial review of the complainants' complaint did not reveal serious difficulties.

93 It is therefore necessary to examine the applicants' arguments against the contested decision regarding the existence of serious difficulties. If such difficulties existed, the decision could be annulled on that ground alone, because of the failure to initiate the *inter partes* and detailed examination laid down in the Treaty, even if it had not been established that the Commission's assessments as to substance were wrong in law or in fact.

94 It is then necessary to examine whether the alleged temporal advantage constituting State aid existed and then whether the principle of non-discrimination was observed.

— The existence of a selective advantage

95 In the contested decision, the Commission considered that 'it [was] not proven that the early obtaining of the UMTS licence gave Orange and SFR any advantage whatsoever that was likely to affect competition, given the delays suffered by all the operators in implementing the UMTS network' and that 'the new system of charging for licences ... [could] be considered more appropriate for taking account of the

different situation of the operators *ratione temporis* in the specific context of the award of the licences in France' (recital 34 of the contested decision).

96 In order to demonstrate the selective nature of the amendment of the UMTS fees, the applicants allege that the amendment gave Orange and SFR a temporal advantage because of the earlier award of their respective licences, to the detriment of Bouygues Télécom, which paid an identical price for a licence that did not take effect until after those of its competitors, which in the view of the applicants constituted discrimination against that operator.

97 In this regard, the applicants contest the view that the disputed amendment can be interpreted as a measure justified by the nature and general scheme of the system, which would exempt it from being classified as State aid (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33; Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 42; and Joined Cases C-128/03 and C-129/03 *AEM and AEM Torino* [2005] ECR I-2861, paragraph 39). In their view, the award of mobile telephony licences does not constitute a purely regulatory activity but an economic activity.

98 In this regard, the applicants claim that the UMTS licences have a commercial value and that when the national authorities award them they act as an economic agent seeking to extract the best price in order to exploit economically the operation of the public airwaves. They add that this price had been accepted by Orange and SFR as consideration for the right they had been granted to use public space. Consequently, by significantly reducing the amount payable by way of the fee that had been initially set, the national authorities abandoned a substantial part of the claim they held on the two operators concerned and transferred State resources to them.

99 According to the file, the fee had initially been set at EUR 4 954 593 000, to be paid in instalments over the period of the licence, and the fee in the wake of the contested amendment consisted of a first component of EUR 619 209 795.27, paid on 30 September of the year in which the authorisation was awarded or at the time of award if that date fell after 30 September, and a second component paid annually before 30 June of each year for the use of the frequencies during that year, calculated as a percentage of the turnover generated by the use of those frequencies (see paragraphs 11 and 17 above). Such an amendment entails, potentially at least, a loss of State resources to which the national authorities consented in the present case.

100 According to the judgment in Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 93, which related to the fees charged to operators acting in different mobile telecommunications markets, the licences have an economic value.

101 Similarly, UMTS licences, which authorise economic activities consisting in the provision of mobile telephony services in the wireless spectrum and are interpreted as conferring the right to occupy or use the corresponding public domain, have an economic value that the manager of that domain is bound to take into account when he determines the amount of fees to be paid by the operators involved.

102 In Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraphs 120 and 121, which revolved around the provision of airport facilities to airlines and service providers and the fees set in that respect by the applicant as manager of the public airport domain, the Court of First Instance held that the existence under domestic law of a system of special supervision of publicly-owned property was not incompatible with the exercise of activities of an economic nature on publicly-owned property and that the provision of airport facilities by Aéroports de Paris

contributed to the performance, on publicly-owned property, of services of an economic nature and formed part of its economic activity.

103 At appeal, the Court of Justice ruled that the provision of airport facilities to airlines and the various service providers, in return for a fee at a rate freely fixed by Aéroports de Paris, constituted an economic activity (Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, paragraph 78).

104 Hence, the exercise of State functions 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.

105 In this regard, the arguments put forward at the hearing by the Commission, to the effect that the assets in question have no market value since there is no equivalent in the hands of private managers, are not sufficient to preclude such assets from constituting a State resource.

106 However, even if, taking into account the economic value of the licences, it must be conceded to the applicants that the national authorities waived their right to a significant part of State resources in the present case, this conclusion must be tempered in the light of the claim in question and, moreover, this loss of resources does not necessarily constitute a State aid by reason of the nature and general scheme of the system.

