



Press and Information

General Court of the European Union
PRESS RELEASE No 03/18
Luxembourg, 16 January 2018

Judgment in Case T-747/15
EDF v Commission

The General Court of the EU upholds the Commission's decision ordering France to recover €1.37 billion in the context of State aid granted to EDF

Électricité de France ('EDF') produces, transports and distributes electricity, particularly in 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 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 2009,³ upheld by a judgment of the Court of Justice of 5 June 2012,⁴ the General Court annulled the Commission's 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 to establish 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 the judgments of the General Court and Court of Justice, the Commission adopted a new decision on 22 July 2015.⁵ Taking the view that the private investor test was not applicable in the present case, the Commission once more declared the aid measure incompatible with the internal market and ordered the recovery of that aid plus interest. The amount of the aid, fixed at approximately €1.37 billion, was repaid to France on 13 October 2015. Dissatisfied with that new decision, EDF, supported by France, brought an action before the General Court for its annulment.

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 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](#) EDF v Commission see also Press Release No [111/09](#).

⁴ Case: [C-124/10 P](#) EDF v Commission see also Press Release No [70/12](#).

⁵ Commission Decision (EU) 2016/154 of 22 July 2015 on State aid SA.13869 (C 68/2002) (ex NN 80/2002) — reclassification as capital of the tax-exempt accounting provisions for the renewal of the high-voltage transmission network (RAG) implemented by France in favour of EDF (OJ 2016 L 34, p. 152).

By today's judgment, **the General Court upholds the Commission's decision of 22 July 2015 and, accordingly, the obligation for the French State to recover the sum of approximately €1.37 billion.**

The General Court examines, essentially, whether the Commission was entitled to find in its new decision of 22 July 2015 that the private investor test was not applicable. In that regard, the General Court recalls, first of all, on the basis of its judgment of 2009 and the judgment of the Court of Justice of 2012, that the role of the State as shareholder of an undertaking, on the one hand, and the role of the State acting as 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. The General Court also recalls that neither it in its judgment of 2009, nor the Court of Justice in its judgment of 2012, presupposed the applicability of the private investor test, thus leaving the Commission to determine whether the private investor test was applicable.

The General Court then examines EDF's argument that, the measure at issue being a recapitalisation measure, the French State had acted in its capacity as shareholder, thus pursuing an objective of investment comparable by its very nature to that of a private investor, which should have led the Commission to declare the private investor test applicable. The General Court does not accept that argument on the ground that **the measure at issue is not, contrary to EDF's claim, a measure recapitalising that undertaking, but a waiver of the tax on the reclassification of the grantor's rights in capital.**

The General Court also rejects EDF's argument that the Commission wrongly concluded that the private investor test was inapplicable because the French State mixed its capacities as public authority and shareholder. It recalls that it is for the French State to establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented fell to be ascribed to the State acting as a shareholder, that evidence having to show clearly that, before or at the same time as conferring the advantage, it took the decision to make an investment in EDF. According to the General Court, **the Commission assessed all the evidence made available to it by EDF and France in order to determine whether the measure at issue emanated from the French State's capacity as shareholder or that of public authority and therefore did not err in law.** The Commission was also right to conclude that **the documents provided by EDF and the French State do not show a separate and autonomous analysis of the State's considerations in its capacity as shareholder, nor do they establish that the considerations linked to the tax and those linked to the remuneration of the State do not overlap.**

The General Court also observes, like the Commission, that **the various documents provided by EDF and the French State neither constitute nor contain economic evaluations comparable to those that a private investor would have made before implementing the measure at issue for the purposes of determining its future profitability.** The Commission therefore did not err in law in considering that such a lack of research, references or specific analyses posed a problem for isolating the effects of the alleged investment in the information sent by the French State or by EDF.

The General Court concludes that **the Commission was right to find that the private investor test was not applicable, given that neither EDF nor France submitted evidence to establish unequivocally that the French State had, before or at the same time as conferring the advantage at issue, taken the decision to make an investment in EDF and had evaluated, as a private investor would have done, the profitability of the investment that would be made by conferring such an advantage on EDF.**

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may,

under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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: Holly Gallagher ☎ (+352) 4303 3355

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