JUDGMENT OF THE COURT (Grand Chamber)

5 June 2012 (*)

(Appeal — State aid — Waiver of a tax claim — Exemption from corporation tax — Increase in share capital — Conduct of a State acting as a prudent private investor in a market economy — Criteria to distinguish between the State as shareholder and the State exercising public power — Definition of ‘reference private investor’ — Principle of equal treatment — Burden of proof)

In Case C-124/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 February 2010,

European Commission, represented by E. Gippini Fournier, B. Stromsky and D. Grespan, acting as Agents, with an address for service in Luxembourg,

appellant,

supported by:

EFTA Surveillance Authority, represented by X. Lewis and B. Alterskjær, acting as Agents,

intervener in the appeal,

the other parties to the proceedings being:

Électricité de France (EDF), established in Paris (France), represented by M. Debroux, avocat,

applicant at first instance,

French Republic, represented by G. de Bergues and J. Gstalter, acting as Agents,

Iberdrola SA, established in Bilbao (Spain), represented by J. Ruiz Calzado and É. Barbier de La Serre, avocats,

interveners at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and M. Safjan, Presidents of Chambers, K. Schiemann, E. Juhász, G. Arestis, A. Borg Barthet, A. Arabadjiev (Rapporteur), D. Šváby and M. Berger, Judges,

Advocate General: J. Mazák,

Registrar: R. ?ere?, Administrator,

having regard to the written procedure and further to the hearing on 12 July 2011,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2011,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment in Case T-156/04 *EDF* v *Commission* [2009] ECR II-4503 ('the judgment under appeal'), by which the General Court of the European Union annulled Articles 3 and 4 of Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (OJ 2005 L 49, p. 9; 'the contested decision').

Legal context

2 Article 38(2) of the French General Tax Code provides:

'The net profit is the difference between the value of the net assets at the close and at the opening of the period for which the surplus constitutes the taxable income, with the deduction of additional contributions and the addition of amounts withdrawn by the owners or members in that period. Net assets are the amount by which the assets exceed that portion of total liabilities comprising third party liabilities, verifiable depreciation and accounting provisions.'

3 Article 4(I) and (II) of Law No 97-1026 of 10 November 1997 concerning urgent fiscal and financial measures (JORF (Official Gazette of the French Republic), 11 November 1997, p. 16387) provides:

'I. The structures of the high-voltage electricity transmission network are deemed to have been owned by Électricité de France [("EDF")] since it was granted the concession for that network.

II. For the purposes of applying the provisions of [paragraph] I, as at 1 January 1997, the counter-value of the assets in kind representing the high voltage transmission network under concession, appearing as liabilities on [EDF's] balance sheet, shall be entered, net of the corresponding revaluation differences, under the item "Capital injections".'

Background to the dispute

General background to the case

4 EDF produces, transports and distributes electricity, particularly throughout France. Created by Law No 46-628 of 8 April 1946 on the nationalisation of electricity and gas (JORF, 9 April 1946, p. 2651), EDF was wholly owned by the French State at the time when the decision to initiate the procedure laid down in Article 88(2) EC was adopted in 2002.

5 Article 36 of Law No 46-628 established the principle of transferring to EDF the nationalised electricity concessions. In 1958, the various electricity transmission concessions granted by the State were converted into a single concession known as the 'réseau d'alimentation générale' (RAG) (high-voltage transmission network).

6 The application to EDF of the General Accounting Plan of 1982, which included accounting rules specific to concessions, led to consideration being given from 1987 onwards to the specific constraints which must be faced by concessionaires, who are bound by the obligation to return assets under concession in good working order when the concession ends, in accordance with the 'principle of the sustainability of public services'.

7 Pursuant to the 1982 General Accounting Plan, an accounting plan specific to EDF was

introduced and approved by the Interministerial Order of 21 December 1986 (JORF of 30 December 1986, p. 15794).

8 Pursuant to that specific accounting plan, the RAG was entered in the assets on EDF's balance sheet under the item 'Fixed assets under concession' and specific provisions in respect of the renovation of the fixed assets under concession, which were intended to enable the concessionaire to return those assets to the grantor in perfect condition at the end of the concession, were created between 1987 and 1996.

9 Expenditure incurred by EDF as a result of renewal was recorded in the balance sheet item entitled 'Counter-value of the assets in kind under concession'. That item — also called 'Grantor rights' — represented a debt which EDF owed to the French State, linked with the return without consideration of the assets replaced at the end of the concession.

10 In 1994, the French Cour des comptes (Court of Auditors) held that the legal and financial regime governing the RAG was irregular and that, in consequence, the accounting plan was irregular, too. The French State accordingly undertook to clarify the legal and financial regime governing the RAG and to restructure EDF's balance sheet.

11 The '1997-2000 State-EDF' management contract, signed on 8 April 1997, provided for the normalisation of EDF's accounts and of its financial relationship with the State, with a view to the opening up of the market in electricity as provided for under 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). It was with those circumstances in mind that Law No 97-1026 was adopted.

