JUDGMENT OF THE COURT (Grand Chamber)

22 December 2008 *

In Case C-333/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour administrative d'appel de Lyon (France), made by decision of 12 July 2007, received at the Court on 17 July 2007, in the proceedings

Société Régie Networks

v

Direction de contrôle fiscal Rhône-Alpes Bourgogne,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), K. Lenaerts, A. Ó Caoimh and J.-C. Bonichot, Presidents of Chambers, K. Schiemann, P. Kūris, E. Juhász, L. Bay Larsen and P. Lindh, Judges,

* Language of the case: French.

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 April 2008,

after considering the observations submitted on behalf of:

— Régie Networks, by B. Geneste and C. Medina, avocats,

— the French Government, by G. de Bergues and B. Messmer, acting as Agents,

— the Commission of the European Communities, by J.-P. Keppenne and B. Martenczuk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the validity of the decision of the Commission of the European Communities of 10 November 1997 not to raise any objections to the new version of an aid scheme to support local radio stations (State aid No N 679/97 — France) ('the contested decision'), a brief notice of which was published in the *Official Journal of the European Communities* (OJ 1999 C 120, p. 2).

2 The reference was made in the course of an action brought by Régie Networks, a company constituted under French law, for reimbursement of a sum which it paid by way of a parafiscal charge levied on advertisements broadcast on sound radio and television for 2001.

Legal context

3 Article 80 of Law No 86-1067 of 30 September 1986 on freedom of communication (JORF of 1 October 1986, p. 11755), as amended by Article 25 of Law No 89-25 of

17 January 1989 (JORF of 18 January 1989, p. 728) and Article 27 of Law No 90-1170 of 29 December 1990 (JORF of 30 December 1990, p. 16439), provides as follows:

'Sound radio broadcasting services in respect of which the commercial revenue deriving from broadcasts of brand or sponsorship advertising is less than 20% of their total turnover shall be granted aid in accordance with the procedure laid down by decree by the Conseil d'État.

To fund that aid, a charge shall be levied on the revenue from advertisements broadcast on sound radio and television.

Revenue from sound radio broadcasting services in connection with advertisements to support collective or public interest initiatives shall not be taken into account for the purpose of determining the threshold laid down in the first paragraph of this article.'

4 According to Article 1 of Decree No 97-1263 of 29 December 1997 creating a parafiscal charge for the benefit of a fund to support radio broadcasting (JORF of 30 September 1997, p. 19194):

'With effect from 1 January 1998, a parafiscal charge on advertisements broadcast on sound radio and television [('the charge on advertising companies')] shall be introduced for a period of five years to fund an aid scheme for the benefit of those holding a licence to provide sound radio broadcasting services in respect of which the commercial revenue deriving from broadcasts of brand or sponsorship advertising is less than 20% of the total turnover.

The objective of this charge is to promote radio broadcasting.'

5 Article 2 of that decree provides as follows:

'The charge shall be levied on the sums, exclusive of agency fees and value added tax, paid by advertisers for the broadcasting of their advertisements to French territory.

Those liable to pay the tax are the persons responsible for marketing such advertisements.

The rate of tax shall be determined in a joint order by the Ministers responsible for the Budget and Communications and shall be paid in stages on the basis of the quarterly revenue of the companies liable for the charge and the following upper limits shall apply:

…'

6 According to Article 3 of the decree, the net revenue from the charge on advertising companies is paid into the Fonds de soutien à l'expression radiophonique (support fund for promoting radio broadcasting; 'FSER'), which is a separate account kept in the accounts of the Institut national de l'audiovisuel (National Audiovisual Institute).

7 Article 4 of the decree provides that that charge is levied, assessed and collected for the FSER by the Directorate-General for Taxation in accordance with the rules applicable to value added tax and the same guarantees and penalties apply.

8 Articles 7 to 20 of Decree No 97-1263 lay down the rules governing aid paid by the Institut national de l'audiovisuel that is financed by the net revenue from the charge on advertising companies paid into the FSER.

9 The persons eligible for such aid are the holders of a licence to provide sound radio broadcasting services referred to in Article 1 of that decree ('local radio stations').

10 According to Article 7 of the decree, the aid is allocated from the available funds by a committee whose composition and rules of procedure are governed by that provision and by Articles 8 to 11 of the decree ('the FSER Committee').

11 Decree No 97-1263 makes provision for three types of aid ('radio broadcasting aid').

12 The first of these is a setting-up grant, for which the conditions of allocation are laid down in Articles 12 and 13 of that decree. That grant, which is limited to FRF 100 000, is allocated to local radio stations newly licensed on the basis of documentation submitted by those stations.

13 The next form of aid is equipment aid, the detailed rules governing this being laid down in Article 14 of the decree. Such aid, which is granted to local radio stations on the basis of documentation submitted by them, cannot be allocated less than five years after a setting-up grant has been provided and may be granted only once every five years. Equipment aid must not exceed 50% of the amount invested and is also subject to a limit of FRF 100 000.

