JUDGMENT OF THE GENERAL COURT (third chamber)

15 December 2009 *

In Case T-156/04,

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

applicant,

supported by

French Republic, represented by G. de Bergues and A.-L. Vendrolini, acting as Agents,

intervener,

* Language of the case: French.

European Commission, represented by J. Buendía Sierra and C. Giolito, acting as Agents,

defendant,

supported by

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

intervener,

APPLICATION for annulment of Articles 3 and 4 of the Commission Decision on aid measures in favour of EDF and the electricity and gas industries (C 68/2002, N 504/2003 and C 25/2003) adopted on 16 December 2003,

THE GENERAL COURT (Third Chamber),

composed of J. Azizi, President, E. Cremona and S. Frimodt Nielsen (Rapporteur), Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 25 November 2008,

gives the following

Judgment

Legal context

Rules of the EC Treaty

1 Under Article 87(1) EC, save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, to be incompatible with the common market.

2 Under Article 88(1) and (2) EC:

'1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'

Regulation (EC) No 659/1999

3 Article 1(b) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), provides:

'[…] "existing aid" shall mean:

(i) … all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

…

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;'

4 Article 15(1) of Regulation No 659/1999 provides that the powers of the European Commission to recover aid are to be subject to a limitation period of ten years.

5 Under Article 15(2) of Regulation No 659/1999, the limitation period is to begin on the day on which the unlawful aid is awarded to the beneficiary.

6 The first sentence of Article 20(1) of Regulation No 659/1999 provides that any interested party may submit comments pursuant to Article 6 of that regulation following a Commission decision to initiate the formal investigation procedure.

Relevant French law

7 Article 38(2) of the 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 provisions.'

8 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 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 value of the assets in kind allocated under concession to the high-voltage transmission network appearing as liabilities on Électricité de France's balance sheet shall be entered, net of the corresponding revaluation differences, under the item "Capital injections".

Facts giving rise to the dispute

General background to the case

9 The applicant, Électricité de France (5'EDF'), produces, transmits and distributes electricity, particularly throughout France.

10 In 2002, when the decision to initiate the procedure laid down in Article 88(2) EC was adopted, EDF was wholly owned by the State, the French Prime Minister appointed its director and its policy was established in close cooperation with the French Ministry of Energy.

11 EDF was created by French Law No 46-628 of 8 April 1946 on the nationalisation of electricity and gas (JORF, 9 April 1946, p. 2651), which nationalised the electricity sector in France. It was created with public enterprise status.

12 Article 36 of Law No 46-628 established the principle of transferring to EDF the nationalised electricity concessions, making the concessionaire responsible for observing the new standard contractual conditions, to be drawn up as provided for in Article 37 of that law.

13 In 1958, the various electricity transmission concessions granted by the State were unified into a single concession known as the 'high-voltage transmission network' ('the RAG'), the contractual conditions of which were approved by Decree No 56-1225 of 28 November 1956 (JORF, 4 December 1956, p. 11562).

14 Article 2 of those contractual conditions sets out in detail the assets which form part of the concession (lines, pylons, etc.) and Article 8 thereof states that EDF is required to carry out 'at its own expense all maintenance and renewal works needed to keep the structures subject to the concession in good working order'.

15 Following an amendment introduced by the Decree of 23 December 1994 (JORF, 28 December 1994, p. 18564), Article 2 of the contractual conditions was reworded as follows:

'The lines, pylons and, in general, any existing or future electricity structures required by the concessionaire to carry out his activity of transmitting and supplying electricity, with the exception of generation facilities, shall form part of the concession.

…'

16 However, the RAG was, in the past, distinguished from other forms of concessions, in particular in so far as, first, it did not specify the system of ownership governing the assets under concession, secondly, it contained no clause on the rules governing the retrocession of the assets under concession and, thirdly, it was for an exceptionally long period of 75 years.

17 In the absence of accounting rules specific to concessions and in agreement with the National Accountancy Council (CNC), EDF was deemed to have been the owner of the RAG since 1946.

18 The assets forming part of the RAG were therefore entered as EDF's own assets in its balance sheet and for accounting purposes were governed by ordinary law and depreciated using the 'historical cost method', which resulted in straight-line depreciation throughout the useful life of the structures and was the case until 1986.

19 The application to EDF of the General Accounting Plan of 1982, which included accounting rules specific to concessions, led to a change in the accounting treatment of the RAG from 1987, in order to take into account the recommendations made in 1975 by the CNC in its 'Guide for Concessions'.

20 This took into account 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'.

21 In addition to requiring concessionaires to record fixed assets under concession under a specific balance sheet item, the General Accounting Plan of 1982 sets out the following principle:

'Maintaining the productive potential of the installations under concession at the level required by the public service must be sought through depreciation or, possibly, through adequate provisions. In so far as the utility value of an installation may be conserved through suitable maintenance, that installation shall not be the subject-matter, with respect to the concessionaire's operating expenses, of contributions to allowances for depreciation. The provisions which may be used for maintaining productive potential are provisions for renewal.'

22 Under the General Accounting Plan of 1982, an accounting plan specific to EDF was introduced. That accounting plan received the assent of the CNC on 19 December 1984 and was subsequently approved by the Interministerial Order of 21 December 1986 (JORF, 30 December 1986, p. 15794).