12 Prior to the adoption of that law, EDF's balance sheet was presented as follows:

– on the assets side, an item entitled 'Fixed assets under concession' in the amount of FRF 285.7 billion, of which approximately FRF 90 billion was for the RAG;

– on the liabilities side, an item entitled 'Provisions' with approximately FRF 38.5 billion set aside for the RAG, and an item entitled 'Counter-value of the assets in kind under concession' recording the expenditure incurred for renovation. That item amounted to FRF 145.2 billon, of which FRF 18.3 billion was for the RAG.

13 Pursuant to Article 4 of Law No 97-1026, the way in which to restructure the upper part of EDF's balance sheet was communicated to EDF, on 22 December 1997, by letter of the Minister for Economic Affairs, Finance and Industry, the State Secretary for the Budget and the State Secretary for Industry and, in particular, by Annex 1 thereto. The tax consequences of that restructuring were set out in Annex 3 to that letter. In paragraph 34 of the judgment under appeal, the General Court summarised as follows the transactions carried out in the context of the restructuring:

– first, the assets constituting the RAG were reclassified, in the amount of FRF 90.325 billion, as 'own assets' and accordingly ceased to be classified as 'assets under concession';

– secondly, the unused provisions for renewal of the RAG, in the amount of FRF 38.521 billion, were posted as retained earnings without flowing through the profit and loss account and were reclassified in the amount of FRF 20.225 billion as accumulated losses, that account being thereby reconciled and the balance of FRF 18.296 billion being allocated to the reserves. Although not flowing through the profit and loss account, those reclassifications resulted in the posting of taxable revenue, which was taxed at the rate of 41.66% pursuant to Article 38(2) of the General

Tax Code;

– thirdly, the ‘grantor rights’ were allocated directly to the capital injections item in the amount of FRF 14.119 billion (of a total of FRF 18.345 billion) without flowing through the profit and loss account, with the balance being recorded in various revaluation accounts.

The administrative procedure and the contested decision

14 By letters of 10 July and 27 November 2001, the Commission asked the French authorities to provide certain information on a number of measures taken in respect of EDF which might involve State aid.

15 The subsequent exchange of correspondence included a letter of 9 April 2002 to the Commission from the French authorities, appended to which was an undated memorandum of the Directorate-General for Taxation of the French Ministry of Economic Affairs, Finance and Industry, in which it was stated, inter alia, that:

‘The grantor rights in respect of the RAG represent an unowed debt which was unjustifiably exempted from tax by being incorporated into the capital.

Those provisions were incorporated into the capital without any tax being incurred, since the RAG did not fall within the fiscal and accounting arrangements governing concessions. Since the RAG constituted own assets, EDF had no debt obligation towards the State to return those assets, with the result that the corresponding amounts posted in the item ‘[G]rantor rights’ constitute not actual liabilities, but a non-tax-exempt reserve. Under those circumstances, before that reserve was incorporated into the capital, it should have been transferred from the enterprise’s liabilities, where it was incorrectly posted, to a net assets account, thereby resulting in a positive variation in net worth that was taxable under Article 38[(2)], referred to above.

The tax advantage thus obtained may be assessed at 5.88 [billion FRF] (14.119 x 41.66%) [or EUR 888.89 million, according to the conversion made by the Commission on the basis of the FRF/EUR exchange rate on 22 December 1997].’

16 By letter of 16 October 2002, published in the *Official Journal of the European Communities* of 16 November 2002 (OJ 2002 C 280, p. 8), the Commission informed the French authorities that it had taken three related decisions concerning EDF. One of these was a decision adopted by the Commission under Article 88(2) EC, initiating a formal investigation into the advantage accruing as a result of the fact that EDF did not pay the corporation tax due on some of the accounting provisions created free of tax for the renewal of the RAG.

17 Further exchanges then took place between the French authorities and the Commission, including a letter of 9 December 2002 to the Commission from the French authorities, in which it is stated, inter alia, that:

‘2. The restructuring of EDF’s accounts in 1997 can be regarded as an additional capital injection in an amount equivalent to the partial tax exemption, the aim of which was also to correct under-capitalisation.

…

Before 1997, the “RAG” grantor rights were already regarded as quasi-“own assets” in view of the special situation arising from the State’s dual role in relation to EDF: grantor of the concession and owner. It was tacitly accepted, in those circumstances, that the grantor rights did not constitute a debt actually owed by EDF to the State.

Accordingly, when the balance sheet was restructured in 1997 — an exercise in which the Minister for Economic Affairs, Finance and Industry, the State Secretary for the Budget and the State Secretary for Industry participated — EDF and the State assigned the quasi-own assets to capital, and the question of corporation tax was left aside.

With that in mind, it was thought that it would be more efficient and more neutral for the public authorities to allocate the grantor rights directly, and in their full amount, to own assets, rather than to carry out the equivalent transaction, which would have entailed:

– assigning to capital a net amount after corporation tax;

– requesting EDF to pay corporation tax in an amount equal to the variation in net worth;

– making an additional capital injection in an amount equal to the tax paid.

That additional injection was justified by EDF’s projected profits in 1997, which were in fact achieved during subsequent years. In comparable circumstances, a private investor in a market economy would have made such a capital injection.

