



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-124/10 P
European Commission v Électricité de France and Others

Advocate General Mazák considers that the Court of Justice should set aside the judgment of the General Court annulling the Commission's decision finding that EDF had received unlawful State aid totalling €1.217 billion

In his view, the General Court erred in requiring the Commission to examine whether the French State had acted as a private investor when the aid in question was granted by the exercise of public powers in the form of tax breaks

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 context of the liberalisation of the electricity market¹, the French State amended its legislation in 1997 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 decision² in which it took the view that EDF had enjoyed a tax concession worth an estimated €888.89 million corresponding to the corporation tax that EDF did not pay in 1997 when unused provisions created for the renewal of the RAG 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 was 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 €1.217 billion. EDF has repaid that sum to the French State.

In December 2009 the General Court annulled³ that Commission decision at the request of EDF, on the basis that the Commission had failed to examine whether the French State had merely acted in the manner of a "private investor", taking into account the whole of the operation of the restructuring and the fact that the French State was the sole shareholder of EDF at the time.

The Commission appealed against that decision to the Court of Justice.

In his Opinion delivered today, **Advocate General Ján Mazák suggests that the Court should allow the appeal and refer the case back to the General Court.**

The Advocate General considers, firstly, that the General Court erred in its characterisation of the facts, in particular insofar as it held that France had converted a tax claim into capital. In his view, what France in fact did, was to grant EDF a selective corporate tax exemption (19). Whilst it is indisputable that a recapitalisation of EDF was being carried out at the same time, it is important to

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 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).

³ Case [T-156/04](#) *Électricité de France v Commission* (see also Press Release [111/09](#))

note that it was only the tax implications, which are dissociable from the recapitalisation, which were categorised as the State aid. The renunciation of a tax debt and its conversion into a capital injection must, in the view of Advocate General Mazák, be regarded as two distinct and consecutive operations (22).

Moreover, on the basis of the information provided to the Court, the conversion into capital of the taxable amount, from which EDF was exempted, went unrecorded in EDF's accounts. It was therefore not open to the General Court to find as a fact that a capital injection had taken place as a result of the abandonment of a tax claim, in the absence of any objective evidence attesting to the actual existence of such a transaction (45). According to Advocate General Mazák, such a finding by the General Court is based on a distortion of the documents before it (46).

Secondly, the Advocate General considers that the General Court further erred in its conclusion that the Commission should have examined the aid in light of the market economy investor principle ("MEIP").

In this regard Advocate General Mazák believes that the General Court erred in attaching crucial weight to the objective pursued by the French State when determining whether the MEIP was applicable. In his view such an approach has no basis in the Court's case law.

In the opinion of Advocate General Mazák, a clear distinction must be made between the State acting as a public authority, and acting as a private investor. It is clear that when a State exercises its powers to tax, it does so as a public authority. A private undertaking has no such powers to tax. The MEIP cannot, therefore be applied to tax matters as there is no possibility to compare the actions of the State with those of a private investor. The Advocate General adds that if the State wishes to act as a private investor, it still can: all it needs to do is to exercise its fiscal powers first and then inject capital (77).

Breaching such a distinction between public powers and private investor, as the General Court did in its judgment, may lead to legal uncertainty and a lack of transparency (92). The Advocate General points out that inter alia in *Altmark*⁴ the Court took a prescriptive approach, seeking to eliminate any possibility of manipulation on the part of the Member States and to bring transparency and clarity into the Member States' activities on the market. Indeed, in his view, there should be a visible separation of the role of State as public authority and the State as shareholder to ensure a level playing field. Only once this level playing field for the various economic operators is established should the MEIP test be applicable (96).

Finally, the Advocate General considers that the General Court also erred in finding that the Commission bears the burden of proof as to whether the MEIP conditions have been met. In his view it is logical that the Member State which seeks to rely on that principle must prove that those conditions are fulfilled.

Advocate General Mazák therefore concludes that the judgment of the General Court should be set aside. As the General Court did not assess all the pleas put forward by EDF, it would be appropriate to refer the case back to the General Court to allow it to consider those arguments. However, since the state of the proceedings so permits the Court should itself give final judgment on the merits of EDF's claim at first instance, that the measures at issue should have been categorised as a capital injection. The Advocate General considers it is appropriate for the Court to reject that claim.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

⁴ Case [C-280/00](#) *Altmark Trans and Regierungspräsidium Magdeburg*

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

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