COMMISSION DECISION

of 29 September 2010

concerning the aid scheme C 4/09 (ex N 679/97) implemented by France to promote radio broadcasting

(notified under document C(2010) 6483)

(Only the French text is authentic)

(Text with EEA relevance)

(2011/147/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof [1],

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof [2],

Having called on interested parties to submit their comments pursuant to the provisions cited above [3],

Whereas:

1. PROCEDURE

(1) By letter of 2 October 1997 the French Republic notified the Commission of aid scheme N 679/97, a draft decree envisaging a change in the existing aid scheme in favour of radio broadcasting services [4]. By Decision of 10 November 1997 [5] the Commission approved the renewal of this radio broadcasting aid scheme for a period of 10 years.

(2) A change in that aid scheme was approved by the Commission Decision of 28 July 2003 [6]. The modification proposed by the French authorities referred, among other things, to a change in the methods of financing the aid scheme [7]. In that Decision the Commission concluded that the amended aid scheme was compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'). The modification entered into force on 1 January 2003 for a period of 10 years.

(3) On 22 December 2008 the Court of Justice of the European Union declared that the Commission Decision of 10 November 1997 concerning the period 1997-2002 was invalid. Consequently, the Commission took all the necessary measures to rectify the illegality identified and has re-examined the information provided by the French authorities (for a detailed description of this procedure, see chapter 3 'Grounds for initiating the procedure').

(4) By letter of 11 February 2009, the Commission informed the French Republic of its decision to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid.

(5) The Commission's decision to initiate that procedure was published in the *Official Journal of the European Union* [8]. The Commission called on interested parties to submit their comments on the aid in question.

(6) By letter of 23 April 2009 the French Republic submitted its comments on the measure.

(7) The Commission has not received other comments from interested third parties on this subject.

2. DETAILED DESCRIPTION OF THE AID

(8) The measure in question is an aid scheme in support of small French local radio stations that play a local social communication role and have commercial revenue from advertising and sponsorship that is not greater than 20 % of their turnover.

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[1] From 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are identical in substance. For the purposes of this Decision, references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88 of the EC Treaty where appropriate.

[2] OJ L 1, 3.1.1994, p. 3.

[3] OJ C 223, 16.9.2009, p. 15. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri = OJ:C:2009:223:0015:0019:EN:PDF

[4] Decree 92-1053 of 30 September 1992.

[5] Letter to the French authorities of 10 November 1997, State aid N 679/97, OJ C 120, 1.5.1999, p. 2; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri = OJ:C:1999:120:0002:0002:EN:PDF

[6] State aid NN 42/03 (ex N 752/02), OJ C 219, 16.9.2003, p. 3. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri = OJ:C:2003:219:0002:0003:EN:PDF; http://ec.europa.eu/community_law/state_aids/comp-2003/nn042-03.pdf

[7] See recital 14.

[8] See footnote 1.

(9) The aid scheme was financed by receipts from a parafiscal charge levied on resources obtained from radio and television advertising broadcasts.

(10) The competent authority, namely the Support Fund for Radio Broadcasting (SFRB), can grant three types of aid:

(a) an installation grant for community radio stations recently licensed by the High Audiovisual Council, which cannot exceed a ceiling specified in a scale;

(b) an operating grant representing an amount specified in a scale which starts progressively and then becomes degressive, established by the committee responsible for granting the subsidies. The committee can increase the amount within predefined limits by taking into account the beneficiary's achievements relating to internal management and educational, community and cultural projects or local social communication;

(c) an equipment grant paying for up to 50 % of the cost of renewing the equipment of eligible radio stations. This can be awarded only once every five years and cannot exceed the ceiling specified in a scale.

(11) The scheme has been in place since 1989 and has been subject to several changes, all notified to and approved by the Commission in 1990, 1992, 1997 and 2003, respectively.

2.1. **Beneficiaries of the aid scheme**

(12) The draft decree notified by the French authorities concerns the implementation of the aid scheme set out in Article 80 of Law No 86-1067 of 30 September 1986 on freedom of communication, as amended by Article 25 of Law No 89-25 of 17 January 1989 and Article 27 of Law No 90-1170 of 29 December 1990, which provides as follows:

'Radio broadcasting services whose commercial revenue from broadcasting brand or sponsorship advertising represents less than 20 % of their total turnover shall benefit from aid in accordance with the rules laid down by decree of the Council of State.