Moreover, it can be stated that the entries regarding the accounting provisions for the renewal of the RAG were rectified … also with a view to having the balance sheet structured more in accordance with undertakings in similar industrial sectors.’

18 On 16 December 2003, the Commission adopted the contested decision.

19 Article 3 of the contested decision states:

‘The non-payment by EDF, in 1997, of corporation tax on some of the provisions created free of tax for the renewal of the RAG, corresponding to FRF 14.119 billion in grantor rights reclassified as capital injections, constitutes State aid that is incompatible with the common market.

The aid involved in the non-payment of corporation tax amounts to EUR 888.89 million.’

20 Article 4 of the contested decision provides, in particular:

‘France shall take all necessary measures to recover from EDF the aid referred to in Article 3 and unlawfully made available to it.’

21 As regards the tax concession allegedly received by EDF in 1997, the Commission found, in the grounds of that decision, inter alia, that:

‘(88) The letter from the Minister for Economic Affairs setting out the tax implications of the restructuring of EDF’s balance sheet shows that the unused provisions for renewal of the RAG were subjected by the French authorities to corporation tax at 41.66%, the rate applicable in 1997.

(89) On the other hand, pursuant to Article 4 of [Law] No 97-1026 of 10 November 1997, some of those provisions, namely the grantor rights, corresponding to renewal operations already carried out, were reclassified as capital injections amounting to FRF 14.119 billion without being subjected to corporation tax. … In a memorandum dated 9 April 2002 addressed … to the Commission, the

French authorities … noted that “the tax concession thus obtained [by EDF in 1997] can be estimated at FRF 5.88 billion (14.119 x 41.66%)”, equivalent to EUR 888.89 million …

…

(91) The Commission takes the view that the grantor rights should have been taxed at the same time and at the same rate as the other accounting provisions created free of tax. This means that the FRF 14.119 billion in grantor rights should have been added to the FRF 38.5 billion in unused provisions and taxed at the rate of 41.66% applied by the French authorities to the restructuring of EDF’s balance sheet. By not paying all the corporation tax due when it restructured its balance sheet, EDF saved EUR 888.89 million.

…

(95) The French authorities claim, furthermore, that the restructuring of EDF’s accounts in 1997 can be regarded as a capital injection of an amount equivalent to the partial tax exemption: it was therefore an investment by them and not an aid measure. …

(96) The Commission has to dismiss these arguments, since the private investor principle can be applied only in the context of the pursuit of an economic activity, not in the context of the exercise of regulatory powers. A public authority cannot use as an argument any economic benefits it could derive as the owner of an enterprise in order to justify aid granted in a discretionary manner by virtue of the prerogatives it enjoys as the tax authority in relation to the same enterprise.

(97) While a Member State may act as a shareholder in addition to exercising its powers as a public authority, it must not combine its role as a State wielding public power with that of a shareholder. Allowing Member States to use their prerogatives as public authorities for the benefit of their investments in enterprises operating in markets that are open to competition would render the Community rules on State aid completely ineffective. Furthermore, while in accordance with Article 295 the Treaty is neutral as regards the system of capital ownership, the fact remains that public enterprises must be subject to the same rules as private enterprises. Public and private enterprises would no longer be granted equal treatment if the State were to use the prerogatives of public power for the benefit of the enterprises in which it is a shareholder.’

22 In paragraph 51 of the judgment under appeal, the General Court stated that, in view of the interest calculated pursuant to Article 4 of the contested decision, the total amount which EDF had been asked to refund amounted to EUR 1.217 billion and that EDF had repaid that sum to the French State.

Procedure before the General Court and the judgment under appeal

23 By application lodged at the Registry of the General Court on 27 April 2004, EDF brought an action for the annulment of Articles 3 and 4 of the contested decision.

24 By document lodged at the Registry of the General Court on 17 August 2004, the French Republic sought leave to intervene in support of the form of order sought by EDF. By order of 20 September 2004, the President of the Third Chamber of the General Court granted the French Republic leave to intervene.

25 By document lodged at the Registry of the General Court on 3 March 2008, Iberdrola SA (‘Iberdrola’) sought leave to intervene in support of the form of order sought by the Commission. Since the application to intervene was made after the end of the six-week period prescribed in

Article 115(1) of the Rules of Procedure of the General Court, Iberdrola was given permission, by order of 5 June 2008, to submit its observations in support of the Commission during the oral procedure.

26 In support of its action, EDF raised three main pleas in law and two subsidiary pleas.

27 The General Court confined its examination to the first main plea and the first three parts of the second main plea. By the judgment under appeal, it rejected the first plea and the first two parts of the second plea. However, the General Court upheld the third part of the second plea and, in consequence, annulled Articles 3 and 4 of the contested decision.

28 By the third part of the second plea in law, EDF claimed that the measures at issue should have been categorised as a capital injection and that the overall background against which they fell to be assessed was that of the clarification of the financial relationship between the French State and EDF. By implementing those measures, the French State acted like a prudent private investor operating in a market economy, a point which the Commission should have established by applying the private investor test.

29 The French Republic intervened in support of EDF, particularly in relation to the third part of EDF's second plea in law. Iberdrola intervened in support of the Commission's contentions concerning that part.