107 Contrary to the applicants' assertions, the State's claim on Orange and SFR which it waived was not certain. First, in the context of the procedure for the first call for applications, these two operators could have withdrawn their applications until 31 May 2001 if they had not received assurances that they would be treated equally with the other operators (see the letters of 22 February 2001 referred to in paragraph 14 above) and secondly they could at any time thereafter relinquish the benefit of the licence and as a result cease to pay the fee, especially if they felt they were being treated unfairly by comparison with Bouygues Télécom.

108 Moreover, the Community framework for telecommunications 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 any fees and leaves the Member States free to choose the procedure for the award of licences, provided that the principles of freedom of competition and equality of treatment are respected. Hence, although the Member States may use public auctions, they may equally opt for a comparative selection procedure, as in the present case, the essential point being that the operators see that they are accorded the same treatment, in particular as regards fees.

109 To that effect, in interpreting Article 11(2) of Directive 97/13 with regard to fees, the Court of Justice stated in the *Connect Austria* judgment (paragraph 90) that the fees charged to different operators must be equivalent in economic terms. Furthermore, having noted that the setting of fee amounts involves complex economic assessments and that the national authorities could therefore not be required to comply with rigid criteria in that regard, provided that they remain within the limits resulting from Community law, the Court stated that the national court must determine the economic value of the licences concerned, taking account inter alia of the size of the different frequency clusters allocated, the time when each of the operators concerned entered the market and the importance of being able to present a full range of mobile telecommunications systems (paragraphs 92 and 93).

110 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, it being recalled that, according to the Court of Justice, it is the time when each of the operators concerned entered the market that must be taken into account (the *Connect Austria* judgment, paragraph 93). 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.

111 Consequently, the fact that the State may have waived resources and that this may have created an advantage for the beneficiaries of the reduction in the fee is not sufficient to prove the existence of a State aid incompatible with the common market, given the specific provisions of Community law on telecommunications in the light of common law on State aid. The abandonment of the claim at issue here was inevitable because of the general scheme of the system, apart from the fact that the claim was not certain, as noted in paragraph 107 above.

112 Hence, the assertion that Orange and SFR were able to pay the initial fees, or indeed that they considered that those fees corresponded to the correct price of the licences, is irrelevant, given the nature and general scheme of the system established by Directive 97/13 and Decision No 128/1999, and it is not necessary for the Court to assess the verisimilitude of that assertion.

113 The Court nevertheless agrees with the applicants that there is an objective difference between the situation of Orange and SFR on the one hand and that of Bouygues Télécom on the other as regards the time when they were awarded their respective licences. It is common ground that Orange and SFR were each awarded their licence under two decrees of 18 July 2001 and that Bouygues Télécom obtained its licence under a decree of 3 December 2002. The applicants' argument that the

award of licences to Orange and SFR about one and a half years before Bouygues Télécom may have given the latter's competitors an advantage is not, at first sight, without relevance.

114 An advantage may stem equally well from a lower price set for a good of equal value as from an identical price set for a good of lower value.

115 However, it appears that in the present case the parties concerned did not benefit from this potential advantage.

116 It is evident from the file that, in the face of the problems associated with the UMTS technology and an unfavourable economic climate for its development, Orange and SFR met with delay in the launch of their services, which they were unable to achieve until the middle of 2004 in the case of SRF and the end of 2004 in that of Orange, in other words more than two years after Bouygues Télécom obtained its licence. It must be found that Bouygues Télécom's competitors did not, in practice, exploit the temporal advantage of the prior award of their licences in order to launch their UMTS services before the award of a licence to Bouygues Télécom enabled it to launch its own services. The delay suffered by Orange and SFR therefore had the effect of neutralising the temporal advantage of these two operators.

117 Moreover, although the applicants maintain that the earlier award of licences to Orange and SFR enabled them to choose more beneficial frequency blocks and to use the opportunity to build uninterrupted networks, increase the authorised field, reduce the risk of interference and facilitate cross-border agreements with other operators, they provide no factual evidence to support these claims.

118 The applicants also assert that Orange and SFR were able to pre-empt the best sites, benefit from an image as an innovative operator at the expense of Bouygues Télécom and conquer parts of the market without having to face real competition.

119 First, with regard to the alleged pre-emption of sites, the applicants state that, when Bouygues Télécom obtained its broadcasting permits, Orange and SFR already had a large number of permits, concentrated in the main cities of France. Even if this information is assumed to be correct, it is difficult to draw useful conclusions from it regarding the potential effect on competition, given the marked differences in economic and commercial strategy and choice of technology and, hence, in market approach, between these operators and Bouygues Télécom. In any case, the applicants fail to demonstrate that, when Bouygues Télécom obtained its licence, the best sites had already been taken or that Bouygues Télécom could not obtain installation permits or that, for that reason, it was particularly constrained in the choice of the sites needed to develop its services.