23 Under the accounting plan specific to EDF, the RAG was entered in the assets on EDF's balance sheet under the item 'Fixed assets operated under the concession'.

24 Specific provisions in respect of the renewal of the fixed assets operated under the concession were included in the straight-line depreciation arising from application of the 'historical-cost method', provisions which were intended to allow the concessionaire to return those assets to the grantor in perfect condition at the end of the concession.

25 Provisions for renewal were created between 1987 and 1996.

26 Expenditure for renewal incurred by EDF was recorded in the balance sheet item entitled 'Value in kind of assets operated under concession'.

27 That item, also called 'Grantor rights', represented a debt of EDF owed to the French State, linked with the return without consideration of the replaced assets at the end of the concession.

28 In a 1994 report, however, the French Cour des Comptes (Court of Auditors) took the following view:

'The accounting principles derogating from ordinary law are based on an actual term in the concession contract which alone makes it possible to draw a distinction between renewable and non-renewable fixed assets. Taking account of that term is the rationale for the accounting arrangement. It determines whether it is possible to return the fixed assets operated under the concession to the grantor of the concession and justifies the posting of the grantor rights as liabilities in the balance sheet. It is the basis for the existence and the deductibility of the provision for renewal, which makes it possible to record the cost to the concessionaire represented by the return to the grantor of the last fixed asset which has become non-renewable…

Where a public undertaking is a permanent concessionaire of the State by virtue of the legislation on nationalisation itself, it is necessary to raise the question of whether the distinction made in the accounts between the assets under concession and the concessionaire's assets actually exists, and state that the absence of an end date for the concession means that it is not possible to apply the recommendations of the accounting guide for concessionaire undertakings.'

29 The French Cour des Comptes also noted the irregular nature of the tax relief received by EDF following the irregular creation of the provisions for renewal of the RAG.

30 The French State therefore undertook to clarify the legal and financial regime governing the RAG and to restructure EDF's balance sheet.

31 The 'State-EDF 1997-2000' management contract, signed on 8 April 1997, provided for normalisation of the undertaking's accounts and of its financial relationship with

the State, with a view to the opening up of the market in electricity laid down by 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):

'The market for electricity is… being transformed. Within the European Union, rules on the functioning of the internal market in electricity have just been established…

Finally, these contractual commitments will also seek to stabilise the financial relationship between the State and EDF and to clarify the exercise of State supervision over EDF, by guaranteeing the undertaking's independence in the context of a joint venture…

EDF's balance sheet will be restructured, with the two-fold aim of strengthening the undertaking's net assets and stabilising the financial relationship between the State and the undertaking on a basis similar to ordinary law. Legislation will be presented to the Parliament in 1997, so that the date of entry into force of that restructuring shall be 1 January 1997.'

32 Those were the circumstances in which Law No 97-1026 was adopted.

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

— on the assets side, an item entitled 'Fixed assets operated under the concession' in the amount of 285,7 billion French francs (FRF), of which approximately FRF 90 billion was in respect of the RAG;

— on the liabilities side, an item entitled 'Provisions' of which approximately FRF 38,5 billion was in respect of the RAG, and an item entitled 'Value in kind of assets operated under concession' recording the expenditure for renewal incurred. That item amounted to FRF 145,2 billion, of which 18,3 billion was in respect of the RAG.

34 Following the adoption of Law No 97-1026 and pursuant to Article 4 thereof, the following was decided:

— first, the assets constituting the RAG were reclassified, in the amount of FRF 90,325 billion, as 'own assets' and thereby ceased to be classified as 'assets operated 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 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.

35 That restructuring of the upper part of EDF's balance sheet is explained in Annex 1 to the letter addressed to EDF on 22 December 1997 by the Minister for Economic Affairs, Finance and Industry, the State Secretary for the Budget and the State Secretary for Industry.

Administrative procedure

36 By letters of 10 July and 27 November 2001, the Commission invited the French authorities to provide certain information on a number of measures taken in respect of EDF and capable of involving State aid.

37 The French authorities communicated certain information to the Commission by letters of 12 October 2001 and 21 February 2002. By letter of 9 April 2002, they provided detailed information, contained in a memorandum from the Directorate-General for Taxation of the French Ministry of Economic Affairs, Finance and Industry ('the Directorate-General for Taxation'), in which it was stated, inter alia, that:

'The line of argument that the reclassification for accounting and tax purposes of the provisions for renewal relating to the [RAG] carried out in 1997 allowed the consolidation of an unjustified tax concession cannot be upheld. In that regard, a distinction must be drawn between the reclassification of the provisions for renewal that were used, which appeared, according to the information provided by EDF, under the item "[G]rantor rights" in the amount of 14,119 [billion FRF] rather than 18,345 [billion FRF], and the reclassification of the still-unused provisions amounting to 38,5 [billion FRF].

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 incurring any tax, 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 × 41,66%).

At the same time, it must be noted that the normalisation of the accounts carried out by the direct allocation to the "retained earnings" account, without flowing through the profit and loss account, nonetheless resulted in the posting of taxable revenue of FRF 38,5 billion (EUR 5,869 billion), pursuant to Article 38(2) of the General Tax Code. It follows that the tax concession stemming from the deduction of the unused provisions at the time they were created has effectively been neutralised.