30 In paragraphs 233 to 237 of the judgment under appeal, the General Court found that, in order to determine whether the Commission was required to use the private investor test for the purposes of analysing the investment made by the French State in EDF's capital, it had to be established whether that action on the part of the French State constituted, in the light of its nature and object and account being taken of the objective pursued, an investment which could be made by a private investor, hence an action to be attributed to the State acting as an economic operator in the same way as a private operator, or whether it constituted action taken by the State acting as a public authority, thus precluding application of the private investor test. In particular, the General Court found that, in examining the measure at issue, it was inappropriate to focus solely on its form, since the use of legislation is not enough in itself to preclude the possibility that, through its intervention in the capital of an undertaking, the State is pursuing an economic objective which could also be pursued by a private investor.

31 In paragraphs 240 to 242 of the judgment under appeal, the General Court recalled that the 'grantor rights' were allocated directly, in the amount of FRF 14.119 billion, to the capital injections item without flowing through the profit and loss account. The General Court stated that the Commission had found that only the failure to tax those rights prior to the capital injection constituted State aid, all the parties agreeing that tax was payable on the amount of FRF 14.119 billion before it was recorded under the item 'Capital injection'.

32 In paragraphs 243 to 245 of that judgment, the General Court found that, since the purpose of the measure in question was to restructure EDF's balance sheet and to increase its own funds, it was not a tax measure per se, but an accounting measure with tax implications. On the other hand, the General Court noted that the Commission had examined only the tax implications of that measure and that the Commission had made clear that, because of the fiscal nature of the advantage which it had identified, it was not under a duty to take into consideration either the capital increase brought about or the private investor test, since a waiver of a tax claim — such as that at issue — stems from the exercise of public authority.

33 In paragraphs 247 to 250 of the judgment under appeal, the General Court found that, in the light of the fact that the objective pursued by the measure in question was the recapitalisation of

EDF, the mere fact that the claim at issue is fiscal in nature did not mean that the Commission could legitimately decline to apply the private investor test. According to the General Court, the Commission was under an obligation to ascertain the economic rationale for the investment in question by undertaking an assessment as to whether, in the same circumstances, a private investor would have invested a comparable amount in EDF. That obligation was incumbent upon the Commission, whatever the form in which the capital had been provided by the State.

34 In paragraphs 251 and 252 of the judgment under appeal, the General Court stated that the possibility cannot be ruled out that the form taken by an investment may give rise to differences in terms of the cost of raising the capital and in terms of the return on that capital, from which it could be concluded that a private investor would not have made such an investment. However, such a conclusion presupposes that an economic analysis has been carried out in the context of applying the private investor test. According to the General Court, an analysis of that nature was justified since, first, a capital increase may result from the incorporation of a claim held by a private shareholder against the undertaking in question and, secondly, it was possible to regard the use of legislation to that end as a necessary consequence of the fact that the rules governing EDF's capital were themselves laid down by statute.

35 Accordingly, in paragraph 253 of that judgment, the General Court concluded that, in view of the need to assess the contested measure in its context, the Commission could not confine its examination to the tax implications alone, but had at the same time to examine the merits of the argument that the waiver of the tax claim as part of the restructuring of EDF's balance sheet and increasing of EDF's capital could satisfy the private investor test.

36 The General Court went on to reject, in paragraphs 254 to 259 of the judgment, the Commission's argument that the private investor test could not be applied in the circumstances since the French State had exercised its prerogatives as a public authority by using legislation to waive payment of the tax claim. In that connection, the General Court found that, in the circumstances, the French State had not been under any obligation in its capacity as a public authority and that it was not a case of assessing certain costs which the State had incurred as a result of its obligations as a public authority.

37 In paragraphs 260 to 263 of the judgment under appeal, the General Court rejected the Commission's argument that the private investor test could not be applied to the conversion into capital of a tax claim, since a private investor could never hold a tax claim against an undertaking, but only a civil or commercial claim. According to the General Court, the purpose of the private investor test is to establish whether, despite the fact that the State has at its disposal means which are not available to the private investor, the private investor would, in the same circumstances, have taken a comparable investment decision. It follows that neither the nature of the claim, nor the fact that a private investor cannot hold a tax claim, is of any relevance.

38 In paragraphs 264 to 277 of the judgment under appeal, the General Court rejected the Commission's argument that a private investor would have had to pay tax in a comparable situation, thereby incurring higher costs, since, in order to provide EUR 100, a private investor would have actually had to raise EUR 141.66.

39 In that regard, the General Court first pointed out that EDF and the French Republic had argued — as did the Commission itself, in paragraph 51 of the decision initiating the formal investigation procedure mentioned in paragraph 16 above — that, under French tax law, the variation in net worth brought about by a capital increase through incorporation of a claim held against an undertaking by one of its shareholders is not to be taken into account when calculating corporation tax and that, consequently, that conversion of the claim into capital does not give rise to taxation having as the basis of its assessment the amount of that claim.

