The Assignment of Spectrum and the EU State Aid Rules: the case of the 4th 3G license assignment in France

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1. The French 4th mobile communications licence

On 5 May 2011, the Commission decided that the level of the fee charged by the French government in 2009 for spectrum assignment to the fourth mobile operator did not entail any State aid in the meaning of Article 107(1) TFEU (2).

1.1. The licensing of mobile operators in France

In 2001, the French authorities launched a call for applications for the provision of mobile telephony licences under the UMTS standard in the so-called 3G spectrum band (3). The lifetime of the licences was to be 15 years. Contrary to the approach in Member States like the UK and Germany, which awarded 3G licences under an auction procedure, France used a ‘comparative’ tendering procedure (‘beauty contest’). Applications were to be rated according to different qualitative criteria, such as scale and speed of network deployment. Moreover, to be eligible, all applicants had to commit to pay an initial spectrum fee of €4.95 billion.

The spectrum available for 3G mobile communications in France was divided into four lots of 15 Mhz each. Given that there were only three mobile telephony operators in France at that time, the French authorities were expecting that the tender would lead to new entry and increased competition in the French mobile telephony market.

However, only the two largest mobile operators, France Télécom, which a few months later became Orange France (‘Orange’) and Société française du radiotéléphone – SFR (‘SFR’), applied for spectrum licences. Other operators chose not to tender, primarily because of the high initial fee.

Following this partial failure, the French authorities revised the application conditions, reducing the initial spectrum fee to €619 million complemented by an annual spectrum fee calculated as a percentage of the turnover generated by the use of those frequencies. At the same time, the validity of the licences was extended to 20 years instead of 15. In December 2001, the French authorities launched the call for applications for the remaining two spectrum lots. However, only the third incumbent, Bouygues Télécom, applied.

1.2. The retroactive reduction of the initial spectrum fees

When the third 3G licence was awarded to Bouygues Télécom, the terms of the licences of Orange and SFR were aligned with the terms of the licence granted to Bouygues Télécom. Bouygues, however, considered that the retroactive reduction of its competitors’ spectrum fees constituted illegal State aid and complained to the Commission. By decision dated 20 July 2004 (State aid NN 42/2004), the Commission decided not to raise objections to the fee alignment. It considered that it was legitimate to avoid discrimination between the three competitors on the French mobile market. This decision, appealed by Bouygues, was confirmed by the Court of First Instance and the European Court of Justice (4).

In 2007 the French government launched a new call for applications, under the same conditions as in 2002, to assign the remaining spectrum and ensure the entry of a fourth mobile communications operator. This time there was an applicant: Free (subsidiary of Illiad). But its application was rejected because it did not commit to pay the initial spectrum fee of €619 million.

1.3. The fourth and fifth calls for applications

Following the failure of this process, the French government decided in 2008 to modify the design of the call for applications and consulted the French telecom regulator (Autorité de Régulation des Communications Électroniques et des Postes – ARCEP) and the highest French administrative court, the Conseil d’État, on possible amendments. Following these consultations, the remaining 15 MHz was

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.


(3) The frequency bands 1,885–2,025 MHz and 2,110–2,200 MHz, as defined by the World Administrative Radio Conference in 1992 (WARC-92) for the exploitation of mobile communications technology, such as UMTS.

(4) ECJ, C-431/07 P, Bouygues and Bouygues Télécom v Commission, 2 April 2009; CFI, T-475/04, Bouygues and Bouygues Télécom v Commission.
split into three lots of 5 MHz each. The first lot was reserved for a new entrant. The initial one-off fee for the first UMTS spectrum lot was fixed at €240 million by Decree 2009/948 of 29 July 2009. In addition, the nine qualitative criteria used in 2001 for the award procedure, such as the credibility of the project, the business plan, territorial coverage and the type of contracts proposed to mobile virtual network operators, were maintained to rank the bids.

While initially several operators expressed interest (5), only Free applied. ARCEP accepted this application on 17 December 2009 and on 13 January 2010 granted the authorisation.

The call for applications for the remaining two lots of 5 MHz was launched on 25 February 2010, with the following award criteria: i) the level of commitments made to improve the hosting conditions offered to MVNOs, and ii) the financial bid, i.e. the amount that the applicant committed to pay as initial spectrum fee above the minimum of €120 million. SFR made the highest bid (€300 million) and France Télécom/Orange the second highest (€282 million) and were each assigned a spectrum lot.

2. The 4th mobile communications licence

2.1. The complaints

ARCEP granted the fourth licence to Free on 13 January 2010. However, on 10 August 2009 the Commission had already received a complaint from Orange against the level set for the initial spectrum fee. On 20 November 2009, a complaint was also lodged by SFR. Bouygues initially challenged the selection process only before the French courts. However on 1 March 2010 Bouygues too lodged a complaint with the Commission.