14 The last form of aid is an annual operating grant and the conditions under which it may be granted are laid down in Articles 16 and 17 of the decree.

15 The first paragraph of Article 17 of Decree No 97-1263 provides as follows:

'The amount of the operating grant shall be determined in accordance with a scale to be drawn up by the [FSER] Committee, taking account of the revenue from normal current operations of the radio station in question before deducting the advertising marketing costs. The scale shall be published.'

16 The second paragraph of that provision provides that that amount may be increased by up to 60% depending on the steps taken to diversify the financial resources directly linked to radio broadcasting, action taken to provide professional training for the staff of the radio station in question, action taken with regard to education and culture, participation in collective programming measures and endeavours in the fields of social communication at local level and integration.

17 The radio broadcasting aid scheme established by Decree No 97-1263, which is applicable to the action in the main proceedings, followed the schemes introduced with effect from 1 January 1983 by various earlier decrees, initially for a period of two years and subsequently for periods of five years.

18 The radio broadcasting aid scheme provided for in Article 302a KD of the Code général des impôts (French General Tax Code), introduced by Article 47 of the Finance Law for 2003, Law No 2002-1575 of 30 December 2002 (JORF of 31 December 2002, p. 22025), was itself the successor to the scheme introduced by Decree No 97-1263 with effect from 1 January 2003 for an indefinite period.

19 That new scheme was amended, with effect from 1 July 2003, by Article 22 of Law No 2003-709 of 1 August 2003 on sponsorship, associations and foundations (JORF of 2 August 2003, p. 13277).

20 The second paragraph of Article 302a KD of the General Tax Code, as amended by that law, is worded as follows:

'The charge shall be levied on the sums, exclusive of agency fees and value added tax, paid by advertisers to advertising companies for the broadcasting of their advertisements from French territory.

…'

The dispute in the main proceedings and the question referred for a preliminary ruling

The Commission's decisions on the successive radio broadcasting aid schemes

21 In its decision of 1 March 1990 relating to aid measure No N 19/90, the Commission informed the French authorities that it did not intend to raise any objections to the setting-up of the radio broadcasting aid scheme which those authorities had notified to the Commission in accordance with Article 93(3) of the EEC Treaty (which became Article 93(3) of the EC Treaty and then Article 88(3) EC).

22 Nor did the Commission raise any objections in its decision of 16 September 1992 relating to aid measure No N 359/92 with regard to a draft decree amending the radio broadcasting aid scheme which had been the subject of its earlier decision and had been notified to it by the French authorities in accordance with Article 93(3) of the EEC Treaty.

23 In that second decision, the Commission took the view that, in the light in particular of the actual characteristics of the beneficiaries of that support (small radio stations with local audiences), intra-Community competition and trade should not be affected to an extent that was contrary to the common interest and, accordingly, a derogation from the prohibition on aid could be justified on the ground that such a scheme continued to pursue public interest objectives.

24 Next, in the contested decision, the Commission also informed the French authorities that it did not intend to raise any objections to the draft decree — subsequently adopted

as Decree No 97-1263 — intended to amend the radio broadcasting aid scheme which had previously been accepted and notified to it by those authorities in accordance with Article 93(3) of the EC Treaty.

25 In that decision, the Commission considered that, in view of the fact that the budgetary resources for the aid in question had not increased and the beneficiaries of that aid were radio stations with local audiences, intra-Community trade should not be affected to an extent that was contrary to the common interest and, accordingly, a derogation from the prohibition on aid could be justified on the ground that such a scheme continued to pursue public interest objectives.

26 Finally, by its decision of 28 July 2003 relating to aid measure No NN 42/03 (formerly N 725/02), the Commission did not raise any objections to the draft law intended to amend the radio broadcasting aid scheme which had previously been approved, in its various forms, by the three decisions referred to above, which the French authorities notified to it in accordance with Article 88(3) EC. The scheme thus amended was then covered by the second paragraph of Article 302a KD of the General Tax Code, as amended by Law No 2003-709.

27 In that decision, the Commission stated that the charge on advertising companies that finances the aid scheme concerned is paid by the advertising companies, not by the individual advertisers, and the charge did not appear on the latter's invoices.

28 The Commission also stated that only advertising companies established in French territory were liable for the charge and, therefore, no charge could be levied on advertisements broadcast to French territory from abroad.

29 Moreover, the Commission took account of the fact that, conversely, advertising companies established in French territory broadcasting exclusively abroad are liable to pay the charge, which is therefore consistent with Community rules governing parafiscal charges intended to finance aid schemes.