…

It follows that, although the reclassification as capital of the provisions for renewal already used and included under the item "[G]rantor rights" should, in any event, flow through the result for tax purposes, this was more than offset, in the same year, by the reincorporation of the unused provisions for renewal.

Since a comprehensive approach to the operations provides no evidence of an unjustified advantage, the accounting and fiscal reclassifications carried out in 1997 do

not constitute aid in favour of EDF capable of unduly strengthening its competitive position.'

38 By letter of 6 May 2002, the Commission stated that certain information was still lacking, in spite of its previous requests, and it also requested clarifications concerning the latest information which had been presented to it.

39 By letter of 28 June 2002, the French authorities forwarded additional information and a meeting was held on 3 September 2002.

40 The Commission informed the French authorities that it had taken three related decisions concerning EDF, by means of a letter dated 16 October 2002, published in the *Official Journal of the European Communities* of 16 November 2002 (OJ 2002 C 280, p. 8) in the authentic language (French), preceded by a summary in the other official languages.

41 First, the Commission proposed to the French authorities, as an appropriate measure pursuant to Article 88(1) EC, that they should withdraw the unlimited State guarantee enjoyed by EDF on all its commitments by virtue of its public enterprise status, which precluded application of the legislation on the administration and compulsory liquidation of firms in difficulty. Second, the Commission initiated a formal investigation under Article 88(2) EC into the advantage resulting from the non-payment by EDF of the corporation tax due on some of the accounting provisions created free of tax for the renewal of the RAG ('the decision initiating the procedure'). Finally, it instructed the French authorities to supply information it needed in order to examine that tax concession.

42 The French authorities submitted their comments to the Commission by letter of 11 December 2002, in which they disputed that EDF had received a tax concession in 1997.

43 A technical meeting attended by the Commission and the French authorities was held on 12 February 2003 concerning the tax concession allegedly received by EDF in 1997.

44 By letter of 12 June 2003, the French authorities sent the Commission their comments in the context of the formal investigation procedure.

45 On 17 November 2003, a further technical meeting was held between the Commission, the French authorities and representatives of EDF concerning the tax concession allegedly received by EDF in 1997. The French authorities provided additional information on that question by letter of 20 November 2003.

46 On 16 December 2003, the Commission adopted the Decision on aid measures in favour of EDF and the electricity and gas industries (C 68/2002, N 504/2003 and C 25/2003) ('the contested decision').

Contested decision

47 The contested decision is concerned, respectively, with an 'unlimited guarantee' arrangement provided by the French Republic to EDF, with certain aspects of the pension scheme for the electricity and gas industries and with 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.

48 Article 3 of the contested decision provides:

'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.'

49 Article 4 of the contested decision provides:

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

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of EDF until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid,

applied on a compound basis in accordance with the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered.'

50 With regard to the tax concession allegedly received by EDF in 1997, the Commission found as follows:

'(84) Since Act No 97-1026… established that EDF was deemed to have been the owner of the high-voltage transmission network (RAG) since 1956, it has to be ascertained whether the Act did not involve a transfer of ownership of the RAG.

(85) According to the information provided by the French authorities, EDF can reasonably be regarded as the owner of the RAG since the initial contractual conditions dating from 1956. That conclusion is based on the following evidence: the features of the different types of concession contract under French law; the special features of the original concession granted to EDF, which did not include an explicit retrocession clause; the procedure for the acquisition of the assets concerned, for which EDF had to pay a fee similar to compensation under a compulsory purchase procedure; and the conditions for the financing, maintenance and extension of the RAG at EDF's expense. The Commission consequently takes the view that the "clarification" of ownership of the RAG brought about by Act No 97-1026… does not in itself involve any State aid.

(86) It now has to be examined whether Act No 97-1026 addressed all the tax implications of such "clarification" and, if not, whether a tax concession was thus granted to EDF.

(87) During the period between 1987 and 1996, EDF created tax-free provisions for the renewal of the RAG. Following [Act No 97-1026] declaring that EDF was deemed

to have been the owner of the RAG since 1956, those provisions became superfluous and therefore had to be reallocated to other items in the balance sheet.

(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 Act No 97-1026…, 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. The French authorities themselves acknowledge that the transaction was illegal. In a memorandum dated 9 April 2002 addressed by the Directorate-General for Taxation to the Commission, the French authorities Stated 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" and that "before this 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)" of the General Tax Code. They noted that "the tax concession thus obtained [by EDF in 1997] can be estimated at FRF 5,88 billion (14,119 × 41,66%)", equivalent to EUR 888,89 million.

(90) The Commission points out, on the one hand, that, in line with the [CNC] Opinion, corrections to accounting errors should be posted in the accounts for the financial year in which they are discovered. On the other hand, since the unused provisions amounting to FRF 38,5 billion that had been created free of tax were subjected to corporation tax at the rate of 41,66% in 1997, the Commission can see no objective reason why the rest of the provisions created free of tax should not have been taxed at the same rate.

(91) The Commission takes the view that the grantor rights should have been taxed at the same time and 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.

(92) The Commission considers that the aid was indeed paid in 1997, since the FRF 14,119 billion was at that time a debt to the State, entered under the balance sheet item of grantor rights, which the State waived by means of Act No 97-1026…

(93) The French authorities claim that, even if EDF had not set aside provisions for the renewal of the RAG, it would still not have been liable for payment of corporation tax between 1987 and 1996 because of the carryover of large tax losses. The Commission dismisses this argument as irrelevant, since the tax concession dated from 1997 and not previous years. It also notes that, if the provisions had not been set aside, the tax losses carried over would have been gradually absorbed between 1987 and 1996 and the amount of tax payable by EDF in 1997 would have been significantly higher.