120 Secondly, it is not established that Bouygues Télécom's brand image was damaged by the fact that its competitors obtained licences earlier than Bouygues Télécom itself. Furthermore, the interveners point out, without being contradicted, that Bouygues Télécom chose to rely initially on an alternative technology to UMTS and postponed the launch of its UMTS services pending the arrival of an improved version of the system. In view of these differences in the operators' strategic choices, the impact of the date of award of the licences on the brand image of the undertakings concerned cannot be held to constitute a significant difference in their respective situations.

121 Thirdly, the applicants fail to substantiate their claim that Orange and SFR were able to capture parts of the market without having to face real competition. In any case,

the applicants' argument is unconvincing, given the specific strategy pursued by Bouygues Télécom in the UMTS market, which it is not contested differs from that of the two other operators involved in the present dispute.

122 It therefore appears that, at the date of the contested decision, the Commission was in a position to find that Orange and SFR had not, in practice, profited from the temporal advantage of having been awarded their licences before Bouygues Télécom. Consequently, the Commission was able to consider that Orange and SFR did not in fact have a competitive advantage over Bouygues Télécom.

123 In any case, the advantage potentially granted to Orange and SFR was the only way to avoid adopting, in breach of Directive 97/13, a measure which, given the significant difference between the two successive fee regimes devised by the national authorities, would have discriminated against these two operators when, first, no operator was present in the market at the date of the disputed amendment owing to the delay suffered by Orange and SFR in the introduction of their UMTS services, as has already been stated, and secondly the characteristics of the licences of the three competing operators were identical.

124 With regard to the latter point, the applicants fail to establish that the inherent characteristics of the UMTS licences issued to the three operators differed, and it has been found above that the award of licences to Orange and SFR before Bouygues Télécom did not, in the present case, have an adverse effect on the latter.

125 As stated by the Commission, supported by the interveners, the characteristics of the different frequency lots allocated are equivalent, as is evident from the notice placed in the file by the applicants on the terms and conditions for the award of

authorisations for the introduction of UMTS in metropolitan France annexed to the decision of the ART of 28 July 2000. Nor is it contested that the available equipment functions in all frequency bands. Moreover, the fact mentioned by the applicants that Orange and SFR were able to form common frequency blocks with their foreign subsidiaries is irrelevant, since Bouygues Télécom has no such subsidiaries.

126 It follows from the foregoing that the alleged temporal advantage is not established and that making that assessment does not constitute a serious difficulty, in the light of which the Commission would have been obliged to initiate the formal procedure to investigate the alleged aid.

— The principle of non-discrimination

127 In the contested decision, the Commission considered that, in the measure aligning the disputed fees, 'the French authorities were merely adhering to Article 11(2) of Directive 97/13, which requires charges to be non-discriminatory' and that they 'were merely applying an obligation deriving from Community law' (recital 28 of the contested decision), namely compliance with the principle of non-discrimination.

128 The applicants consider that, in order to ensure non-discriminatory treatment of the operators, the French authorities should have maintained the terms, in particular as regards fees, on the basis of which Orange and SFR had been issued their respective licences, since the two consecutive calls for applications constituted separate procedures. They rely in this regard on the rules applicable to public contracts, in

particular the principle of the inalterability of the selection criteria or the terms of the award, and claim that the national authorities should have annulled the first call for applications and recommenced the selection procedure if they considered it impossible to maintain the terms already agreed with the operators selected initially.

129 According to established case-law, discrimination consists in the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30, and Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 16).

130 It is evident from the file that, at the end of the two calls for applications described in paragraphs 11 to 22 above, Orange, SFR and Bouygues Télécom were granted their respective licences, in the case of the first two by decrees of 18 July 2001 and in that of the third by a decree of 3 December 2002.

131 Unlike Orange and SFR, Bouygues Télécom did not respond to the first call for applications because of the level of the fee, and thus risked being unable to introduce its UMTS services or being able to do so only after a delay, a risk likely to be harmful to the undertaking from the point of view of competition in relation to the other two operators.

132 This objective difference in situation resulting from the fact that Orange and SFR responded to the first call for applications and Bouygues Télécom to the second must be set alongside the identical terms which they were ultimately granted. Hence, the contested decision in effect allows two undertakings, which by applying

immediately did not take the same risk as Bouygues Télécom, to enjoy the more favourable terms that were granted to the latter under a procedure in which they had not taken part.