30 Furthermore, the Commission considered in particular that, given that the beneficiaries of the aid scheme in question are non-commercial radio stations with purely local audiences, that scheme pursued a public interest objective by protecting the plurality of the media at local level and any effect it may have on intra-Community trade is negligible.

31 The Commission accordingly took the view that that scheme, which facilitates the development of community radio broadcasting and does not affect intra-Community trade to an extent that is contrary to the Community interest, constituted aid that is compatible with the common market by virtue of Article 87(3)(c) EC.

The facts of the case

32 The facts of the case, as disclosed by the order for reference, may be summarised as follows.

33 Régie Networks, the company which sells advertising space for the NRJ Group's local radio stations, paid EUR 152 524 by way of charge on advertising companies for 2001.

34 It then claimed reimbursement of that sum from the local tax authorities. Since those authorities failed to give a decision on that claim within the statutory time-limit and the claim was thus rejected by implication, it instigated proceedings before the Tribunal administratif de Lyon (Administrative Court, Lyons).

35 In a judgment of 25 April 2006, that court rejected Régie Networks' application. That company then appealed against that decision before the Cour administrative d'appel de Lyon (Administrative Court of Appeal, Lyons).

36 Before the Cour administrative d'appel de Lyon, Régie Networks submitted, first of all, that the contested decision was invalid on the ground that the statement of reasons was inadequate.

37 It contended that no reason is given in that decision to justify the view that the aid scheme in question does in fact fall within one of the categories of exception provided for in the EC Treaty. Moreover, in that decision, the Commission failed to examine whether the method by which that scheme was financed, namely by means of the charge on advertising companies, is compatible with the Treaty and to give express reasons for its assessment of that issue, whereas it is apparent from the Court's case-law that such an examination is essential for the purpose of determining whether aid is compatible. Régie Networks referred to the judgment in Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249 in that regard.

38 Secondly, Régie Networks maintained that the contested decision is vitiated by an error of law. The charge on advertising companies is incompatible with the common market on the ground — which was moreover taken into account by the Commission in its decision of 28 July 2003 referred to at paragraphs 26 to 31 above — that, according to

the established case-law of the Court, imported goods and services must be exempt from all fiscal charges designed to finance an aid scheme which benefits only national undertakings.

39 Thirdly, Régie Networks argued that the contested decision is vitiated by an error in the assessment of the facts, since the Commission stated, contrary to the facts, that the budgetary resources for the aid scheme in question had not increased.

40 Régie Networks concluded that, if the Court of Justice were to find that the contested decision is invalid, the aid scheme whose implementation was authorised by that decision is unlawful ab initio and the effect of that unlawfulness is to make the financing of the scheme unlawful.

41 The Cour administrative d'appel de Lyon considers that the three pleas in law relied upon by Régie Networks raise serious difficulties which call into question the validity of the contested decision.

42 In those circumstances, the Cour administrative d'appel de Lyon decided to stay the proceedings and to request a preliminary ruling from the Court of Justice on the following question:

'Is the [contested decision] valid in respect of the statement of reasons, the assessment made as to the compatibility with the EC Treaty of the funding of the radio broadcasting

aid scheme for the period 1998 to2002 and in respect of the contention that there was no increase in the budgetary resources for the aid scheme at issue?'

The question

Admissibility

43 The Commission takes the view that there is no need for the Court to rule on the referring court's question as to the validity of the contested decision, since that question bears no relation to the purpose of the main action, which concerns the legality of the charge on advertising companies.

44 According to the Commission, that charge does not fall within the scope of the Treaty provisions on State aid. Since there is no connection between the amount of grants paid out under the radio broadcasting aid scheme and the revenue generated by the charge which finances such aid, in so far as the criteria for determining the amount of aid are unconnected to the level of revenue from the charge, it does not form an integral part of that scheme. The Commission refers in that regard to paragraph 40 of Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Distribution Casino France and Others* [2005] ECR I-9481.

45 That objection cannot be accepted.

46 According to settled case-law, questions on the interpretation of Community law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22 and the case-law cited).

47 The Court may decide, in particular, not to give a preliminary ruling determining the validity of a Community act where it is quite obvious that that determination, requested by the national court, bears no relation to the actual facts of the main action or its purpose (see, inter alia, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 75 and the case-law cited).

48 In order to determine whether the present reference for a preliminary ruling is admissible, it is sufficient to state that the possibility cannot be ruled out a priori that there is a connection between the question referred for a preliminary ruling on the validity of the contested decision, adopted in the context of the Treaty rules on State aid, and the dispute in the main proceedings, the subject of which is Régie Networks' application for reimbursement of sums paid for 2001 by way of the charge on advertising companies and which requires an assessment of whether that charge is lawful.

49 At the very least, it is not obvious that that charge does not form an integral part of the radio broadcasting aid scheme.