The aid scheme shall be financed by a charge levied on resources obtained from radio and television advertising broadcasts.

The remuneration received by the radio broadcasting services for messages aimed at supporting community or general interest projects shall not be taken into account when determining the ceiling referred to in the first paragraph of this section.'

2.2. **Method of financing the aid scheme**

(13) As regards the financing component of the aid scheme, Article 1 of the draft decree notified by the French authorities on 2 October 1997 which became Decree No 97-1263 of 29 December 1997, introducing a parafiscal charge to be paid into a support fund for radio broadcasting ([9]), states:

'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.'

Article 2 of the same decree states:

'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 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:

[…]'

Article 4 of the same decree provides that the charge referred to in Article 2 is to be levied, collected and recovered by the Directorate-General for Taxation for the radio broadcasting support fund, in accordance with the same rules, guarantees and penalties as those referring to the VAT.

([9]) *Official Journal of the French Republic*, 30.12.1997, p. 19194.

(14) These provisions have been amended following the change in the aid scheme notified to the Commission and approved by the decision of 28 July 2003 ([10]). Under the new rules, the parafiscal charge applies only to companies established on French territory.

3. GROUNDS FOR INITIATING THE PROCEDURE

(15) In 1997, by Decision N 679/97, the Commission approved a change in the aid scheme consisting in a financing mechanism based on a parafiscal charge levied on radio and television advertising broadcasts. That decision did not include any assessment of the method of financing. The 1997 decision was in force until 2003, when it was replaced by a new positive decision, Decision NN 42/03 ([11]).

(16) On 3 August 2004, *Régie Network*, the advertising arm of a major French radio station, NRJ, challenged the charge paid in 2001 (EUR 152 524) before the Lyon courts. The case was referred to the Court of Justice for a preliminary ruling on the validity of the Commission Decision of 10 November 1997 approving the aid.

(17) The judgment ([12]) of the Court of Justice, delivered on 22 December 2008, declared that the 1997 decision was invalid on the grounds that the Commission had omitted to assess the method of financing the measure under investigation.

(18) Under paragraph 89 of its judgment, the Court pointed out that consideration of an aid measure by the Commission must necessarily also take into account the method of financing the aid in cases where that method forms an integral part of the measure. Under paragraph 99 of its judgment, the Court stated that 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 internal market.

(19) After having verified that all the requirements have been met in that case, the Court concluded, under paragraph 112 of its judgment, that the charge on advertising companies forms an integral part of the radio broadcasting aid scheme which that charge is intended to finance. Accordingly, the Commission should have taken that charge into account when it examined the aid scheme in question, which it omitted to do in Decision NN 42/03.

(20) Following the judgment declaring that the Commission Decision of 10 November 1997 was invalid, the Commission took all the necessary measures to rectify the illegality identified and has re-examined the information provided by the French authorities. Consequently, on 11 February 2009 the Commission initiated the formal investigation procedure in accordance with Article 108(2) TFEU, under procedure number C4/2009 ([13]).

4. COMMENTS FROM FRANCE

(21) By letter of 23 April 2009 the French authorities submitted the following comments to the Commission:

(a) An annual average of EUR 20 million was collected and paid during the period in question, and distributed to over 500 recipients.

(b) It is not disputed that the parafiscal charge has also been paid by foreign operators providing radio broadcasting services in France delivered by radio stations or companies established in other Member States, but it would be impossible to identify them.

(c) The aid cannot give rise to any recovery primarily for two reasons: first, the aid scheme was duly notified to and approved by the Commission on several occasions, which gave its recipients legitimate expectations; secondly, given the current financial situation of the recipients it would be impossible for the French authorities to recover the amounts paid.

5. ASSESSMENT OF THE AID

5.1. Legal basis for the assessment

(22) The assessment of the aid scheme in question is based on Article 107(3) TFEU.

5.2. Existence of aid within the meaning of Article 107(1) TFEU

(23) Article 107(1) TFEU provides as follows:

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

([10]) State aid NN 42/03 (ex N 752/02), OJ C 219, 16.9.2003, p. 3. See note 5.
([11]) See footnote 10.
([12]) Case C-333/07, *Régie Networks* v *Direction de Contrôle Fiscal Rhône-Alpes Bourgogne*; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri = CELEX:62007C0333:EN:HTML
([13]) See footnote 1.

(24) Examination of this case according to the conditions laid down in Article 107(1) TFEU.