(94) The French authorities also take the view that, even if the creation of provisions for the renewal of the RAG resulted in an advantage, that advantage should be regarded as cancelled out by the increase in corporation tax paid in 1997. The Commission cannot but dismiss this argument. As it has demonstrated above and as the French authorities themselves acknowledge in their memorandum dated 9 April 2002,

although the unused replacement provisions were correctly taxed, the grantor rights were reclassified as capital injections without being subjected to corporation tax. The tax paid by EDF in 1997 is therefore lower than the tax normally due.

(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. They also argue that, over the period from 1987 to 1996, EDF paid more to the State overall than the corporation tax that would have been paid by a commercial enterprise which did not create provisions for the renewal of the RAG and which paid its shareholder a dividend equal to 37,5% of its net result after tax.

(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.

(98) The French authorities claim that the rate of corporation tax that should have been applied when EDF's balance sheet was restructured was the 1996 rate and not the 1997 rate. As stated earlier, the Commission would first point out that the [CNC] considers that corrections to accounting errors should be posted in the accounts for the financial year in which they are discovered. Since the provisions for renewal of the RAG became superfluous following Act No 97-1026…, they should have been reclassified in the accounts for the 1997 financial year and therefore taxed at the rate of corporation tax applicable to that year. The Commission also notes that the French authorities themselves applied the 1997 rate of corporation tax to the share of the provisions that was taxed.

(99) The non-payment by EDF, in 1997, of EUR 888,89 million in tax therefore constitutes an advantage for the group. EDF was able to use the amount of the unpaid tax to increase its capital and reserves without having to raise outside finance. The advantage is necessarily selective, since the non-payment of corporation tax on some of the accounting provisions constitutes an exception to the tax treatment normally applicable to such a transaction. The fact that the advantage was granted to EDF by a specific legislative instrument, Act No 97-1026…, is proof that it is unique and overrides the rules of ordinary law.

…

(154) In the light of the foregoing considerations, the Commission accordingly takes the view that the aid under examination constitutes operating aid which has had the effect of strengthening EDF's competitive position in relation to its competitors. It is therefore incompatible with the common market.

(155) Lastly, the Commission considers that, contrary to what is claimed by the French authorities, the rule on limitation periods does not apply in the case in point. Although EDF created the accounting provisions free of tax between 1987 and 1996, it should be pointed out, on the one hand, that corrections to accounting errors, which by their very nature relate to the posting of past transactions, should according to the [CNC] be posted in the accounts for the financial year in which they are discovered and, on the other hand, that the Act providing that the grantor rights were to be reclassified as capital injections without being subject to corporation tax dates from 10 November 1997. The tax concession therefore dates from 1997 and any new aid paid on that date is therefore not time-barred.'

51 In view of the interest calculated pursuant to Article 4 of the contested decision, the total amount which EDF has been asked to refund amounts to EUR 1,217 billion. EDF repaid that sum to the French State.

Procedure and forms of order sought by the parties

52 EDF brought the present action by application lodged at the Registry of the [General Court] on 27 April 2004.

53 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 leave to intervene. The French Republic lodged its statement in intervention within the prescribed period.

54 By letter of 18 February 2005, the Commission requested that the [General Court] adopt a measure of organisation of the procedure with a view to having a report entitled 'the Oxera Report', annexed by EDF to its observations on the French Republic's

statement in intervention, removed from the case-file on the ground that it constituted new evidence which was inadmissible at that stage of the procedure.

55 By letter of 25 April 2005, EDF requested that the [General Court] adopt a measure of organisation of the procedure inviting the Commission to take a view on the content of that report. The Commission submitted its observations on that request by letter of 7 June 2005.

56 The [General Court] (Third Chamber) invited the parties to respond in writing to questions which were notified to them by the Registry on 12 June 2006. The parties complied with that request within the prescribed period.

57 By document lodged at the Registry of the [General Court] on 3 March 2008, Iberdrola SA sought leave to intervene in this case in support of the form of order sought by the Commission.

58 Since the application to intervene was made after the expiry of the period of six weeks referred to in Article 115(1) of the Rules of Procedure of the [General Court], by order of 5 June 2008, Iberdrola was granted leave to intervene in support of the form of order sought by the Commission and to submit its observations during the oral procedure.

59 The [General Court] (Third Chamber) invited the parties to respond in writing to further questions which were notified to them by the Registry on 14 May 2008. The parties complied with that request within the prescribed period.

60 The parties put oral arguments and gave their answers to the questions put by the [General Court] at the hearing of 25 November 2008.

61 EDF, supported by the French Republic, requests that the General Court should:

— annul Articles 3 and 4 of the contested decision;

— order the Commission to pay the costs.

62 The Commission, supported by Iberdrola, contends that the General Court should:

— dismiss the application as unfounded;

— order EDF to pay the costs.

63 In its observations on the statement in intervention of the French Republic, the Commission also requested that the General Court should order the French Republic to pay the costs.