50 At this stage in the analysis of the question referred for a preliminary ruling, it is sufficient to state that the contrary would appear to be the case, since the national legislation in question expressly provides that the purpose of the revenue generated by the charge on advertising companies is to finance the FSER, which is used to fund that aid.

51 If it appears that it can be argued, prima facie, that that charge is hypothecated to the aid which it was designed to fund, it cannot be ruled out that a finding that the contested decision is invalid may stem from the fact that the charge is unlawful, which may result in an obligation to reimburse the sums paid by way of that charge.

52 In those circumstances, it is not apparent, or at the very least not obviously so, that the determination sought as to the validity of the contested decision bears no relation to the actual facts of the main action or its purpose.

53 The Commission also contends that the question referred for a preliminary ruling is inadmissible on the ground that it does not necessarily follow that the effect of any judgment finding that the contested decision is invalid is that the charge concerned is unlawful and must be reimbursed.

54 According to the Commission, in view of the Commission's sole power to determine whether aid is compatible, the national court should order reimbursement of sums paid by way of a charge financing aid authorised by the Commission only if the invalidity established is such that, even if a new decision were adopted, that aid could only be declared incompatible with the common market.

55 That objection must also be rejected.

56 Admittedly, if, following a preliminary ruling declaring that the contested decision is invalid, the Commission adopts a new decision, the outcome of that decision will not necessarily be that the charge on advertising companies must be regarded as unlawful, since that new decision may once again be favourable.

57 However, it does not follow from that fact alone that the determination sought as to the validity of the contested decision clearly bears no relation to the purpose of the case in the main proceedings and that, as a consequence, the national court's assessment that the reference for a preliminary ruling is relevant and necessary could be called into question by the Court.

58 On the contrary, if it were to be established that the contested decision must in fact be declared invalid, an answer from the Court to that effect could be useful and relevant to the decision to be given in the main proceedings, since it would oblige the Commission to re-examine the aid scheme at issue in those proceedings.

59 Moreover, the possibility cannot be excluded, primarily in so far as some of Régie Network's complaints relate to aspects of that scheme which the Commission has not yet examined and which would render it incompatible with the common market, that as a result of that re-examination the Commission may come to the conclusion that the scheme must in fact be declared incompatible with the common market, which could have the effect, as explained at paragraph 51 above, of making the charge on advertising companies unlawful, thus giving rise to an obligation to reimburse the sums paid by way of that charge.

60 The presumption of relevance enjoyed by references for a preliminary ruling has not therefore been rebutted by the objections raised by the Commission (see by analogy, inter alia, *van der Weerd and Others*, paragraphs 22 and 23).

61 It follows that the question referred for a preliminary ruling is admissible.

Substance

Whether the contested decision is valid in the light of the obligation to state adequate reasons

62 By its question, in so far as it seeks to ascertain whether the contested decision is valid as far as the statement of reasons is concerned, the Cour administrative d'appel de Lyon asks the Court whether that decision must be regarded as invalid on the ground of insufficient reasoning, since, first, no reason is given in that decision to justify the view that the aid scheme in question does in fact fall within one of the categories of exception provided for in Article 92(3) of the EC Treaty and, second, in that decision, the Commission failed to consider whether the method by which that aid scheme was financed, namely by means of the charge on advertising companies, is compatible with the Treaty and to give express reasons for its assessment in that regard.

63 According to settled case-law, the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of

reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 79, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 88 and the case-law cited).

64 As regards, first of all, the measure at issue, the contested decision was adopted at the end of the preliminary stage of the procedure for reviewing aid under Article 93(3) of the EC Treaty, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete compatibility of the aid in question without opening the formal investigation procedure under Article 93(2) of the EC Treaty, which is designed to enable the Commission to be fully informed of all the facts pertaining to that aid (see to that effect, inter alia, *Nuova Agricast*, paragraph 57 and the case-law cited).

65 Such a decision, which is taken within a short period of time, must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the common market (Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 48).

66 Secondly, as regards the context in which the contested decision was adopted, as is apparent from paragraphs 21 to 23 above, that decision was taken following two other favourable decisions on earlier radio broadcasting aid schemes which were essentially

the same as that in issue in the contested decision and had also been previously notified by the French authorities to the Commission. The contested decision also refers expressly to the Commission's examination and acceptance of the aid scheme preceding the scheme which was the subject of that decision, which it was intended to replace.

67 That fact also justified the statement of reasons in the contested decision being succinct.

68 It is in the light of those considerations that it is necessary to examine the specific complaints made against that decision alleging infringement of the obligation to state adequate reasons.

69 The reasons given in that decision are that 'in view of the fact that the relevant budgetary resources have not increased and the beneficiaries of that aid are radio stations with local audiences, intra-Community trade should not be affected to an extent that is contrary to the common interest and, accordingly, a derogation from the prohibition on aid can be justified on the ground that such a scheme continues to pursue public interest objectives'.

