JUDGMENT OF THE COURT (Fourth Chamber)

18 October 2007 *

In Case C-441/06,

ACTION under Article 88(2) EC for failure to fulfil obligations, brought on 25 October 2006,

Commission of the European Communities, represented by C. Giolito, acting as Agent, with an address for service in Luxembourg,

applicant,

v

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

defendant,

* Language of the case: French.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, J. Malenovský and T. von Danwitz, Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by failing to execute, within the prescribed period, Commission Decision 2005/709/EC of 2 August 2004 on the State aid implemented by France for France Télécom (OJ 2005 L 269, p. 30, 'the decision in question'), the French Republic has failed to fulfil its obligations under Articles 2 and 3 of that decision, the fourth paragraph of Article 249 EC and Article 10 EC.

Background to the dispute

2 France Télécom ('FT') provides and operates telecommunication networks and services. FT is active, in particular, on the following markets: fixed telephony, mobile telephony, the internet and other information services, services for business, broadcasting and cable television.

3 By derogation from the ordinary business tax system applying in France (Articles 1447 ff. of the General Tax Code, 'the CGI'), according to which business tax is payable each year by natural or legal persons regularly carrying on a self-employed business, two successive taxation schemes different from the normal rules were set up in favour of FT, namely a transitional scheme, applicable from 1 January 1991 until 31 December 1993, followed by a definitive scheme, which applied from 1 January 1994 onwards. The latter scheme was abolished with effect from 31 December 2002.

4 Under the transitional scheme (1991-1993), pursuant to Article 19 of Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications services (JORF of 8 July 1990, p. 8069), during that period, FT, like the State, was not liable to taxes such as business tax, property tax or corporation tax.

5 Under the definitive scheme (1994-2002), pursuant to Article 18 of Law No 90-568 and Article 1654 of the CGI, FT was subject to the ordinary tax system as from 1 January 1994, except for local direct taxation, with respect to which the applicable legislative provisions laid down special conditions concerning the rate, the base and the taxation arrangements.

6 Those two schemes were the subject of a formal investigation procedure under Article 88(2) EC, in accordance with a Commission decision notified to the French Republic on 31 January 2003 (OJ 2003 C 57, p. 5).

7 In paragraphs 33 and 53 of the grounds of the decision in question, the Commission found that the transitional scheme did not constitute State aid. By contrast, the Commission found, in paragraphs 42 and 60 of those grounds, that the difference between the business tax actually paid by FT and that which would have been payable under the ordinary law from 1 January 1994 to 31 December 2002 constituted State aid implemented illegally in infringement of Article 88(3) EC.

8 The decision in question did not fix the exact amount to be recovered. However, the Commission estimated, in paragraph 59 of the grounds of the decision in question, that the relevant amount was to be somewhere in a range between EUR 798 million and EUR 1 140 million in capital, to which had to be added interest from the date on which the aid in issue was at the disposal of the recipient until the date of its recovery. In this respect, it is stated in that same paragraph that the exact amount of aid to be recovered will be determined by the Commission, in collaboration with the French authorities, within the framework of the recovery procedure, at the latest by 1 November 2004.

9 The operative part of the decision in question is worded as follows:

'*Article 1*

The State aid granted illegally by France in infringement of Article 88(3) [EC] to France Télécom under the business tax scheme applicable to that company during

the period 1 January 1994 to 31 December 2002 (provided for by Law No 90-568 (Article 18) and Article 1654 CGI) is incompatible with the common market.

Article 2

1. France shall take all necessary measures to recover from France Télécom the aid referred to in Article 1.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision.

3. The aid to be recovered shall include interest from the date on which it was at the disposal of the recipient until the date of its recovery.

4. The interest shall be calculated in conformity with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [OJ 2004 L 140, p. 1].

Article 3

France shall inform the Commission, within two months of notification of this Decision, of the measures that it proposes to take and that it has already taken to comply with it. For that purpose, France shall use the questionnaire annexed to this Decision.

...'

10 Between 17 September 2004 and 10 August 2006, the Commission and the French authorities exchanged numerous letters concerning the measures to be taken to execute the decision in question. In addition, several meetings took place for that same purpose between the Commission and those authorities.