Law

64 EDF essentially raises three pleas in law.

65 By its first plea, on the one hand, EDF claims that the Commission misinterpreted the provisions of Article 20 of Regulation No 659/1999 by not allowing it to submit relevant observations on the 'reversal of analysis' which occurred between the decision initiating the procedure and the contested decision.

66 On the other hand, EDF submits that the fact that it was not informed, in the course of the procedure, of a 'fundamental change of analysis' constitutes an infringement of its 'right to be heard'.

67 By its second plea, EDF claims, essentially, that the Commission made several errors in law when interpreting the concept of 'State aid' and also that there are several lacunae in the statement of reasons for the contested decision.

68 First, the 'under-compensation' in respect of the public service costs borne by EDF, which increased very substantially from 1997, offset any 'hypothetical advantage' which it might have received.

69 Secondly, the measures at issue should have been classified as a capital injection and analysed in an overall context of clarifying the financial relationship between the State and EDF. By implementing those measures, the State acted like a prudent private investor in a market economy.

70 Thirdly, the Commission should have taken into account the overall context of the restructuring of financial relations between the State and EDF in 1997, in order to reach the conclusion that no overall advantage was granted to EDF.

71 Fourthly, the measures at issue did not affect trade between Member States.

72 By its third plea, EDF argues that the Commission infringed the obligation to state reasons by failing to provide reasons for its decision to reject the argument classifying the measures at issue as a recapitalisation operation.

73 EDF also submits that the Commission misinterpreted fiscal aspects of the operation carried out in 1997.

74 EDF also raises two pleas in the alternative.

75 By its first plea put forward in the alternative, EDF claims that the measures at issue — if they may be classified as aid — must, for the most part, be regarded as existing aid, pursuant to Article 1(b)(v) of Regulation No 659/1999, in that they were implemented before the effective liberalisation of the electricity sector. Moreover, the majority of them should be regarded as existing aid within the meaning of Article 15(1) of Regulation No 659/1999, relating to limitation periods.

76 By its second plea put forward in the alternative, EDF submits that, in any event, the contested decision contains several calculation errors which render it invalid.

77 The French Republic intervenes in support, first, of the part of the second plea which is concerned with the non-application by the Commission of the private investor test, secondly, of the third plea, alleging infringement of the obligation to state reasons and, thirdly, of the pleas put forward in the alternative by EDF.

The first plea, alleging, first, infringement of Article 20 of Regulation No 659/1999 and, second, infringement of the right to be heard

Arguments of the parties

78 In the context of the first part of its second plea, EDF submits that, in the contested decision, the Commission adopted a radically different position to that which it had taken in the decision initiating the procedure with regard, in particular, to the classification of the measures at issue.

79 EDF submits that, in terms of the decision initiating the procedure, the alleged aid stems from the creation of provisions for the renewal of the RAG during the period from 1987 to 1996, those provisions being supposed to have granted EDF an undue tax concession each year during that period, which was partially offset by the accounting adjustments and reclassifications carried out in 1997. EDF refers, in that regard, to paragraphs 45, 49, 52, 56 and 84 of the decision initiating the procedure.

80 EDF takes the view that it clearly follows from paragraphs 45 and 49 of the decision initiating the procedure that the provisions of Law No 97-1026 are analysed by the Commission as having reduced the advantages previously obtained and not as having constituted those advantages.

81 It also considers that it is only by having recourse to the concept of 'consolidation of the preceding aid' — a concept which is, moreover, without precedent and extraneous to Regulation No 659/1999 — that the Commission has seemed to seek artificially to link solely to 1997 the alleged advantages, which it also argued had been obtained during the 1987-1996 period. EDF makes particular reference, in that regard, to paragraph 71 of the decision initiating the procedure.

82 EDF submits that, in the contested decision the Commission changed its position, by taking the view that the provisions of Law No 97-1026, which it had until then presented as having reduced the amount of the advantages obtained by it, actually constituted the alleged aid. EDF relies, in that regard, on the wording of Article 3 of the contested decision.

83 EDF further considers that that change of analysis had an influence on the classification as new aid of the measures at issue and on the refusal to take into consideration the fact that they were, if anything, existing aid.

84 EDF submits that, once the decision to initiate the investigation procedure has been made, the Commission is required to give the State and any interested third parties the opportunity to submit their comments.

85 EDF acknowledges that, as the case-law presently stands — it refers in that regard to Case T-613/97 *UIFEX and Others* v *Commission* [2000] ECR II-4055 — the purpose of

that stage of the procedure is not so much to safeguard their 'right to be heard', as to allow the Commission to gather information relevant to its analysis.

86 EDF points out that recital 8 in the preamble to Regulation No 659/1999 none the less states that 'in all cases where, as a result of the preliminary examination, the Commission cannot find that the aid is compatible with the common market, the formal investigation procedure should be opened in order to enable the Commission to gather all the information it needs to assess the compatibility of the aid and to allow the interested parties to submit their comments; whereas the rights of the interested parties can best be safeguarded within the framework of the formal investigation procedure provided for under Article [88](2) [EC].'

87 Relying in particular on the last sentence of that recital, EDF takes the view that interested third parties have rights which the formal investigation procedure is intended to safeguard. Those rights consist in the opportunity to provide the Commission with all the information enabling it properly to carry out its analysis.