70 While, admittedly, that statement of reasons is succinct, it nevertheless discloses in a clear and unequivocal fashion the reasons for which the Commission considered that it was not faced with serious difficulties in assessing the compatibility of the aid scheme at issue with the common market. It follows from this that the Commission based its conclusion essentially on the ground that intra-Community trade should not be affected by that scheme to an extent that was contrary to the common interest.

71 In the light of the case-law cited at paragraphs 63 to 65 above, such a statement of reasons must, in view of the nature and context of the measure in which it appears, be regarded as sufficient for the purpose of satisfying the requirement to state adequate reasons laid down in Article 190 of the EC Treaty, the question of whether the reasoning is well founded being a separate matter.

72 While it would have been preferable for the Commission in the contested decision expressly to have identified which of the categories of exception set out in Article 92(3) of the EC Treaty applied in this case and to have described the charge funding the radio broadcasting aid scheme — as it did in its subsequent decision of 23 July 2003 which amended that scheme — the contested decision cannot be declared unlawful pursuant to Article 190 of the EC Treaty on the ground that no specific reasons are given which address those points.

73 With regard in particular to the complaint alleging that, in the statement of reasons for the contested decision, no indication is given of the category of exception in Article 92(3) of the EC Treaty which the aid scheme in question falls within, it is implicit in the statements that 'the beneficiaries of that aid are radio stations with local audiences' and 'intra-Community trade should not be affected to an extent that is contrary to the common interest' that the category of exception intended was that in Article 92(3)(c) of the EC Treaty, namely aid to facilitate the development of certain economic activities, which, in this instance, as the Commission specified in its decision of 23 July 2003, is community radio broadcasting.

74 Finally, as regards the fact that the contested decision does not expressly address the compatibility with the Treaty of the method by which the scheme was financed, namely by means of the charge on advertising companies, the allegation of an infringement of Article 190 of the EC Treaty must in any event fail since, according to the Commission, there was no need to consider that point because that charge did not form an integral part of the aid scheme in question.

75 The merits of that argument cannot be assessed in the context of the examination of the complaint relating to the obligation to state adequate reasons. That assessment will therefore be carried out in due course, in connection with the response to that part of the question that raises an allegation of an error of law in so far as the contested decision failed to state that the charge on advertising companies is incompatible with the common market.

76 As regards the obligation to state reasons, it must be concluded that the examination of the question referred has disclosed nothing capable of affecting the validity of the contested decision.

The alleged error in the assessment of the facts relating to changes in the budgetary resources allocated to the radio broadcasting aid scheme

77 By its question, in so far as it seeks to ascertain whether the contested decision is valid as far as concerns the contention that the budgetary resources allocated to finance the aid scheme in question were not increased, the Cour administrative d'appel de Lyon asks the Court whether that decision must be regarded as invalid because the statement of reasons contains a factual error in that it states that the budgetary resources allocated to the aid concerned were not increased, whereas those resources were in fact increased.

78 According to case-law, in the application of Article 92(3) of the EC Treaty, the Commission enjoys wide discretion, the exercise of which involves complex economic and social assessments which must be made in a Community context. In that context, judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with, and to verifying that the facts relied on are accurate and that

there has been no error of law, manifest error in the assessment of the facts or misuse of powers (see, inter alia, Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraph 59 and the case-law cited).

79 In the present case, at the time when it was made, the Commission's statement that the budgetary resources allocated to the aid in question were not increased constituted an assessment of the future effects of the radio broadcasting aid scheme as regards, in particular, the revenue from the charge on advertising companies which was intended to finance the FSER, which was used to fund that aid.

80 However, it is irrelevant that, subsequently, the resources allocated to that fund were actually increased to a certain extent.

81 The legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted, especially where the decision in question is a decision not to raise objections to an aid scheme adopted at the end of the preliminary stage of the procedure for reviewing aid under Article 93(3) of the EC Treaty, such as the contested decision (see, to that effect, *Nuova Agricast*, paragraphs 54 and 55).

82 Since, in the contested decision, the Commission had cause to assess the future effects of an aid scheme at a time when such effects could not be accurately foreseen, that decision can be declared unlawful — on the ground of its assessment that the budgetary resources for the aid concerned would not be increased — only if that decision was manifestly incorrect in the light of the information available to the Commission when that decision was adopted.

83 While it is true, as regards television advertising, that Article 2 of the draft decree which became Decree No 97-1263 provided that the ceiling on the charge rates could be raised, the Court points out that, at the time when the aid scheme was notified to the Commission, those rates had yet to be determined in accordance with the third paragraph of Article 2 of that draft decree.

84 Moreover, it is not disputed that, at that time, the advertising revenue which formed the basis of assessment of the charge on advertising companies was also still unknown and could therefore only be estimated.