11 In the course of those exchanges, the Commission proposed, in a letter of 23 December 2005, to fix the amount of aid which FT received:

— at EUR 635 million net of interest for the period 1994-1999, and

— at EUR 293 million net of interest for the period 2000-2002.

12 Consequently, according to the Commission, that aid amounted to EUR 928 million net of interest. In the same letter, the Commission asked the French authorities to take all necessary measures to recover that sum, with interest, from the recipient and to inform the Commission of the measures taken by 20 January 2006.

13 In the said letter, the Commission also told the French authorities that, if they wished to provide clarification or make specific and constructive amendments to the Commission's proposal, these would have to reach the Commission by the same date.

14 Not satisfied with the action taken by the French authorities following this request, the Commission decided to bring an action before the Court.

The action

Arguments of the parties

15 The Commission notes that, more than two years after the decision in question was adopted, none of the aid in issue has been repaid. No procedure to implement that decision at national level has been started, even for the lowest amount in the range referred to in paragraph 59 of the grounds of the decision in question, namely that of EUR 798 million plus interest.

16 The Commission points out that the failure to recover the aid cannot be justified by the practical difficulties encountered in determining the amount to be repaid. In such a case, the Commission and the Member State concerned must cooperate in good faith in order to overcome such difficulties, in accordance with the obligations set out in Article 10 EC.

17 The Commission submits that it made proposals for the amount of aid to be recovered and invited the French authorities to put forward appropriate suggestions in this regard. However, those authorities merely challenged the approach chosen without ever presenting alternatives.

18 The Commission explains that the reason for the range referred to in paragraph 59 of the grounds of the decision in question is the fact that the amount of aid to be recovered lies somewhere between EUR 798 million and EUR 1 140 million, which represent, respectively, the minimum and the maximum amount between which the final amount must be fixed.

19 The Commission submits that, to be acceptable, a minimum amount equivalent to the lowest amount in the range, namely EUR 798 million, must be recovered to ensure effective recovery of the State aid which FT received.

20 The Commission concludes that the French Republic has not taken the measures necessary to guarantee the proper, immediate and effective execution of the decision in question. Such conduct is contrary to the duty of loyal cooperation established in Article 10 EC. The relevant authorities of that Member State have never displayed a constructive attitude making it possible to fix the amount to be repaid.

21 The French Republic submits that the decision in question did not specify the amount to be recovered and did not lay down the criteria or the parameters for calculating it. In paragraph 59 of the grounds of the decision in question, the Commission reserved to itself competence to determine the amount of aid to be recovered.

22 That Member State submits that, in any event, the Commission ought to have provided a sufficiently precise and reliable method of calculation to enable the amount of aid repayable to be determined. Since the Commission did not do so, the national authorities were unable to take steps to recover the aid.

23 In the French Republic's view, that reading of the decision in question is not called into question by the fact that, pursuant to Article 2 of that decision, the national authorities are required to take all necessary measures to recover the aid in question. The operative part of that decision is inseparable from its grounds and must be interpreted taking into account the considerations that led to its adoption.

24 That Member State explains in that respect that even the lowest amount in the range referred to in paragraph 59 of the grounds of the decision in question was not relevant, since the range was only indicative, so that it was not possible to use the amounts given in the decision for the purposes of the recovery of the aid.

25 The French Republic points out that, following a suggestion from the Commission, it had obtained FT's agreement for a significant sum — namely EUR 500 million, or even EUR 600 million — to be lodged pending determination of the aid repayable. Lodging such an amount would have deprived FT of the competitive advantage allegedly conferred on it by the aid in issue. However, the Commission rejected that solution.

26 That Member State adds that the national authorities identified weak points in the calculation method used by the Commission. In addition, numerous exchanges of letters and working meetings between the national authorities and the Commission took place between September 2004 and August 2006. Consequently, there is no basis for finding that there has been an infringement of the duty of loyal cooperation laid down in Article 10 EC.