88 Consequently, in so far as the decision initiating a formal procedure is liable to affect the legal situation of the recipient of the aid and adversely to affect him (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 85), EDF should, throughout the administrative procedure, have been placed in a position in which it could effectively make known its view of the reality and relevance of the facts and the complaints and circumstances alleged by the Commission (see, in that regard, Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 40, and Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 32), particularly since the amount of the sums at stake was considerable and there was only a single recipient concerned.

89 EDF claims that, since the Commission failed to inform the interested third parties of the 'fundamental change' in its analysis, EDF was not in a position to appreciate the scale of the financial impact of the contested decision or to provide the Commission with the information required for a proper understanding of the situation.

90 According to EDF, since the rights of interested third parties are limited, it is necessary to ensure that observance of those rights is 'particularly rigorous' and, accordingly, that the sole right conferred on interested third parties — which is the ability to communicate relevant documents and information to the Commission — may, at the very least, be exercised with full knowledge of the analysis conducted by the Commission, since that right would otherwise be rendered meaningless.

91 According to EDF, that was not the case in this instance, since it was not informed of the Commission's change of analysis and was therefore unable to provide relevant information and evidence which might, for example, have led the Commission not to abandon its initial analysis, which could have resulted in most of the measures in question being categorised as existing aid.

92 Accordingly, the Commission infringed Article 20 of Regulation No 659/1999.

93 In the second part of its first plea, EDF invites the General Court to consider the 'rigour of the present case-law' on the 'right to be heard of interested third parties' — in particular that of the recipient of the alleged aid — in the context of State aid procedures.

94 EDF points out that, in Case C-142/87 *Belgium* v *France* [1990] ECR I-959 (*Tubemeuse*), the Court of Justice held that observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules (paragraph 46 of the judgment).

95 In the field of State aid, 'an actual right to be heard' for the purpose of that judgment may be conferred solely on the Member States, since the procedure is initiated against them and not against third-party recipients.

96 According to EDF, such an approach is, in essence, difficult to reconcile with the fact that it is the third-party recipients who are addressed by a repayment order, the Member State being, by contrast, the financial beneficiary of such an order. A 'conflict of interests', between the Member States and the recipient is therefore possible.

97 EDF submits, in essence, that that 'potential conflict of interests' situation, on the one hand, highlights the need to safeguard the few rights conferred on interested third parties in the context of State aid proceedings — and, in particular, the right conferred on them by Article 20 of Regulation No 659/1999 — and, on the other hand, justifies, quite apart from that provision, conferring on interested third parties or, at the very least, on recipients of the aid, the 'rudiments of an actual right to be heard'.

98 EDF considers, in that regard, that observance of the rights of interested third parties in general and of the rights of the recipient of the aid in particular requires the Commission to allow them to make known their views in an effective manner and, therefore, requires it to publish a new notice if it plans in its final decision to put forward facts, complaints, analyses or circumstances which differ substantially from those set out in the notice which was sent to those third parties.

99 In this case, the fact that the Commission 'fundamentally' changed its analysis of the nature of the measures at issue in its final decision and did not publish a second notice in the Official Journal constitutes, according to EDF, a serious infringement of its 'right to be heard'.

100 The Commission disputes that line of argument.

Findings of the Court

— Infringement of the right to be heard

101 It must be borne in mind that, according to settled case-law, respect for the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules. That principle requires that the undertaking concerned be afforded the opportunity during the administrative procedure to make known in an effective manner its views on the truth and relevance of the facts and circumstances relied on and on the documents used by the Commission to support its claim that there has been an infringement of Community law (Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 28, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 121).

102 However, the administrative procedure relating to State aid is initiated solely against the Member State concerned. The undertakings receiving aid are regarded solely as 'interested parties' in that procedure. They cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to the abovementioned Member State (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraphs 81 and 83).

103 Accordingly, the case-law confers on the parties concerned essentially the role of information sources for the Commission in the administrative procedure instituted

under Article 88(2) EC. It follows that, far from enjoying the same rights to a fair hearing as those which individuals against whom a procedure has been instituted are recognised as having, interested parties have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (see Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 59 and 60, and the case-law cited, and *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited in paragraph 101 above, paragraph 125).

104 The inevitable conclusion is therefore that the applicant cannot claim an infringement of his right to be heard, since no such right is conferred on him in the context of the administrative procedure, even though he is right in submitting that the Member State which granted the aid and the recipient thereof may have diverging interests in the context of procedures conducted by the Commission relating to State aid.

105 The first part of the first plea must therefore be dismissed.

— The infringement of the procedural rights of the recipient of the aid as an interested party

106 It is settled case-law that, during the investigation phase under Article 88(2) EC, the Commission has a duty to put the interested parties on formal notice to put forward their comments (see judgment of 8 May 2008 in Case C-49/05 P *Ferriere Nord* v *Commission*, not published in the ECR, paragraph 68, and the case-law cited).

107 Although those interested parties do not enjoy the rights to a fair hearing, they nevertheless have the right to be involved in the administrative procedure conducted by

the Commission to the extent appropriate in the light of the circumstances of the case (*Ferriere Nord* v *Commission*, cited in paragraph 106 above, paragraph 69).