85 In the light of the existence of such variables, which constituted elements of uncertainty to be assessed by the Commission at the same time as taking into account, in particular, the evidence contained in the notification of the aid scheme concerned and any information communicated by the national authorities, it cannot be found that there was a manifest error in the assessment of the information in question.

86 As regards the alleged error of assessment of the facts, it must be concluded from the above that the examination of the question referred has disclosed nothing capable of affecting the validity of the contested decision.

The alleged error of law regarding the compatibility with the Treaty of the charge on advertising companies

87 By its question, in so far as it seeks to ascertain whether the contested decision is valid as far as concerns the assessment made of the compatibility with the Treaty of the radio broadcasting aid scheme set up for the period between 1998 and 2002, the Cour administrative d'appel de Lyon seeks to ascertain whether that decision should be declared invalid on account of the fact that the charge on advertising companies was

incompatible with the common market in so far as that charge was also levied on radio and television advertisements broadcast to France from abroad, whereas the revenue from that charge finances an aid scheme from which only local radio stations established in France can benefit.

88 While, as pointed out at paragraph 78 above, the Commission enjoys wide discretion in the application of Article 92(3) of the EC Treaty, that power is none the less subject to compliance with certain limitations which the Community judicature is required to review.

89 Thus, the Court has held that the method by which aid is financed may render the entire aid scheme which it is intended to finance incompatible with the common market. Therefore, the aid cannot be considered separately from the effects of its method of financing. Quite to the contrary, consideration of an aid measure by the Commission must necessarily also take into account the method of financing the aid in a case where that method forms an integral part of the measure (see to that effect, inter alia, *van Calster and Others*, paragraph 49, and Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 29).

90 In such a case, the notification of the aid provided for in Article 93(3) of the EC Treaty must also cover the method by which it is financed, so that the Commission may consider it on the basis of all the facts. If this requirement is not satisfied, it is possible that the Commission may declare that an aid measure is compatible, when, if the Commission had been aware of its method of financing, it could not have been so declared (*van Calster and Others*, paragraph 50).

91 However, the Commission submitted at the hearing that it must be assumed that a charge financing an aid measure need only be notified by a Member State and, therefore, considered by the Commission, if, on an initial assessment that must be carried out by the Member State concerned, those liable to pay that charge and the beneficiaries of the aid in question are in competition with each other. Where there is no such relationship of competition, there is no Community interest in a Member State notifying or the Commission examining a charge financing an aid measure.

92 That argument must be rejected.

93 While the question whether there is a relationship of competition between the persons liable to pay a charge and the recipients of the aid which that charge is used to fund may be an important factor in the context of the Commission's substantive examination as to whether aid is compatible with the common market, it cannot be an additional criterion determining the scope of the obligation to notify aid laid down in Article 93(3) of the EC Treaty.

94 Where a charge constitutes the means by which an aid scheme such as that at issue in the main proceedings is financed, it is clearly in the Community interest that the Member State notifies that scheme, including the method of financing which forms an integral part of it, so that the Commission may have available to it all the information necessary to assess the compatibility of that measure with the common market, an assessment which falls within its exclusive competence, subject to review by the Community judicature (see to that effect, inter alia, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 52 and the case-law cited).

95 The effectiveness of that exclusive power would be at risk of being compromised if, in order to exercise it, the Commission had to rely on each Member State carrying out a prior unilateral assessment as to whether the persons liable to pay a charge and the recipients of aid financed by the charge were in competition with each other.

96 That applies all the more so in a context involving an aid scheme and a charge such as those at issue in the main proceedings, since that scheme concerns aid whose recipients operate in a market which cannot be regarded as being clearly distinct from that in which the persons liable to pay the charge also operate.

97 The answer to the question whether there is a relationship of competition between those aid recipients and parties liable to pay the charge may, in many cases, be open to discussion, as demonstrated by the divergence of opinion expressed in the course of these preliminary reference proceedings, both in the written observations and at the oral hearing. In order to provide such an answer, it is necessary to conduct a detailed investigation of the characteristics of the markets in question as part of the substantive review of the aid which the Commission alone can carry out, subject to review by the Community judicature.

98 It is necessary to determine whether the charge on advertising companies should in any event have been taken into account by the Commission in its review of the aid scheme concerned on account of the fact that, in the light of the case-law referred to at paragraph 89 above, it should be considered to form an integral part of the radio broadcasting aid scheme which that charge was used to finance.

99 For a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid under the relevant national rules, in the sense that the revenue from the charge is necessarily allocated for the financing of the aid and has a direct

impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the common market (see, inter alia, Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 46 and the case-law cited).

100 In the circumstances of the present case, it is apparent from Articles 3 and 6 of Decree No 97-1263 that the net revenue from the charge on advertising companies finances the FSER, from which the FSER Committee pays the radio broadcasting aid. That charge is levied specifically and solely for the purpose of financing the aid at issue (see, by analogy, *van Calster and Others*, paragraph 55).