40 Secondly, the General Court found that there was a contradiction between the Commission's argument and the advantage which the Commission had identified in the contested decision, since that argument leads to an examination of the overall cost borne by a private investor in order to invest FRF 14.119 billion whereas the reclassification of the grantor rights, in that amount, had not been regarded by the Commission as constituting aid.

41 Thirdly, the General Court found that the Commission's argument was inconsistent, since the Commission acknowledged that it would have examined the additional capital injection of FRF 5.88 billion (an amount which the General Court mistakenly stated to be FRF 5.6 billion) if EDF had previously paid tax on that amount and if the French State had then returned that same amount to EDF, since the cost borne by the State could then — and only then — have been compared with the cost borne by a private investor. The General Court found, however, that in such circumstances the cost to the State would have been the same and the amount received by EDF would have been the same as the amount which EDF received as a result of the measure at issue.

42 Fourthly, the General Court found that, even if a private investor was indeed required to pay tax, the cost of a capital injection by means of the incorporation of a claim would, for such an investor, amount to FRF 5.88 billion and would consequently be identical to the cost borne in the circumstances by the French State. Moreover, only by applying the private investor test was it possible to determine whether there was any difference in cost.

43 Fifthly, the General Court found that, even if the cost of a recapitalisation operation in the amount of FRF 14.119 billion were FRF 0 to the French State and FRF 5.88 billion to a private investor, that difference in cost would not preclude application of the private investor test.

44 In paragraph 283 of the judgment under appeal, the General Court rejected the Commission's argument that accepting application of the private investor test could have the effect of justifying any form of tax exemption implemented by Member States. In that regard, the General Court stated that, in the view of that court, it was not a case of a simple tax exemption granted to an undertaking, but rather the waiver of a tax claim in the context of a capital injection into an undertaking of which the State was sole shareholder, and also that it was not possible to prejudge the outcome of the application of that test, in the absence of which it would be pointless.

Procedure before the Court

45 By document lodged at the Registry of the Court on 29 July 2010, the EFTA Surveillance Authority applied for leave to intervene in support of the form of order sought by the Commission.

46 By order of 2 September 2010, the President of the Court granted leave to intervene.

Forms of order sought

47 The Commission claims that the Court should:

– set aside the judgment under appeal in so far as, by that judgment, the General Court annulled Articles 3 and 4 of the contested decision and ordered the Commission to pay its own costs and to bear those incurred by EDF;

– reject the third part of the second plea in law raised by EDF at first instance;

– refer the case back to the General Court for reconsideration; and

– reserve the costs of the proceedings.

48 The EFTA Surveillance Authority claims that the Court should:

– uphold the appeal and set aside the judgment under appeal; and

– refer the case back to the General Court.

49 Iberdrola claims that the Court should:

– uphold the appeal and set aside the judgment under appeal;

– reject the third part of the second plea in law raised by EDF;

– refer the case back to the General Court; and

– order EDF to pay the costs, including those incurred by Iberdrola.

50 EDF and the French Republic contend that the Court should:

– dismiss the appeal; and

– order the Commission to pay the costs.

The appeal

51 The Commission raises two grounds of appeal, alleging (i) distortion of the facts and (ii) an error of law in the interpretation of Article 87 EC and, more specifically, in the determination of the scope and content of the ‘prudent private investor in a market economy’ test.

52 It is appropriate to consider the second ground of appeal first.

The second ground of appeal: error of law in the interpretation of Article 87 EC

53 The second ground of appeal is made up of four parts, which it is appropriate to examine together.

Arguments of the parties

54 By the first part of the second ground of appeal, the Commission claims that the General Court erred in law by relying on the objective pursued by the French State in order to determine whether the French State had acted as a shareholder or as a public authority. Article 87(1) EC draws no distinction between State intervention measures based on the objectives pursued.

55 The Commission submits that the intention of a Member State is not a criterion which

enables a distinction to be made between intervention by the State acting as shareholder and intervention by the State acting as a public authority. According to the Commission, that criterion is subjective and lends itself to manipulation.

56 By the second part of the second ground of appeal, the Commission argues, first, that the General Court did not seek to establish whether the French State's conduct was comparable with that of a private investor because, instead of focusing on the 'short plan' approach actually provided for under Law No 97-1026, the General Court focused on the 'long plan' approach which consisted in: (i) allocating an amount net of tax to the item 'capital injection'; (ii) requesting payment by EDF of a tax corresponding to the variation in net worth; and (iii) making a further capital injection in an amount equal to the tax paid.

57 As it is, according to the Commission, the choice of one or other of those approaches is not irrelevant because, under the 'long plan', the State budget guaranteed transparency whereas, under the 'short plan' applied in the present case, the resources employed escaped all budgetary discipline. Accordingly, in breach of the principle of equality before tax, EDF enjoyed special treatment without any transparency whatsoever.

58 Secondly, the Commission claims that the General Court did not take account of the need to define a reference private investor, since case-law calls for the definition of a real basis for comparison existing in a market economy. According to the Commission, the Court of Justice has excluded from the scope of the private investor test situations in which there is no real operator with whose conduct that of the State can be compared.