(a) *Aid granted by the State or through State resources*

The aid scheme is financed by resources obtained from a parafiscal charge provided for by legislative and regulatory provisions, collected by the tax authorities and levied on radio and television advertising broadcasts.

The aid is therefore granted through French State resources.

(b) *Distortion or the threat to distort competition by favouring certain undertakings or the production of certain goods*

The aid scheme promotes only radio broadcasting services. The beneficiaries of the aid scheme are providers of such services whose advertising revenue is less than 20 % of their total turnover. These broadcasting services are competing to attract listeners and advertising revenue, in particular with other radio broadcasting services in France whose commercial revenue exceeds this threshold and which do not receive public assistance under the aid scheme.

Therefore, the aid in question distorts or at least threatens to distort competition between the service providers receiving the aid and those not receiving it.

(c) *Effect on trade between Member States*

The radio broadcasting services delivered from locations on French territory, for instance by those benefiting under the aid scheme, can also be received in other Member States, albeit only in cross-border areas. At the same time, the parafiscal charge provided for by the legislative and regulatory provisions notified also applies to the advertising revenue of the services delivered in France from other Member States.

It follows that trade between Member States is affected or likely to be affected by the aid scheme notified.

(d) *Conclusion on the existence of State aid*

Under these circumstances, the Commission considers that the radio broadcasting aid scheme notified by the French authorities falls within the scope of Article 107(1) TFEU. Given that the scheme in question constitutes State aid, the Commission has the duty to examine its compatibility with the internal market. In accordance with the abovementioned *Régie Networks* judgment, the charge levied on advertising companies and used to finance the aid in question must be taken into account when assessing the compatibility of the scheme.

5.3. **Compatibility of the aid in the light of Article 107(2) and (3) TFEU**

(25) Because of its object and scope, the aid measure notified clearly fails to meet the requirements laid down in Article 107(2) TFEU and Article 107(3)(a) and (b) TFEU.

(26) Because its goal is to favour radio stations providing radio broadcasting services on French territory, in particular by assisting those with the lowest advertising revenue, the aid scheme aims to ensure media pluralism on French territory, which is a legitimate general objective. Thus, the aid component can be examined from the point of view of the criteria laid down in Article 107(3)(c) TFEU. That Article provides as follows: 'The following may be considered to be compatible with the internal market: (…) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest (…).' In this case, the Commission must weigh the positive and negative effects of the measure.

(27) In its previous decisions, the Commission concluded that the aid scheme in question has positive effects and is compatible with the internal market, in particular because the aid scheme contributes to a clearly specified objective of general interest. It aims to promote the plurality of radio stations providing radio broadcasting services on French territory. It supports small radio stations serving local audiences by taking into account social, cultural and local interests, which is a legitimate general objective. Moreover, any distortion of competition potentially caused by the aid scheme favouring these local radio stations is slight and does not change trading conditions to an extent contrary to the common interest. Given the mission and size of the radio stations in question, the distortion of competition between them and providers of the same type of service in another Member State is quite small. Consequently, this scheme's impact on trade is particularly weak.

(28) However, the assessment of Articles 3 and 6 of Decree No 97-1263 indicates that the financing of the aid scheme by means of the parafiscal charge in question forms an integral part of the measure, as was already stated by the Court in its *Régie Networks* judgment (paragraphs 99 to 112).

(29) As the Court pointed out in paragraph 89 of the *Régie Networks* judgment: 'the method by which aid is financed may render the entire aid scheme which it is intended to finance incompatible with the internal 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 aid's method of financing in cases 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).'

(30) It follows that the Commission must take this charge into account when examining the compatibility of the aid scheme with the internal market. The charge in question, levied on advertising companies, appears to run counter to the general principle, regularly asserted by the Commission and confirmed by the Court in its judgment in Case 47/69 *France* v *Commission* [1970] ECR 487, that imported products and services must be exempt from all parafiscal charges intended to finance an aid scheme which benefits national undertakings only. The Court referred to this assessment in paragraph 115 of its *Régie Networks* judgment.

(31) The Commission takes the view that the non-exemption of radio broadcasting services delivered in France by radio stations which are located in other Member States and cannot benefit from aid under the notified aid scheme adversely affects trading conditions to an extent contrary to the common interest. Even though the general purpose of the aid component of the notified scheme may be legitimate and may be regarded as compatible with the internal market, the same cannot be said of the method of financing it.