101 That close link between the charge on advertising companies and the aid which it is used to finance is also clearly apparent from both the title of Decree No 97-1263 — 'creating a parafiscal charge for the benefit of funds to support radio broadcasting' — and the titles of the two parts of that decree, thus reflecting its structure, namely '[FSER] resources' and 'Allocation of aid' respectively.

102 The charge on advertising companies is also of a fundamentally different nature from that of the charges financing the aid measures at issue in certain judgments of the Court relied on by the Commission, in which the Court found that the charge was not hypothecated to the aid measure in question under the relevant national rules (Case C-175/02 *Pape* [2005] ECR I-127, and *Distribution Casino France and Others*).

103 In those cases, that conclusion was based on the finding that, under the relevant national rules, the revenue from the charge in question did not have a direct impact on the amount of the aid.

104 In the present case, the net revenue from the charge on advertising companies is used wholly and exclusively to finance radio broadcasting aid and therefore has a direct impact on the amount of that aid. While it is true that the aid is allocated by the FSER Committee, it is not disputed that that body does not have the power to allocate the funds available for purposes other than that of such aid.

105 Thus, Article 7 of Decree No 97-1263 provides that the aid is to be allocated from the available funds by the FSER Committee. Nor is it disputed that the FSER's resources, other than those generated by the revenue from the charge on advertising companies, are negligible.

106 While it is true that the setting-up grant and equipment aid are subject to limits and calculated according to specific assessment criteria, if their amount is below those ceilings it must be determined essentially within the limits of the anticipated revenue from the charge on advertising companies.

107 That is even more apparent in the case of the annual operating grant, which is clearly the most important type of aid for radio broadcasting, since, for example, it alone accounts for more than 96% of the total aid paid in 2003, as Régie Networks stated at the hearing without being contradicted on that point.

108 According to Article 17 of Decree No 97-1263, the amount of aid is determined in accordance with a scale drawn up by the FSER Committee, which takes account of the revenue from the current normal operations of the radio station in question before deducting the advertising marketing costs.

109 At the hearing, Régie Networks explained, again without being contradicted on this point, that that scale is fixed on the basis of the FSER's resources for the previous year, the projected amount of revenue from the charge on advertising companies set out in the initial Finance Law and forecast trends in the advertising market.

110 Lastly, while the possible increase in the annual operating grant in accordance with the second paragraph of Article 17 of Decree No 97-1263 cannot be more than 60%, the annual amount of that grant is also dependent, subject to that limitation, on the funds available and, therefore, essentially on the revenue or the projected amount of revenue from the charge on advertising companies.

111 In those circumstances, the revenue generated by the charge has an impact on the amount of radio broadcasting aid paid. In fact, the grant of that aid and, to a large degree, its extent are dependent on the revenue from that charge.

112 It must be concluded from the above that the charge on advertising companies forms an integral part of the radio broadcasting aid scheme which that charge is intended to finance.

113 Accordingly, the Commission should have taken that charge into account when it examined the aid scheme in question, namely following notification of that scheme, at the preliminary stage of the procedure for reviewing aid under Article 93(3) of the EC Treaty.

114 It is not in dispute that, while the method by which the scheme was financed was indeed notified to the Commission, since it constituted the subject of Title I of the draft decree which subsequently became Decree No 97-1263, the Commission did not review it in the course of the procedure which concluded with the adoption of the contested decision. Before the Court, the Commission argued in fact that it was not necessary to carry out such a review, since the charge on advertising companies does not form an integral part of the radio broadcasting aid scheme.

115 It should also be noted that, in a letter of 8 May 2003, the Commission objected to a method of financing an amended version of the radio broadcasting aid scheme that was essentially the same as the charge on advertising companies at issue in the main proceedings, taking the view that that scheme was contrary to the general principle,

frequently reasserted by the Commission and confirmed by the Court in Case 47/69 *France* v *Commission* [1970] ECR 487, that imported goods and services must be exempt from any parafiscal charge designed to finance an aid scheme which benefits only national undertakings. It is only after the proposed aid in question had been amended so that the charge linked to it would henceforth cover only advertisements broadcast from French territory that the Commission decided, in its letter of 28 July 2003, not to raise any objections to the scheme.

116 Since, for the purpose of assessing whether the aid scheme in question was compatible with the rules of the Treaty on State aid, the Commission failed to take account of the method by which that aid was financed, even though it formed an integral part of that scheme, its assessment of the compatibility of that scheme with the common market is necessarily vitiated by an error.

117 On that ground, it follows that the contested decision is invalid.

118 The French Government has asked the Court, in the event of the contested decision being declared invalid, to limit the temporal effects of its judgment, excluding from those limits only those undertakings which, prior to the judgment to be delivered, brought legal proceedings or made an equivalent complaint regarding the levying of the charge on advertising companies.