59 Thirdly, the Commission submits that the conduct of the French State could not have been adopted by a private investor, since a private investor would have had to pay corporation tax and would not have been able to convert it into capital. Only the State, in its capacity as fiscal authority, could still have had the sum at issue at its disposal. As it is, the private investor test is intended as a means of determining whether a private investment could have been made in similar circumstances.

60 Fourthly, the Commission submits that, as conceived by the General Court, the yardstick of the private investor is designed to test all conduct on the part of the State solely by reference to profitability, which would enable public undertakings to benefit from the status of their owner.

61 By the third part of the second ground of appeal, the Commission submits that, since account was taken only of the profitability angle and given that the State is able to wield its public powers, the analysis made by the General Court is inconsistent with the principle of equal treatment between public and private undertakings; it causes distortions to competition, contrary to Articles 295 EC and 87 EC; and it goes against the objective pursued by the private investor test. The private investor test would become a means of ensuring that certain measures which a private investor is unable to take could not be categorised as aid.

62 By the fourth branch of the second plea, the Commission claims, first, that the General Court disregarded the rules regarding the burden of proof. According to the Commission, where all the other conditions required to support a finding of State aid are met, it is for the Member State which is relying on the exception based on the private investor test to demonstrate that the conditions required for that exception to be accepted are met.

63 As it is, it is common ground, according to the Commission, that, during the administrative procedure, the French authorities simply relied on the projected profits without any data being produced to support their claims. Moreover, nothing in the file indicated that the French State considered the potential profitability of the tax exemption in question. In those circumstances, the

Commission submits that it could not be required to examine the tax exemption in question in the light of that test.

64 Secondly, the Commission states that the legality of a decision concerning State aid must be assessed in the light of the information available to the Commission at the time when the decision was adopted. However, it follows from the foregoing that, at that time, the Commission had no evidence to suggest that the private investor test was relevant.

65 Iberdrola adopts the Commission's arguments and adds, in relation to the first part of the second ground of appeal, that, by focusing on the objective pursued by the State, the General Court ignored the distinction between the State as shareholder and the State acting as a public authority. In that way, the inequality between the means available to a private operator and those available to the State went unremarked, because attention was fixed on the possible convergence of the objectives pursued.

66 Iberdrola states that no private operator has the power to define the conditions which determine tax liability and submits that, since an economic activity consists in offering goods or services on a given market, the exercise of fiscal power does not form part of an economic activity. Iberdrola adds that prohibiting a Member State from using its tax powers for the benefit of public undertakings does not give rise to discrimination, since the State can always make a capital contribution.

67 As regards the second part of the second ground of appeal, Iberdrola states that, if the French State had charged tax and then integrated it into its budget, it is not certain that the amount in question would have been contributed to EDF's capital, since the procedures, controls and arbitration laid down for the implementation of a decision on such a contribution would have been different from those giving rise to the tax exemption in question.

68 As regards the third part of the second ground of appeal, Iberdrola submits that the separation of the activities of a shareholder from those resulting from the exercise of the State's public power is intended to prevent a conflict of interests and to preserve equality of opportunity as between operators. However, the line of reasoning followed by the General Court would allow Member States to use their prerogatives to exempt public undertakings from certain obligations which are incumbent on private operators.

69 The EFTA Surveillance Authority adopts the arguments of the Commission and Iberdrola. So far as concerns the first part of the second ground of appeal, it argues that, even if it were possible to determine with certainty the intentions of the State, they should not be taken into account. It is necessary to determine, on the basis of objective and verifiable criteria, whether the State acted as a public authority or as a private investor.

70 The EFTA Surveillance Authority argues that, just as the State collects tax through the exercise of public authority, that is the framework within which tax debts are waived. Such conduct on the part of the State cannot be compared with that of a private investor.

71 As regards the second part of the second ground of appeal, the EFTA Surveillance Authority states that the debt owed by EDF to the French State was not commercial or contractual, but a tax debt. It argues that, instead of comparing notional, subjective conduct on the part of the French State with that of a notional private investor, the General Court should have compared the actual conduct of that State, not with that of a creditor, but with that of an investor existing on the market.

72 The EFTA Surveillance Authority states that the financial crisis has shown that, in that type of situation, it is necessary to use a test which is clear and easy to apply, based on objective

factors which are amenable to review by the Courts. The approach adopted by the General Court does not meet that requirement.

73 As regards the fourth part of the second ground of appeal, the EFTA Surveillance Authority claims that the reversal of the burden of proof effected by the General Court puts the institutions responsible for monitoring State aid in a difficult position, since they are able to make their decisions only in the light of the information available to them. The Commission could not apply the private investor test on its own initiative.

74 EDF and the French Republic contend that the second ground of appeal should be rejected. In particular, according to EDF and the French Republic, the General Court was right to find that the private investor test was applicable in the circumstances and, by failing to apply that test at the outset, the Commission acted in breach of its procedural obligations.

Findings of the Court

75 The Commission, the EFTA Surveillance Authority and Iberdrola claim, in essence, that, in examining whether the private investor test was applicable in the circumstances, the General Court took into account, for that purpose, the objective pursued by the French State when it adopted the contested measure; secondly, it confused the roles of the State as shareholder and the State exercising its powers of taxation; thirdly, it acted in breach of the principle of equal treatment as between public and private undertakings; and, fourthly, it infringed the rules regarding allocation of the burden of proof.