108 Furthermore, the Commission must initiate a formal investigation procedure, informing the interested parties, when, following a preliminary investigation, it has serious doubts as to the compatibility of the financial measure in question with the common market. It follows that, in its notice of intention to initiate that procedure, the Commission cannot be required to present a complete analysis on the aid in question, but it is sufficient for it to define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to put forward their comments (Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission* [2006] ECR II-1475, paragraph 85).

109 It should also be remembered that, according to Article 6(1) of Regulation No 659/1999, where the Commission decides to initiate the formal investigation procedure, it is permissible for its decision merely to summarise the relevant issues of fact and law, include a preliminary assessment as to the aid character of the State measure in question and set out its doubts as to the measure's compatibility with the common market (Joined Cases T-269/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others* v *Commission* [2002] ECR II-4217, paragraph 104).

110 Thus, a decision to initiate the procedure must give interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties concerned to be aware of the reasoning which has led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with the common market (Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark and Others* v *Commission* [2008] ECR II-2935, paragraph 139, and the case-law cited).

111 It must be pointed out that, in this case, both in the decision initiating the procedure and in the contested decision, the Commission examined the treatment for tax purposes of the grantor rights when EDF's balance sheet was restructured by Law No 97-1026 ('the contested measure') and that, therefore, in that regard, the framework of the investigation is the same in the two decisions.

112 Furthermore, both in paragraph 51 of the decision initiating the procedure and in recital 89 in the preamble to the contested decision, the Commission used the calculation of the tax owed as presented by the French authorities, according to which calculation the tax relief received by EDF could be estimated at FRF 5 883 billion.

113 Accordingly, as a result of the decision initiating the procedure, EDF must be regarded as being sufficiently aware of the relevant framework of the investigation and of the reasoning which led the Commission to conclude provisionally that the contested measure might constitute aid incompatible with the common market to be able effectively to submit its comments in that regard.

114 Therefore, even if they were well founded, the arguments put forward by EDF that the Commission conducted, from a tax and accounting standpoint, an analysis of the contested measure which differs from that provisionally used in the decision initiating the procedure must be dismissed as irrelevant.

115 It is therefore necessary to dismiss the first plea raised by EDF.

The second plea, alleging infringement by the Commission of Article 87 EC

The first part, alleging failure to take account of 'under compensation' for the public service costs borne by EDF

— Arguments of the parties

116 EDF submits, essentially, that the public service obligations imposed on the undertaking by the public authorities have increased very substantially since 1997. However, those additional costs have not been recouped through electricity prices, since the latter have fallen very significantly during the same period.

117 EDF argues, in essence, that the increase in the costs of the public service stemming from the restructuring of the relationship between it and the State formed part of the financial balance which was set out in the management contract of 8 April 1997 (see paragraph 31 above).

118 In order to substantiate that claim, EDF relies on its public service obligation to purchase electricity for the benefit of producers who have established cogeneration facilities, the most significant obligation during the relevant period.

119 According to EDF, that single obligation is sufficient to establish that the corresponding costs clearly exceed any tax concession which it may have received.

120 EDF claims that, in Decision C (2003) 2508 of 23 July 2003 raising no objections to the capital increase of La Poste SA/NV by the Belgian State, the Commission considered, with regard to the public service obligation incumbent on La Poste, that since the 'historical under-compensation' for the additional net cost of the activities constituting services of general economic interest exceeded the capital contribution notified by the State, that increase did not in itself constitute State aid, as it conferred no advantage on La Poste, or constituted State aid compatible with the common market. The Commission therefore took the view that, in so far as the notified capital contribution was thus compatible with the common market, it was not necessary for it to analyse whether the State's decision to contribute the capital in question represented the actions of a prudent private investor in a market economy.

121 EDF therefore takes the view that it is necessary to consider, by analogy with that decision by the Commission, that the capital contribution to EDF does not in itself constitute State aid, since it confers no advantage, or constitutes State aid compatible with the common market.

122 Moreover, EDF submits, essentially, that the Commission was careful to reject, in paragraph 79 of the decision initiating the procedure, the argument concerning the possible 'under-compensation' in respect of public service costs, but that it did so by relying on all the aid examined, including that whose classification as aid was ultimately rejected.

123 EDF also submits, in essence, that if the French Republic were to be regarded as having failed to communicate to the Commission the information requested by the latter concerning possible public service costs during the formal investigation procedure and if, in consequence, the arguments which were put forward in the context of this action cannot be taken into consideration, since the legality of a State aid decision must be assessed on the basis of the information available to the Commission at the time when that decision was adopted and since the complex assessments made by the Commission must be examined solely on the basis of the information available to it at the time when the assessments were made, this would have the effect that, having not been involved in the administrative procedure, EDF would be denied the right to rely on that part of its plea. However, that would confirm that its 'right to be heard' had been infringed, since, by not being informed 'sincerely and completely' by the

Commission during the administrative procedure, it was not given the opportunity to evaluate the need to put forward that line of argument and is now prevented from doing so.

124 The Commission disputes that line of argument.

— Findings of the Court

125 It must be borne in mind that, according to settled case-law, in an action for annulment, the legality of a Community measure must be assessed on the basis of the information existing at the time when the measure was adopted. In particular, the complex assessments made by the Commission must be examined solely on the basis of the information available to it at the time when the assessments were made (see Case T-217/02 *Ter Lembeek* v *Commission* [2006] ECR II-4483, paragraph 82, and the case-law cited).