133 Any discrimination of which Bouygues Télécom may thus have been victim must be examined in the procedural context in question in order to determine the national authorities' obligations in the present case.

134 Despite the way in which it was actually organised, the procedure for awarding UMTS licences initiated in July 2000 by the French authorities constituted, in reality, a single procedure aimed at the award of four licences for the introduction of the UMTS system in France (see paragraph 11 above). It was the partial failure of the first call for applications that necessitated the launch of a supplementary call less than six months after the award of the first two licences (see paragraphs 15 and 16 above) in order to ensure effective competition in an emerging market and to permit the award of the other two licences, the design and execution of the two calls for applications being identical in formal terms (advertising, timetable, etc.).

135 It is necessary in this regard to reject as inoperative the applicants' arguments based on the procedural rules applicable with regard to public contracts and concessions, which are not applicable in the present case. The principle of the inalterability of the selection criteria or conditions of award, on which the applicants rely, appears neither in Directive 97/13 nor in any other applicable provision of Community law. On the contrary, Article 8(4) of Directive 97/13 stipulates that Member States may amend the conditions attached to an individual licence in objectively justified cases and in a proportionate manner.

136 In the context of a single selection operation, albeit one organised in several stages, as in the present case, the principle of non-discrimination must therefore be applied by considering the two calls for applications as a single procedure.

137 In that framework, any solution other than the one adopted by the national authorities would not have achieved equality of treatment between the three operators concerned in a more satisfactory manner.

138 In the circumstances of the case, it appears that the national authorities had three options when they found that the first call for applications had not enabled them to select a sufficient number of operators to guarantee effective competition in the sector.

139 The first option would have been for the authorities to declare the first call for applications unsuccessful and to have recommenced the entire procedure, setting the fee according to the provisions of the amended arrangement.

140 However, it appears that this solution would have led to the same outcome, since in fact the same operators, namely Orange, SFR and Bouygues Télécom, would in any case have been the only applicants and they would ultimately have been awarded licences that, in substance, were identical to those they actually obtained.

141 On the other hand, this option would have had at least one disadvantage in relation to Community telecommunications law. It would have led to a delay in the launch of the services concerned, set for 1 January 2002 at the latest in Decision No 128/1999 (see paragraph 8 above), a delay mentioned by the Commission in the contested decision, and one which would have been directly attributable to the French authorities.

142 Consequently, although this first option would have ensured equality of treatment equally well, the French Republic would have risked delaying the implementation of the Community provisions in question, and hence of failing to meet its obligations in this regard.

143 Under the second option, the national authorities would have continued with the procedure by issuing a second call for applications but, in contrast with the solution actually adopted, without aligning the fees of Orange and SFR with those of Bouygues Télécom.

144 In such a case, Orange and SFR would have been treated differently from Bouygues Télécom in violation of the principle of non-discrimination, given the equal value of the licences and the fact that, at the date of the amendment of the fee, no operator was active in the market. Moreover, such a solution would not have been consistent with the factors for determining fees indicated by the Court of Justice in the *Connect Austria* judgment (see paragraph 109 above).

145 Had the French authorities maintained the initial fees regime for Orange and SFR, there would have been a danger of infringing the requirements for non-discrimination and proportionality laid down in Directive 97/13 owing to unequal treatment and lack of proportion, reflected in the ratio between the initial and amended regimes, which according to the uncontested indications of SRF was about 1:8. Such a disparity in the fee amounts would have revealed discrimination in favour of Bouygues Télécom at the expense of the other two operators.

146 Moreover, in such a case, the two operators initially selected could have renounced the benefit of their licence, which would have obliged the French authorities to issue a third call for applications in order to ensure effective competition in the sector concerned, thus delaying the launch of the services in question by a corresponding period.

147 Under the third option, the national authorities would have issued a second call for applications, specifying, in particular, lower revised financial terms, and would have amended retrospectively the terms for the licences that had been awarded.

148 This solution, which was adopted in the present case, made it possible to ensure equal treatment for the three operators that were the only applicants in this overall procedural framework in the abovementioned context of identical licences and an emerging market which no operator had entered at the date when the fee was amended. The option chosen by the national authorities also enabled the French Republic to avoid delays in the launch of the UMTS services laid down in Directive 97/13.

149 It must also be noted that the outcome would have been no different if the alignment of the financial terms for the award of licences had applied only as from the date on which the disputed fees were amended, rather than being backdated to the date on which they were issued, as was decided in the present case.