76 According to case-law, a measure granted through State resources which puts the recipient undertaking in a more favourable financial situation than that of its competitors and which, for that reason, distorts or threatens to distort competition and affects trade between Member States is not excluded outright from being categorised as ‘aid’ for the purposes of Article 87 EC because of the aims pursued by that State (see, to that effect, Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 15; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 25 and the case-law cited; and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato ‘Venezia vuole vivere’ and Others* v *Commission* [2011] ECR I-4727, paragraph 94 and the case-law cited).

77 Article 87(1) EC does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (*Comitato ‘Venezia vuole vivere’ and Others* v *Commission,* paragraph 94 and the case-law cited).

78 However, it is also clear from settled case-law that the conditions which a measure must meet in order to be treated as ‘aid’ for the purposes of Article 87 EC are not met 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 the case of public undertakings, that assessment is made by applying, in principle, the private investor test (see, to that effect, Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 20; Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraphs 68 to 70; and *Comitato ‘Venezia vuole vivere’ and Others* v *Commission,* paragraph 91 and the case-law cited).

79 In particular, it is clear from case-law that, in order to assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State, 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 (see, to that effect, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 14; Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 13; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 22; and Case C-334/99 *Germany*

v *Commission* [2003] ECR I-1139, paragraph 134).

80 It follows that the roles of the State as shareholder of an undertaking, on the one hand, and of the State acting as a public authority, on the other, must be distinguished, as has been correctly argued by the Commission, the EFTA Surveillance Authority and Iberdrola and as the General Court held in paragraphs 223 to 228 of the judgment under appeal.

81 The applicability of the private investor test ultimately depends, therefore, on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it.

82 It follows that, if a Member State relies on that test during the administrative procedure, it must, where there is doubt, 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.

83 That evidence must show clearly that, before or at the same time as conferring the economic advantage (see, to that effect, *France* v *Commission*, paragraphs 71 and 72), the Member State concerned took the decision to make an investment, by means of the measure actually implemented, in the public undertaking.

84 In that regard, it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability.

85 By contrast, for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen (see, to that effect, *France* v *Commission*, paragraphs 71 and 72).

86 If the Member State concerned provides the Commission with the requisite evidence, it is for the Commission to carry out a global assessment, taking into account — in addition to the evidence provided by that Member State — all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority. In particular, as the General Court held in paragraph 229 of the judgment under appeal, the nature and subject-matter of that measure are relevant in that regard, as is its context, the objective pursued and the rules to which the measure is subject.

87 Accordingly, in the circumstances of the case, the General Court was right to hold that the objective pursued by the French State could be taken into account, in the context of the requisite global assessment, for the purposes of determining whether the State had indeed acted in its capacity as shareholder and whether, as a consequence, the private investor test was applicable in the present case.

88 As regards the question whether the applicability of the private investor test could be ruled out in the present case simply because the means employed by the French State were fiscal, it should be recalled that, under Article 87(1) EC, any aid granted through State resources — in any form whatsoever — which, in terms of its effects, distorts or threatens to distort competition is incompatible with the common market in so far as it affects trade between Member States (see Case C-156/98 *Germany* v *Commission*, paragraph 25 and the case-law cited).

89 Moreover, it has been noted in paragraph 78 above that the private investor test is applied in order to determine whether, because of its effects, the economic advantage granted, in whatever form, through State resources to a public undertaking distorts or threatens to distort competition and affects trade between Member States.

90 The intention underlying Article 87(1) EC and the private investor test is thus to prevent the recipient public undertaking from being placed, by means of State resources, in a more favourable position than that of its competitors (see, to that effect, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and Case C-6/97 *Italy* v *Commission*, paragraph 16).

91 However, 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, when considering whether the private investor test was applicable, the General Court did not err in law by focusing its analysis, not on the fiscal nature of the means employed by the French State, but on the improvement — with a view to the opening up of the electricity market — in EDF's financial situation and on the effects of the measure in question on competition.

92 Accordingly, it follows from all of the foregoing that, in view of the objectives underlying Article 87(1) EC and the private investor test, an economic advantage must — even where it has been granted through fiscal means — be assessed inter alia in the light of the private investor test, if, on conclusion of the global assessment that may be required, it appears that, notwithstanding the fact that the means used were instruments of State power, the Member State concerned conferred that advantage in its capacity as shareholder of the undertaking belonging to it.

93 It follows that the finding made by the General Court in paragraph 250 of the judgment under appeal, to the effect that the obligation for the Commission to verify whether capital was provided by the State in circumstances which correspond to normal market conditions exists regardless of the way in which that capital was provided by the State, is not vitiated by an error of law.

94 As regards the argument, put forward by the Commission, the EFTA Surveillance Authority and Iberdrola, that a private investor would not have been able in comparable circumstances to make an investment such as that made by the French State, since it would have had to pay the tax and since only that State, as tax authority, could still have had at its disposal sums corresponding to that tax, it should be noted, first, that in respect of the accounting transaction in question, it is the private undertaking in EDF's situation which would have had to pay the tax, not its shareholder.