According to all complainants, the price difference between the fourth licence and the three first licences constitutes State aid. They argue that the fourth licence is part of the same procedure which started in 2000. So, in order to respect the principle of non-discrimination, the initial spectrum fee for the fourth licence should be the same as the price set for the first three operators. They admit that less spectrum was assigned in 2009, but argue that the value of spectrum is not directly proportional to its amount. Taking into account the monetary erosion since 2001, Orange claims that the initial fee should have been set at €900 million at least. SFR argues that the late arrival of the fourth operator on the market cannot justify a reduced initial spectrum fee, because the French mobile market has still big growth potential. Bouygues also considers that the initial spectrum fee was set below its market value, which it estimates on the basis of two different calculation methods.

On 28 June 2010, the Commission communicated its preliminary findings to the complainants, informing them that the granting of the fourth mobile licence had not involved a selective advantage to the operator concerned and did not constitute State aid within the meaning of Article 107 (1) TFEU. All three complainants reacted, maintaining their claims. They repeated that the spectrum for the fourth licence has an economic value and that assigning it on terms that do neither reflect this economic value is, by definition, State aid. They criticized the Commission for not having discussed the spectrum value estimates they had provided, nor the methods used for these estimates. They maintained that in any case, the Commission should have reviewed in detail the hypotheses and calculations used by the French government to set the initial fee. SFR added that Free would likely also have agreed with the fee, if set at for example €410 million. There was no justification to reduce the initial fee by 60% in comparison with 2001. Orange and Bouygues emphasized that if the initial fee had been reduced to make sure that a fourth entrant would apply, it would corroborate the existence of State aid as an incentive to entry.

2.2. The position of the French government

The French authorities provided several arguments to justify the different initial spectrum fees set in 2001 and 2009. First, they said that the evolution of market conditions since 2001 required lowering the initial spectrum to make market entry possible. Second, the reduced spectrum also justifies a lower spectrum fee. With less spectrum an operator must limit the number of customers, reduce quality or invest in additional antennas. France considers that this approach is in line with the Connect Austria judgment in which the Court explained that the economic value of licences must be determined “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” (6).

At the same time, the French authorities emphasized that the initial spectrum fee (€240 million) had been set on the basis of objective financial studies

(5) The possible candidates were: Orascom, Kertel, Bolloré, Numericable-Virgin Mobile. See press articles in Reuters (22 and 26 October 2009) and LesEchos (29 October 2009). According to these articles, they cited unfavourable conditions and uncertainty about the project’s costs to explain why they refrained from putting in a bid.

analysing the fees paid for 3G licences in other European countries as well as stock market data and simulations with the discounted cash flow method. For example, the study by Professor Mucchielli (Sorbonne University) estimated the value of the spectrum at €200-250 million. The French authorities also sought a valuation from the independent committee in charge of the government’s patrimonial interests (Comité des Participations et Transferts - CPT), assisted by HSBC bank. They estimated the value of the spectrum at €240 million, the amount eventually used by the French government.

2.3. The judgment of the French Council of State

In parallel with the State aid complaints to the EU Commission, SFR and Bouygues had asked the French Conseil d’Etat to annul Decree 2009-948 of 29 July 2009 setting the initial spectrum fee, mainly on grounds of national administrative law. On 12 October 2010, the Conseil d’Etat rejected all their claims. It took the view that treating existing operators and the entrant identically would have constituted discrimination against the latter and a barrier to entry in the market. Second, the Conseil rejected the argument that technological developments in recent years (resulting in lower equipment costs) would have been favourable to an entrant and would effectively neutralize the disadvantages of its later entry into the market. Moreover, the Conseil found that since 2000 the difference in the situations of the incumbent operators and a new entrant had changed to the detriment of a new entrant. Pursuing its public policy objective of fostering competition on the French mobile telephony market, the French government was, according to the Conseil, therefore fully justified in updating the regime initially foreseen for entrants. Furthermore, the Conseil rebutted the criticism that the spectrum would have a value for Free higher than the initial spectrum fee, since the tender conditions set for all by the decree contemplated the potential value of the spectrum for a theoretical entrant and obviously aimed to entice more applicants than only Free. Finally, the Conseil observed, somewhat in passing, that “For the same reasons, the grant of a 3G licence to a fourth operator on different financial conditions in comparison to those of the other three licences does not constitute state aid within the meaning of EU law”.