Findings of the Court

Infringement of Articles 2 and 3 of the decision in question

27 It must be noted, as a preliminary point, that the only defence available to a Member State in opposing an infringement action by the Commission under Article 88(2) EC is to plead that it was absolutely impossible for it to implement the decision in question (see, in particular, Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 16; Case C-261/99 *Commission* v *France* [2001] ECR I-2537, paragraph 23, and Case C-499/99 *Commission* v *Spain* [2002] ECR I-6031, paragraph 21).

28 It is also apparent from the case-law of the Court that a Member State which, in giving effect to a Commission decision on State aid, encounters unforeseen and unforeseeable difficulties, whether of a political, legal or practical kind, or becomes aware of consequences overlooked by the Commission, must submit those problems to the Commission for consideration, together with proposals for suitable amendments to the decision in question. In such cases, the Commission and the Member State concerned must work together in good faith with a view to overcoming the difficulties whilst fully observing the provisions of the EC Treaty and in particular those on aid (see *Commission* v *France*, paragraph 24; Case C-378/98 *Commission* v *Belgium* [2001] ECR I-5107, paragraph 31; and *Commission* v *Spain*, paragraphs 24 and 25).

29 In addition, the Court has held that no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out itself, without overmuch difficulty, that amount (see, in particular, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25, and Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraph 39).

30 It is in that legal framework that the arguments put forward by the French Republic must be examined.

31 As regards the argument that the Commission reserved to itself competence to determine the amount of aid to be recovered from the recipient, it must be recalled that the decision in question states, in paragraph 59 of its grounds, that this amount must be between EUR 798 million and EUR 1 140 million in capital.

32 It is apparent from paragraph 54 of the grounds of the decision in question that the Commission set the latter amount following a letter from the French authorities of 15 May 2003 concerning the undertaxation of FT between 1994 and 2002 under the business tax scheme. According to paragraph 58 of those grounds, the first amount was taken from a fax from the French authorities of 16 July 2004. The table in paragraph 58 shows that those two amounts were, moreover, divided into annual amounts for the period covering the years 1994 to 2002.

33 It follows that the amount of EUR 798 million must be considered to be the minimum aid amount to be recovered in accordance with Article 2 of the decision in question. The operative part of a decision relating to State aid is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account

must be taken of the reasons which led to its adoption (see, in particular, Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21).

34 It is indeed uncontested that, in paragraph 59 of the grounds of the decision in question, the Commission had in fact stated that the exact amount of aid to be recovered would be determined by it. However, it also stated in the same paragraph that that amount would be determined in collaboration with the French authorities, within the framework of the recovery procedure, at the latest by 1 November 2004. Implementation of the recovery procedure did not therefore depend on fixing the said amount. Therefore, the fact that the exact amount of aid to be recovered had not been laid down definitively did not prevent the authorities from implementing the recovery procedure for the minimum amount of aid or from cooperating effectively in determining the final amount of the aid to be recovered.

35 In those circumstances, the argument of the French Republic that the amounts set out in paragraph 59 of the grounds of the decision in question are only indicative and do not have any binding legal force cannot be upheld either.

36 As regards the argument that the Commission did not provide a reliable calculation method with which to determine the amount of aid to be repaid, it must be pointed out that the difference between the tax actually paid by FT and that to which it would have been liable under the ordinary rules governing business tax has been the subject of detailed analyses since the opening of the investigation procedure provided for in Article 88(2) EC.

37 In the context of that procedure, the Commission developed the parameters that would allow the French authorities to make a definitive proposal concerning the amount of aid to be repaid.

38 The information needed in this respect was, inter alia, provided by the Commission in paragraphs 25 to 38, 60 to 67, and 72 to 80 of the decision of 31 January 2003 opening the formal investigation procedure and, in particular, in paragraphs 34 to 44 of the grounds of the decision in question.

39 The national authorities accordingly had the information enabling them to propose to the Commission an exact amount reflecting the undertaxation which FT enjoyed between 1994 and 2002. The national authorities are in fact in the best position, not only to determine the appropriate means to recover the State aid unduly paid, but also to determine the exact amounts to be repaid (see, to that effect, *Commission* v *Belgium*, paragraphs 50 and 51).