6. **CONCLUSION**

(32) Under these circumstances, the Commission concludes that the aid scheme can be declared compatible with the internal market, in particular as regards the criteria set out in Article 107(3)(c) TFEU. On the other hand, the Commission cannot approve the method of financing the scheme.

(33) The Commission has noted the impossibility, alleged by the French authorities in their letter of 23 April 2009, of identifying (among the payers of the parafiscal charge used to finance the aid scheme) the foreign operators who provided radio broadcasting services in France delivered by radio stations or companies located in other Member States during the period covered by the aid scheme in question. The Commission can admit the existence of administrative difficulties preventing their identification, given that the facts date far back in time. Nevertheless, on the basis of the explanations submitted by the French authorities, in the case in question the passage of time does not in itself appear to constitute an insurmountable obstacle to identifying who is liable to pay the charge. In reply, the French authorities stated that it was not always possible to establish, on the basis of the data available to them, whether the persons liable for the charge were companies broadcasting from French territory or from another Member State. In this case, they have to send individual notices to the persons liable for the charge, within six months of the date when this decision is notified, informing them of their specific right to reimbursement if they have been broadcasting to France from another Member State. The authorities must use all the available means to identify the persons liable for the charge. However, since it is not certain that the French authorities can identify all the persons liable for the charge, they also have the duty to conduct an adequate campaign advertising the reimbursement measures, so that the operators concerned can come forward.

(34) There is nothing to prevent France from enabling these unknown operators to exercise their right to the reimbursement of undue taxes paid between 1997 and 2002. France could rectify the incompatibility of the method of financing aid scheme by reimbursing the amount that is incompatible with the internal market in accordance with the following criteria:

— France shall send the operators concerned individual notices informing them of their specific right to reimbursement in each case where the French authorities are able to identify them and shall also ensure adequate publicity, especially by publishing advertisements in specialist periodicals throughout the European Union ([14]),

— the persons liable for the charge shall be given three years from the date of the adequate publicity to submit the reimbursement request ([15]),

— reimbursement shall be made within a maximum period of six months from the date of submission of the request ([16]),

([14]) Within its 2003 borders.

([15]) This is the normal response time in relations between the tax authorities and taxpayers in France and can be regarded as reasonable.

([16]) This period was specified in the Commission Decision of 14 December 2004 concerning the tax on meat purchases (rendering tax) implemented by France. It appears to be reasonable and there is no reason not to apply it in this case.

— added to the amounts reimbursed shall be the interest actually accrued from the date when they were collected until the date of the actual reimbursement, calculated on a compound basis using as an objective benchmark rate, by analogy, the rate referred to in Article 9 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 ([17]),

— the French authorities shall accept all reasonable proof submitted by the operators in question demonstrating that they have paid the charge,

— the right to reimbursement cannot be subjected to any other conditions,

— the French authorities shall send the Commission regular reports concerning the reimbursement procedure, every six months starting from the date when this decision is notified,

HAS ADOPTED THIS DECISION:

Article 1

The aid scheme introduced by France is compatible with the internal market subject to the conditions laid down in Article 2.

Article 2

To remove the discrimination suffered by foreign broadcasters who paid the charge on advertising companies to the French State without the possibility of benefiting from the aid scheme, the French authorities shall reimburse the parafiscal charge collected from foreign operators between 1997 and 2002. Within six months of the date when this decision is notified, they shall inform all the operators who paid the charges to be reimbursed, in each case where they can identify them and send notices, by means of adequate publicity, so that the operators concerned can come forward. The French authorities shall give them three years to submit a reimbursement request ([18]). Following such a call and on the basis of the evidence presented by the operators in question, France shall, within six months at most from the date of submission of the reimbursement request, reimburse the amount of charges incompatible with the internal market plus the interest actually accrued, calculated on a compound basis using as an objective benchmark rate, by analogy, the rate referred to in Article 9 of Regulation (EC) No 794/2004.

Article 3

Within two months of the date on which this Decision is notified, France shall inform the Commission of the measures taken to comply with it.

It shall send the Commission regular reports concerning the reimbursement procedure referred to in Article 2, every six months starting from the date on which this Decision is notified until the end of a three-year period starting from the date of the last adequate publicity measures referred to in Article 2.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 29 September 2010.

For the Commission
Joaquín ALMUNIA
Vice-President

([17]) OJ L 140, 30.4.2004, p. 1.

([18]) In accordance with the conditions set out in recital 34.