150 It is evident from the file that at the date of the amending decrees, that is to say 3 December 2002, Orange and SFR had paid, in accordance with the timetable for instalment payments laid down in the initial regime, an amount that corresponded to the first component of the fee under the amended scheme, payable upon award of the licence. The second component laid down in the amended regime, linked to the turnover generated by the use of the frequencies, would not have been payable until after the launch of the operators' UMTS services, which Orange and SFR had not yet undertaken at the abovementioned date of the decrees amending their licences and the decree granting the licence to Bouygues Télécom.

151 Hence, in the circumstances of the case, the amendment of the regime applied to Orange and SFR had no effect on the three competing operators, as the retrospective nature, or not, of the amendment had no impact in this respect.

152 In this context, despite the granting of identical terms to the winners of different selection procedures, the Commission was able to consider, in the contested decision, that the new system of fees did not discriminate against Bouygues Télécom.

153 On the contrary, in the circumstances of the case, the requirement of Directive 97/13 to treat operators equally necessitated the alignment of the fees payable by Orange and SFR with those payable by Bouygues Télécom.

154 The applicants' argument that the amendment was discriminatory because the greater financial capacity of Orange and SFR by comparison with that of their competitors enabled them to participate in the first call for applications and hence to win a licence does not alter the assessments stated above, as the earlier award of licences did not give them an effective advantage and equal treatment of the operators required that the fees be equalised.

155 It follows from the above that the amendment of the disputed fee did not constitute discrimination against Bouygues Télécom and that making this assessment did not constitute a serious difficulty necessitating the opening of the formal procedure for investigating the alleged aid.

156 In those conditions, the Commission could legitimately conclude, without considering serious difficulties to be involved, that the disputed national measure did not entail aid elements within the meaning of Article 87(1) EC.

157 Although in its written submissions relating to the case that led to the order in *Bouygues and Bouygues Télécom* v *Commission* the Commission mentioned exceptional complexity, that reference did not relate to the measure at issue in the present action, contrary to what the applicants maintain, but to the whole set of measures covered by the complaint, which challenged 11 measures. Indeed, as it considered that some of them raised serious difficulties, the Commission initiated the procedure laid down in Article 88(2) EC for some of those measures on 31 January 2003. That procedure was closed by the adoption of two decisions, dated 2 August 2004, regarding respectively the business tax scheme applicable to France Télécom (C(2004) 3061) and a shareholder loan granted by the State to France Télécom (C(2004) 3060), which are currently the subject of actions before the Court of First Instance (Case T-425/04 *France* v *Commission*, Case T-427/04 *France* v *Commission*, Case T-444/04 *France Télécom* v *Commission*, Case T-450/04 *Bouygues and Bouygues Télécom* v *Commission*, Case T-456/04 *AFORS Télécom* v *Commission* and Case T-17/05 *France Télécom* v *Commission*).

158 The applicants' allegation that the Commission lacked diligence in the treatment of the national measure at issue here and contested in their complaint lodged on 4 October 2002, on which that institution adopted a position in the contested decision of 20 July 2004, is not only inoperative but also not established. The Commission is entitled to give differing degrees of priority to the complaints brought before it (Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 88).

159 The abovementioned complaint, extending to almost 90 pages not including the annexes, related to a total of 11 measures. Accordingly, it has to be considered that the Commission — which initiated the procedure laid down in Article 88(2) EC three and a half months after the lodging of the complaint for some of the measures to which it related and thus dealt with part of the complaint, and in so doing gave priority to the very measures that raised serious difficulties — was entitled, in the light of its workload and its right to set the priorities for investigations, to postpone

dealing with the measure, which in the Commission's opinion did not raise serious difficulties, without it being open to an accusation of lack of diligence in this regard.

160 In that context, the period of one year, ten months and fifteen days between the lodging of the complaint and the contested decision does not reveal a lack of diligence on the part of the Commission.

161 In the light of all the foregoing, the application must be dismissed, without it being necessary for the Court to examine the other criteria laid down in Article 87(1) EC, since one of the cumulative conditions necessary for recognition of a State aid has not been fulfilled.

Costs

162 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered jointly and severally to bear their own costs and also to pay those incurred by the Commission and by Orange and SFR, interveners in support of the Commission.

163 The French Republic must bear its own costs, in accordance with the first paragraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Bouygues SA and Bouygues Télécom SA jointly and severally to pay their own costs, those of the Commission and those of Orange France SA and Société française du radiotéléphone — SFR;**

3. **Orders the French Republic to bear its own costs.**

Legal Wiszniewska-Białecka Moavero Milanesi

Delivered in open court in Luxembourg on 4 July 2007.

E. Coulon H. Legal

Registrar President