40 The Commission's decision does contain the appropriate information to enable the French Republic to determine itself, without too much difficulty, the final aid amount to be recovered, and that amount would have to be somewhere within the range established by the Commission.

41 It follows that the argument of that Member State that the Commission did not provide a sufficiently reliable calculation method to determine the amount of aid to be recovered cannot be accepted.

42 Finally, as regards the argument of that Member State that it is impossible to determine with certainty the amount of aid to be recovered, it must be recalled that, in situations involving the recovery of amounts of aid from a large number of undertakings in conjunction with numerous individual calculation parameters, the Court has held that such difficulties in implementing the relevant decisions did not constitute an absolute impossibility, within the meaning of the case-law cited (see, in particular, Case C-280/95 *Commission* v *Italy* [1998] ECR I-259, paragraphs 18 and 23, and *Commission* v *Belgium*, paragraphs 41 and 42). The documents before the

Court do not show that the problems arising, in the present case, in calculating the amount of aid to be recovered are greater than those encountered in the situations that gave rise to the judgments cited above.

43 It must also be pointed out that apprehension of internal difficulties in the course of implementing a decision on State aid cannot justify a failure by a Member State to comply with its obligations under Community law (see, to that effect, Case C-52/95 *Commission* v *France* [1995] ECR I-4443, paragraph 38; Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 55, and Case C-280/95 *Commission* v *Italy*, paragraph 16).

44 Consequently, it must be concluded that the French Republic has failed to fulfil its obligations under Articles 2 and 3 of the decision in question and the fourth paragraph of Article 249 EC.

Infringement of Article 10 EC

45 It should be borne in mind, first of all, that Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty (see Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 63).

46 As regards the complaint that the Commission has raised in this regard in the present case, it must be noted that, in its exchanges with the French authorities

following the adoption of the decision in question, the Commission requested in numerous letters a certain amount of information to enable it, in agreement with those authorities, to determine the final amount of aid to be repaid.

47 In addition, in the context of its discussions with the French authorities aimed at implementing the decision in question, the Commission, in a letter of 23 December 2005, fixed the amount of aid to be repaid at EUR 928 million net of interest.

48 However, the French authorities did not consider it necessary to take a clear position on that point or to submit to the Commission a counter-proposal backed up by concrete figures.

49 Moreover, even if the French Republic, throughout the exchanges it had with the Commission following the adoption of the decision in question, believed it necessary to contest the merits of that decision, and in particular the categorisation as State aid of the tax arrangements applicable to FT between 1994 and 2002, this did not in any way exempt it from implementing the said decision.

50 The French Republic also raised numerous questions concerning the parameters of the calculation necessary to determine the amount of aid to be recovered. In addition, it repeatedly stated that it was technically impossible to identify a reliable and precise methodology and, consequently, to reconstruct exactly and without leaving any room for dispute the amount of business tax that FT would have had to pay if it had been subject to the ordinary business tax system. That Member State reached the conclusion, repeated in several letters drafted between 2005 and 2006, that there was no sufficiently sound legal basis on which to initiate a recovery procedure without a major risk of litigation.

51 Taking into account those assertions and in the light of the foregoing considerations, it must be held that the French Republic displayed a lack of cooperation towards the Commission as regards providing the assistance needed to implement the decision in question.

52 Consequently, the conduct of the said authorities must be regarded as constituting an infringement of Article 10 EC.

53 Therefore, the action brought by the Commission is well founded in its entirety.

54 Consequently it must be held that, by failing to execute, within the prescribed period, the decision in question, the French Republic has failed to fulfil its obligations under Articles 2 and 3 of that decision, the fourth paragraph of Article 249 EC and Article 10 EC.

Costs

55 Under Article 69(2) of the Rules of Procedure, 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 Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that, by failing to execute, within the prescribed period, Commission Decision 2005/709/CE of 2 August 2004 on State aid implemented by France for France Télécom, the French Republic has failed to fulfil its obligations under Articles 2 and 3 of that decision, the fourth paragraph of Article 249 EC and Article 10 EC;**

2. **Orders the French Republic to pay the costs.**

[Signatures]