Legal questions raised by the complaints

The complaints raise two important State aid issues: i) is compliance with the EU Directives harmonizing spectrum assignment procedures enough to avoid State aid, and ii) if a parallel assessment is required, should the Commission second guess the “objective” value of spectrum, to determine whether Member States are foregoing revenues when setting spectrum fees? The case also raised a further issue, given that the highest administrative jurisdiction in France made a finding of the absence of State aid.

2.4. Interplay with EU Directives

In Decision NN 76/2006 – Czech Republic (7), the Commission acknowledged that the EU State aid rules did not require Member States to charge a market price when assigning spectrum for mobile communications services, as under Article 7(4) of Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) Member States have the choice between competitive (i.e. auctions) and comparative selection procedures (“beauty contest”) for the assignment of spectrum.

Article 5 of the Authorisation Directive moreover provides that rights of use must be granted “through open, transparent and non-discriminatory procedures”. Where the Member States grant rights of use for radio frequencies, under Article 7 of the Directive they are allowed to impose fees “which reflect the need to ensure the optimal use of these resources”. In this case, the fees, under Article 13 of the Directive, must be “objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Article 8 of Directive 2002/21/EC (Framework Directive)”. Under the EU regulatory framework, the Member States are thus entitled to review and even differentiate spectrum fees, particularly if this is conducive to greater entry and competition in the market.

The question is whether, when a Member State complies with all these conditions, it is still possible that the procedure provides a selective economic advantage to the beneficiary in the meaning of Article 107(1) TFEU.

As in the Czech precedent, the Commission did not consider that the mere fact that the EU regulatory framework had been complied with, and that the spectrum had been assigned under an open procedure, based on transparent, objective, proportional and non-discriminatory criteria, ipso facto excluded the possibility that the tender procedure might have provided an economic advantage and/or distorted competition.

2.5. Determination of spectrum value

There is no market for spectrum and thus no ‘market price’. Spectrum is a public resource. Member States grant temporary rights of use to specific parts of the spectrum, according to administrative

procedures. In certain Member States, rights of use can, after a specific time, be transferred. Generally there is no secondary market in rights of use, which would allow determining easily the value of rights of use. On the other hand, spectrum for the provision of mobile communications services has an economic value.

However, under the EU regulatory framework, Member States may assign such spectrum on the basis of criteria other than the maximisation of income from spectrum fees. Member States may assign spectrum also on the basis of qualitative criteria and thus waive financial revenues, as it were, in exchange for other policy objectives such as cheaper retail tariffs, better geographical coverage, more advanced services etc. This might result in economic externalities and social benefits that are not reflected in the amounts collected in the form of spectrum fees.

The EU State aid provisions must however be complied with where a Member State changes the assignment procedures or spectrum fees over time. Reducing spectrum fees may constitute a waiver of state resources, which is one of the cumulative conditions of Article 107(1) TFEU. In such cases, the Commission needs to examine whether the measure confers a selective advantage to the assignee (8). This was the issue in the Czech precedent, in the Bouygues case and in the complaints discussed here.

In the Czech precedent, the Commission reviewed the reasons why similar procedures in 2001 and 2005 resulted in different spectrum fees. It found that the different fees resulted from changes in market and economic circumstances (9). The Commission concluded that there had been no discrimination and for that reason there had been no advantage in the sense of Article 107(1) TFEU, and thus no aid.

The Bouygues case concerned the retroactive reduction of the initial spectrum fees that had been agreed by Orange and SFR in 2001. The Commission found that the prior award of licences to Orange and SFR did not give them a selective advantage of a temporal nature given the fact that they were not yet using their licences when Bouygues obtained its own licence.

In the case at stake, the facts were significantly different. Whereas in the Bouygues case both calls for applications were part of the same procedure, the 2009 call was launched under different legal rules and concerned a different amount of spectrum. The initial spectrum fee was not based on the same methodology as in 2001, but on a new set of studies and methodologies. A comparison of the 2001 and 2009 spectrum fees was therefore not relevant. The Commission no-aid Decision of 5 May 2011 therefore assesses on its own merits the initial spectrum fee set by the French government for the fourth licence, without taking the 2001 prices as a benchmark. The starting point of the assessment is that not only auctions allow market prices to be determined. Comparative procedures (‘beauty contests’) also lead to market outcomes, given that commitments made under the qualitative award criteria have also an economic cost for the applicant. The ‘price’ paid for the spectrum is thus both the spectrum fee and the cost of the commitments under the qualitative criteria. In its Decision, the Commission noted for example that Free made more ambitious commitments in terms of quality and coverage (10) than the minimum in the call for applications.