95 In the present case, therefore, application of the private investor test would have made it possible to determine whether, in similar circumstances, a private shareholder would have subscribed, to an undertaking in a situation comparable with that of EDF, an amount equal to the tax due.

96 Secondly, as the General Court pointed out in paragraphs 275 and 276 of the judgment under appeal, the possibility that there might be a difference between the cost to the private investor and the cost to the State as investor does not preclude application of the private investor test. Rather, that test makes it possible to address precisely that point, that is to say, to establish, inter alia, that such a difference exists and to take it into account when assessing whether the conditions laid down by that test are met.

97 It follows that — contrary to the assertions made by the Commission, the EFTA Surveillance

Authority and Iberdrola — the analysis carried out by the General Court is not inconsistent with the principle of equal treatment between public and private undertakings; it does not cause distortion of competition; and it does not go against the objective pursued by the private investor test.

98 Accordingly, in finding that the private investor test may be applicable even where fiscal means have been employed, the General Court did not err in law.

99 It should be added that, by the judgment under appeal, the General Court did not prejudge the applicability of that test to the present case; nor, as was noted in paragraph 283 of that judgment, did the General Court prejudge the outcome of applying that test.

100 In particular, by merely verifying whether the applicability of the private investor test could be ruled out simply because the means employed by the French State were fiscal, the General Court in no way adopted an analysis tantamount to authorising the Member States to take into account, when applying that test, the advantages and obligations linked to their status as a public authority or factors which are subjective and open to manipulation.

101 As to the question whether, in the present case, it was necessary to define a reference investor, it should be noted that the case-law relied upon in that regard by the Commission, the EFTA Surveillance Authority and Iberdrola concerns a situation marked by the impossibility of comparing the position of a public undertaking operating in a reserved sector with that of a private undertaking not operating in a reserved sector (see, to that effect, Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* v *Ufex and Others* [2003] ECR I-6993, paragraph 38).

102 As it is, the argument put forward by the Commission, the EFTA Surveillance Authority and Iberdrola is not that it is impossible to compare EDF’s situation with that of a private undertaking operating in sectors identical to those in which EDF operates. Moreover, it follows from the same line of authority that, for the purposes of such a comparison, an assessment must be carried out by reference to the objective and verifiable evidence which is available.

103 Furthermore, contrary to the assertions made by the Commission and the EFTA Surveillance Authority, the private investor test is not an exception which applies only if a Member State so requests, in situations characterised by all the constituent elements of State aid incompatible with the common market, as laid down in Article 87(1) EC. It follows from paragraph 78 above that, where it is applicable, that test is among the factors which the Commission is required to take into account for the purposes of establishing the existence of such aid.

104 Consequently, where it appears that the private investor test could be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that test are met, and it cannot refuse to examine that information unless the evidence produced has been established after the adoption of the decision to make the investment in question.

105 It has already been noted in paragraphs 83 to 85 above that, for the purposes of applying the private investor test, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to make the investment was taken. That is especially so where, as in the present case, the Commission is seeking to determine whether there has been State aid in relation to an investment which was not notified to it and which, at the time when the Commission carries out its examination, has already been made by the Member State concerned.

106 In the light of all the foregoing, the second ground of appeal must be rejected.

The first ground of appeal: distortion of the facts

107 The Commission submits, in essence, that the General Court distorted the evidence in finding that, by the measure at issue, the French Republic converted a tax claim into capital. The Commission claims that, by that measure, the French Republic granted EDF an exemption from corporation tax and that, in the case of a tax exemption, the private investor test is not relevant.

108 However, in the course of considering the second ground of appeal, it has been found that, where a Member State confers an economic advantage upon an undertaking belonging to it, the fiscal nature of the process used to grant that advantage does not mean that the applicability of the private investor test can automatically be ruled out. It follows, a fortiori, that the precise *modus operandi* chosen by the Member State is irrelevant for the purposes of assessing whether that test applies.

109 In those circumstances, even if it were established, the alleged distortion of the facts would not, in any event, be such as to affect the soundness of the judgment under appeal. It follows that the first ground of appeal must be rejected as ineffective.

110 It follows from all the foregoing considerations that the appeal must be dismissed.

Costs

111 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since EDF has applied for costs against the Commission, which has been unsuccessful, the latter must be ordered to pay the costs.

112 Pursuant to the first subparagraph of Article 69(4) of those Rules of Procedure, applicable to appeal proceedings by virtue of Article 118 thereof, the French Republic must bear its own costs.

113 Pursuant to the second subparagraph of Article 69(4) of those Rules of Procedure, applicable to appeal proceedings by virtue of Article 118 thereof, the EFTA Surveillance Authority must bear its own costs.

114 The third subparagraph of Article 69(4) of those Rules of Procedure, applicable to appeal proceedings by virtue of Article 118 thereof, provides that the Court may order an intervening party to bear its own costs. It is appropriate to apply that provision in respect of Iberdrola.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the European Commission to pay the costs;**

3. **Orders the EFTA Surveillance Authority, the French Republic and Iberdrola SA to bear their own costs.**

[Signatures]

*Language of the case: French.