



Press and Information

Court of Justice of the European Union
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Judgment in Case C-124/10 P
Commission v Électricité de France (EDF)

The Court confirms the annulment by the General Court of the Commission decision declaring that a tax measure taken by France in favour of EDF constitutes State aid

The Commission erred in law by refusing, simply because the measure was fiscal, to consider whether the French State had acted as a private investor

Electricité de France ('EDF') produces, transports and distributes electricity, particularly throughout France. At the material time, EDF was a public undertaking, wholly owned by the French State. In 1997, within the framework of the opening up of the internal market in electricity¹ the French State amended its legislation in order to clarify the legal and financial regime under which EDF operates, to restructure EDF's balance sheet and to increase its capital.

On 16 December 2003, the Commission adopted a decision² finding that, in the context of the restructuring of EDF's balance sheet and increasing of its capital, the French State had waived a tax claim valued at €888.89 million, corresponding to the corporation tax due from EDF. According to the Commission, the effect of that waiver had been to strengthen EDF's competitive position in relation to its business rivals and that the waiver constituted State aid incompatible with the common market. The Commission calculated that the aid to be paid back by EDF amounted in total to €1.217 billion, including interest. EDF has repaid that sum to the French State.

EDF, supported by France, brought an action before the General Court for the annulment, in part, of that decision. By judgment of 15 December 2009³, the General Court did indeed annul the decision, holding that the Commission was not entitled, simply because the measure taken was fiscal in nature, to refuse to examine whether the French State had acted as a 'private investor in a market economy'. The private investor test is intended as a means of establishing whether, in participating in the capital of the recipient undertaking, or in taking action in connection with that capital, the State is pursuing an economic objective which might also be pursued by a private investor and is accordingly acting in its role as economic operator, in the same way as a private operator.

Following that judgment, the Commission brought an appeal before the Court of Justice seeking to have it set aside. According to the Commission, the fiscal nature of the measure in question precludes the applicability of the private investor test, since such a measure is not within the capabilities of a private investor. Moreover, since State aid is an objective concept, the General Court was wrong to take into account the aims pursued by the French State.

By its judgment delivered today, the Court dismisses the Commission's appeal, finding that the judgment of the General Court is not vitiated by any error of law.

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 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 the non-payment, in 1997, of corporation tax in respect of some of the accounting provisions established for the renovation of the high-voltage transmission network (State Aid No C 68/2002, N 504/2003 and C 25/2003 – France).

³ Case [T-156/04](#) EDF v Commission, see also Press Release [111/09](#)

The Court examines whether, in a situation where a Member State is both a fiscal creditor of a public undertaking and its sole shareholder, that State can rely on the private investor test where it makes a capital injection in that undertaking by waiving a tax claim or whether that test must be ruled out – as the Commission did in the present case – in view of the fiscal nature of the claim and the fact that, in waiving the claim, the State is exercising its prerogatives as a public authority.

The Court recalls that EU law⁴ on State aid does not distinguish between State intervention measures by reference to their causes or their aims but defines them in relation to their effects. EU law seeks to prevent any aid granted through State resources – in any form whatsoever – from distorting competition, in terms of its effects, in particular by enabling the recipient public undertaking to be placed in a more favourable financial position than that of its competitors.

Consequently, the Court also held that the conditions which must be met if a measure is to be treated as ‘aid’ are not satisfied if the recipient public undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources.

In order to assess whether the same advantage would have been conferred in normal market conditions by a private investor in a situation as close as possible to that of the State, the Court has stated that only the benefits and obligations linked to the situation of the State as shareholder – to the exclusion of those linked to its situation as a public authority – are to be taken into account.

Accordingly, the Court finds that **the role of the State as shareholder** of an undertaking, on the one hand, and **the role of the State** acting as a **public authority**, on the other, **must be distinguished** and that **the applicability of the private investor test ultimately depends on the State having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it.**

Moreover, the Court states that the financial situation of the recipient public undertaking depends not on the means used to place it at an advantage, however that may have been effected, but on the amount that the undertaking ultimately receives. Consequently, in considering that **the private investor test may be applicable even where fiscal means have been employed**, the General Court did not err in law.

However, the Court specifies that, if a Member State relies on the applicability of the private investor test, it must establish, unequivocally and on the basis of objective and verifiable evidence, that the measure implemented falls to be ascribed to the State acting as shareholder. In particular, that evidence must show clearly that, before or at the same time as conferring the economic advantage, the Member State concerned took the decision to make an investment, by means of the measure actually implemented, in the public undertaking.

If the Member State concerned produces such evidence, it is for the Commission to carry out a global assessment, taking into account all evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority. Accordingly, the General Court was right to hold that **the objective pursued** by the French State **could be taken into account for the purposes of determining whether the State had indeed acted in its capacity as shareholder.**

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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⁴ Article 87 EC

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

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