The Decision lists several elements indicating that the award procedure for the fourth licence actually led to a market outcome:

a) transparent process: the government launched a call for applications allowing any interested party, apart from the incumbents, to make a bid. None of the other operators that initially expressed an interest complained that they were excluded from the tender;

b) the failed call for applications of 2007 with an initial spectrum fee of €619 million shows that the willingness to pay, and thus the market value for potential entrants, was lower. Unlike incumbent operators, the new entrant would have to face competitors with an installed mobile customer base. Moreover the market was in the meantime reaching saturation. Obtaining market share for an entrant would require an aggressive pricing strategy, which reduces profit margins. With the entry of the fourth operator, competition would increase and the economic value of each mobile licence might therefore be reduced;

c) setting the spectrum fee too high in “beauty contests” will exclude potential applicants and favour applicants already controlling assets that can be used to deploy mobile communications networks. Potential applicants’ willingness to pay often differs significantly. Applicants have

(8) See for example Case T-475/04 Bouygues and Bouygues Télécom v Commission [2007] ECR II-2097, point 111: “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 …”

(9) Point 34.

(*) See points 71 and 72.
different reservation prices (13) because their respective cost of fulfilling qualitative requirements do differ (for example, certain applicants already have infrastructure and an installed customer bases, whereas others do not);

d) the French authorities have carried out a thorough analysis to determine the market value of the spectrum. The assumptions used in the studies for the French government appear not out of line with the market consensus, and

e) the fees that SFR and Orange proposed for the remaining two lots of 5 MHz in 2010 were in the same range as the initial fee set for the fourth licence. The outcome of these tender procedures suggest that if the French government had used an auction to assign the fourth licence, it would probably have yielded a lower fee since the incumbent operators were not allowed to bid for the fourth licence.

The procedure having led to a competitive outcome, the Decision concludes that no selective advantage was granted to the assignee.

2.6. The no-aid finding by the French Conseil d’Etat

In its judgment of 12 October 2010, the French Conseil d’Etat found that “the grant of a 3G licence to a fourth operator in different financial conditions in comparison to those of the other three licensees does not constitute state aid within the meaning of EU law” making a final finding regarding the interpretation of Article 107(1) TFEU.

The ECJ has explicitly stated that, as is the case for the Commission, national courts have powers to interpret the notion of State aid. However, where doubts exist as to the qualification of State aid, national courts may ask for a Commission opinion under section 3 of the Commission notice on the enforcement of State aid law by national courts (12). They must refer the matter to the ECJ for a preliminary ruling under Article 267 TFEU when their decisions regarding an interpretation of EU law can no longer be appealed.

The no-aid finding by the Conseil d’Etat could have brought about a contradiction between its final judgment and a Commission Decision if the latter subsequently had reached the opposite conclusion. Under the case law of the Court (14), the no-aid finding of the Conseil would then cease to benefit from the principle of res judicata. Whether such national decision would constitute exceptional circumstances that could be deemed sufficient to create legitimate expectations is not completely clear under the current case law of the Court of Justice (15).

In this case, the finding of the Conseil d’Etat had no consequence because the Commission’s assessment confirmed the conclusion of the French Court. The lack of coordination in this case may however be a symptom of a more general problem, which might need to be dealt with in the future.

3. Conclusion

The Commission decided not to open a formal investigation under Article 108(2) TFEU. This is required when the Commission has serious doubts as to whether aid is compatible with the internal market, such as when complex calculations are necessary. However this case did not require complex calculations, as the tender process chosen has led to a market outcome. Moreover, there were precedents and case-law. In addition, all three incumbents had lodged complaints. All stakeholders therefore had the opportunity to express their views, doing away with the need to open a formal investigation. In addition, there was no need to obtain more information than the information already contained in the studies used by the French government and the alternative studies commissioned by the complainants. Moreover, the opening could have delayed the deployment of the fourth mobile operator in France and postponed further competition, to the detriment of the consumer.

None of the complainants challenged the Commission Decision, which suggests that both the reasons on which it is based and the decision not to open a formal investigation were robust and do not give rise to much legal criticism.

The Commission Decision on the French fourth mobile communications licence is not likely to be the last regarding the level of spectrum fees. Given that the EU Regulatory Framework for electronic Communications sets the promotion of competition as an important objective, there may be more cases of incumbent operators complaining about ‘lighter’ conditions for later entrants. The Commission might even have to examine such cases under Article 107 (3) c TFEU, given that the EU Framework give broad discretion to Member States to adopt pro-competitive licensing terms.

(13) The “reservation” price is the maximum price a bidder would be willing to pay.
(15) See, inter alia, Case C-298/00 P Italy v Commission [2004] ECR I-4087, paragraph 75.