



IPress and Information

General Court of the European Union
PRESS RELEASE No 111/09
Luxembourg, 15 December 2009

Judgment in Case T-156/04
Électricité de France (EDF) v Commission

The General Court annuls the Commission's decision declaring certain measures implemented by France for EDF to be incompatible with the common market

The Commission did not examine whether the French State acted like a 'private investor' when it granted accounting and fiscal measures to EDF

Électricité de France ('EDF') produces, transmits and distributes electricity, particularly throughout France. This public undertaking, wholly owned by the French State, was entrusted with carrying out, at its own expense, for the purposes of a single concession known as the 'high-voltage transmission network ('RAG'), 'all maintenance and renewal works needed to keep the structures subject to the concession in good working order'. Within the framework of the opening up of the internal market in electricity,¹ the French State amended its legislation in 1997² in order to clarify the legal and financial regime in which EDF operates and to restructure its balance sheet.

On 16 December 2003, the Commission adopted a decision³ in which it took the view that EDF had enjoyed a tax concession worth an estimated EUR 888.89 million corresponding to the corporation tax that EDF did not pay in 1997 when unused provisions created for the renewal of the electricity transmission network were reclassified as capital in the balance sheet.

According to the Commission, since that aid had the effect of strengthening EDF's competitive position in relation to its competitors, it is incompatible with the common market. In view of the interest calculated in accordance with the decision, the total amount of aid claimed back from EDF amounted to EUR 1.217 billion. EDF has repaid that sum to the French State.

On 27 April 2004, EDF brought an action before the General Court for the annulment of that decision.

EDF, supported by the French Republic, submitted as part of its action that the measure at issue was an additional capital injection in an amount equivalent to the partial tax exemption. EDF accordingly argued that the Commission could not refuse to examine whether the French State – EDF's sole shareholder – had acted like a private investor in a market economy.

The General Court points out that, in the present case, the private investor test consists in establishing whether the public participation or intervention in the capital of the beneficiary undertaking has an economic objective that might also be pursued by a private investor and is thus undertaken by the State in its role as an economic operator, in the same way as a private operator, or whether, on the other hand, it is justified by the pursuit of a public interest objective and must be regarded as action taken by the State in the exercise of its authority as a State. In the latter case,

¹ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20).

² Law No 97-1026 of 10 November 1997 concerning urgent fiscal and financial measures (Official Gazette of the French Republic of 11 November 1997, p. 16387).

³ Commission Decision C(2003) 4637 final of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries in the form of non-payment, in 1997, of corporation tax on part of the provisions created for the renewal of the high-voltage transmission network ('RAG') (State aid No C 68/2002, N 504/2003 and C 25/2003 – France).

the actions of a State are not comparable with those of an economic operator or a private investor in a market economy.

In order to determine whether measures taken by the State represent the exercise of State authority or whether they are the consequence of obligations that the State must assume as shareholder, it is important to look not at the form of those measures, but at their nature, their subject-matter and the rules to which they are subject, while taking into account the objective pursued.

The fact that the State has access to financial resources accrued through the exercise of State authority is not in itself sufficient justification for regarding the State's actions as attributable to the exercise of State authority. If it were, application of the prudent private investor test to the conduct of a State which is a shareholder could well be futile or, at least, of disproportionately limited value, since, as a State, it inevitably has recourse to financial resources accrued through the exercise of public power, in particular from taxation.

Accordingly, in the case of an undertaking whose share capital is owned by the public authorities and into which the State injects capital, the conduct of the State as shareholder can be assessed using the prudent private investor test, irrespective of the form chosen by the State for the capital injection.

In the circumstances of the present case, in which, in 1997, the French State was both the fiscal creditor of a public undertaking and its sole shareholder, the General Court holds that the restructuring of EDF's balance sheet and the capital injection it received had to be analysed as a whole and that the fact that the capital derived in part from a fiscal debt did not preclude the measure from being examined in the light of the private investor test.

The General Court concludes that, **by refusing to examine the contested measures in their context and to apply the private investor test, the Commission erred in law and infringed the rules governing State aid. The General Court therefore annuls the Commission's decision.**

Given that the Commission did not apply the private investor test, it is not for the General Court to examine whether, in the present case, that test would have been satisfied.

If it considers it to be justified, the Commission may adopt a new decision in compliance with the considerations set out in the judgment of the Court.

Unofficial document for media use, not binding on the General Court.

The [full text](#) of the judgment is published on the CURIA website on the day of delivery

Press contact: Christopher Fretwell ☎ (+352) 4303 3355

Pictures of the delivery of the judgment are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106