119 The Commission has asked the Court, in the event of the same outcome, to preserve the effects of the invalid decision, so that neither the levying of the charges nor the allocation of the aid is affected.

120 In support of that request, it has been pointed out in particular that the aid scheme was notified to and authorised by the Commission, as were the previous schemes, and was applied for a lengthy period. The French Government considers in particular that if an obligation were imposed to recover the sums in question from the FSER and local radio stations for the period between 1998 and 2002, their finances and their very existence might be in jeopardy and the plurality of the media could be threatened.

121 In that regard, it must be noted, first, that, where it is justified by overriding considerations of legal certainty, the second paragraph of Article 231 EC, which is also applicable by analogy to a reference under Article 234 EC for a preliminary ruling on the validity of a measure adopted by the Community institutions, confers on the Court a discretion to decide, in each particular case, which specific effects of such a measure must be regarded as definitive (see to that effect, inter alia, Case C-228/99 *Silos* [2001] ECR I-8401, paragraph 35 and the case-law cited).

122 In accordance with that case-law, the Court has limited the temporal effect of a declaration that a Community measure is invalid where overriding considerations of legal certainty involving all the interests, public as well as private, at stake in the cases

concerned precluded the calling into question of the charging or payment of sums of money effected on the basis of that measure in respect of the period prior to the date of the judgment (see, inter alia, *Silos*, paragraph 36).

123 In this instance, it is clear, first, that the aid scheme in question was applicable for a period of five years and that a great deal of aid was paid under that scheme, affecting a large number of operators. Second, the overriding considerations of legal certainty invoked by both the French Government and the Commission and, in particular, the fact that the aid scheme at issue was notified to the Commission and the decision by which the latter authorised that scheme was not challenged before the Community judicature are capable of justifying the imposition of a limitation on the temporal effects of the declaration that the contested decision is invalid.

124 Next, where the Court rules, in proceedings under Article 234 EC, that a measure adopted by a Community authority is invalid, its decision has the legal effect of requiring the competent Community institutions to take the necessary measures to remedy that illegality, as the obligation laid down in Article 233 EC in the case of a judgment annulling a measure applies in such a situation by analogy (see, inter alia, Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 123 and the case-law cited).

125 Finally, as stated at paragraph 94 above, exclusive power is conferred on the Commission by the Treaty to assess the compatibility of State aid with the common market, subject to review by the Community judicature.

126 Accordingly, the effects of the declaration that the contested decision is invalid must be suspended until a new decision is adopted by the Commission, so that it may remedy the illegality established in this judgment. Those effects are to be suspended for a period of no more than two months from the date of delivery of this judgment if the Commission decides to adopt such a new decision under Article 88(3) EC, and for a reasonable further period if the Commission decides to initiate the procedure under Article 88(2) EC.

127 In the light of the foregoing, it is necessary, however, to grant the French Government's request to exclude from the temporal limitation of the effects of this judgment only those undertakings which, prior to the date of delivery of this judgment, brought legal proceedings or made an equivalent complaint regarding the levying of the charge on advertising companies under Decree No 97-1263.

128 Having regard to all the foregoing considerations, the answer to the question is that the contested decision is invalid. However, the effects of that declaration that the decision is invalid will be suspended pending the adoption of a new decision by the Commission under Article 88 EC. Those effects are to be suspended for a period not exceeding two months from the date of delivery of this judgment if the Commission decides to adopt such a new decision under Article 88(3) EC, and for a reasonable further period if the

Commission decides to initiate the procedure under Article 88(2) EC. Only undertakings which, prior to the date of delivery of this judgment, brought legal proceedings or made an equivalent complaint regarding the levying of the charge on advertising companies established by Article 1 of Decree No 97-1263 are excluded from the temporal limitation of the effects of this judgment.

Costs

129 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The decision of the Commission of the European Communities of 10 November 1997 not to raise any objections to the new version of an aid scheme to support local radio stations (State aid No N 679/97 — France) is invalid.

The effects of the declaration that that decision of the Commission of the European Communities of 10 November 1997 is invalid are suspended pending the adoption of a new decision by the Commission under Article 88 EC. Those effects are to be suspended for a period not exceeding two months from the date of delivery of this judgment if the Commission decides to adopt such a new decision under Article 88(3) EC, and for a reasonable further period if the Commission decides to initiate the procedure under Article 88(2) EC. Only undertakings which, prior to the date of delivery of this judgment, brought legal proceedings or made an equivalent complaint regarding the levying of the parafiscal charge on advertisements broadcast on sound radio or television, established by Article 1 of Decree No 97-1263 of 29 December 1997 creating a parafiscal charge for the benefit of a fund to support radio broadcasting, are excluded from the temporal limitation of the effects of this judgment.

[Signatures]