126 In this respect, it cannot be complained that the Commission failed to take into account information which could have been submitted to it during the administrative procedure but which was not, since it is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it (*Ter Lembeek* v *Commission*, cited in paragraph 125 above, paragraph 83).

127 Having regard to the wording of paragraph 79 of the decision initiating the procedure and to recital 153 in the preamble to the contested decision, as well as the footnote to that recital, it must be concluded that the Commission is correct to argue that it could not and was not required to examine possible public service costs in the absence of information on that matter from the French authorities and the interested parties and that it could not take into account, at the time of adopting the contested decision, information which it was made aware of only in the context of this action.

128 As regards the argument concerning the infringement of the right to be heard put forward by EDF, it must be rejected since, although they had been invited to submit information on that matter in the context of the administrative procedure, the French Republic and EDF considered that it was not necessary to do so. EDF cannot therefore argue, in the context of its action before the General Court, that it was not given the opportunity to assess the need to put forward a line of argument on that subject and that its right to be heard would be infringed if, now, those arguments were not examined in that regard.

129 It must be pointed out that any differences in analysis between the decision initiating the procedure and the contested decision are not such as to influence that assessment, in so far as the Commission had indicated in the decision initiating the procedure that it considered that the treatment to be given to the accounting provisions for the renewal of the RAG were capable of constituting new aid. It was therefore incumbent on the French Republic and on EDF to draw the procedural conclusions that such an analysis was likely to have for them and to provide the information necessary to defend their position, which they failed to do.

130 As regards the argument that the Commission nevertheless addressed that question in paragraph 79 of the decision initiating the procedure, but confined itself to pointing out that 'the aid examined … conferred on EDF an operational advantage which seems at this stage to exceed the costs of any public service', the sentence from which EDF cited extracts must be placed in its proper context:

'EDF's activities include those of a public-service provider. It should be noted that although, until now, they have not relied in that connection on the application of Article 86(2) [EC], the French authorities have pointed out that EDF is entrusted with public-service tasks. The authorities have not, however, provided any assessment of the cost incurred by EDF as a result of those obligations. It is therefore impossible to ascertain whether the various forms of State aid received by that operator correspond to the costs of the public-service tasks imposed on it. It seems, in any event, that the aid examined in this case, which essentially takes the form of exceptional derogations from the provisions normally applicable in the accounting and commercial field, conferred on EDF an operational advantage which seems at this stage to exceed the costs of any public service. EDF has not received capital injections for a considerable period. The aid examined in fact contributed to financing the

aggressive expansion of EDF through the acquisition of shareholdings abroad. Such a use of those funds seems to fall outside the framework of what can be regarded as an acceptable public-service task.'

131 This was therefore merely a provisional assessment and an invitation, addressed to the French Republic and to EDF, to provide any information necessary to rebut that initial analysis. Accordingly, it cannot be used by the applicant as the basis of an argument.

132 Similarly, the Commission cannot be criticised for the fact that paragraph 79 of the decision initiating the procedure relates to all the aid examined by it and not solely to the aid which it ultimately declared incompatible with the common market when ordering its recovery in Articles 3 and 4 of the contested decision, that is to say the contested measure.

133 The first part of the second plea must therefore be dismissed.

The second part, alleging the absence of any effect on trade between Member States

— Arguments of the parties

134 EDF submits that the contested measure has not affected trade between Member States within the meaning of Article 87(1) EC, in so far as, on the one hand, in the light of Community case-law, the concept of 'trade' should be interpreted as being 'synonymous' with the concept of 'competition' and, on the other hand, trade between

traditional national producers, enjoying a monopoly position in their respective countries at the time, cannot be treated in the same way as a competitive situation.

135 EDF claims that the General Court has clearly linked the concept of 'trade between Member States' 'to the concept of 'competition 'and notes, in that regard, that the General Court has held that, concerning State aid, the conditions under which trade between Member States is effected and competition is distorted are as a general rule inextricably linked (Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 81, and Case T-288/97 *Regione Autonoma Friuli-Venezia Giulia* v *Commission* [2001] ECR II-1169, paragraph 44).

136 EDF argues that that analysis was confirmed by the Court of Justice in Case C-159/94 *Commission* v *France* [1997] ECR I-5815, in which the Court of Justice rejected the Commission's argument that the abolition of the exclusive import and export rights of EDF and of Gaz de France (GDF) would foster the development of trade in the interests of the European Community and held that the Commission was required to define beforehand the Community interest in relation to which the development of trade must be assessed. EDF takes the view that the Court of Justice therefore clearly linked the concept of 'distortions of competition' and the concept of 'trade between Member States'.

137 EDF submits that, although in the contested decision the Commission refers at length to the trade which could have taken place between the electricity operators having, for the most part, monopolies in the Member States prior to the liberalisation of that sector, it is nonetheless clear that there was no 'genuine situation of competition' prior to that liberalisation, which was gradually implemented only following the transposition of Directive 96/92.

138 With particular regard to France during the relevant period (1986-1997), EDF submits that the electricity sector was clearly closed to competition. Although several

directives were adopted during that period [Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids (OJ 1990 L 313, p. 30) and Directive 96/92], their transposition in several Member States nevertheless took some time, 'because of the complex initial situation and the disparity between electricity structures within the Community', as was recognised by K. Van Miert, the member of the Commission responsible for competition at that time.

139 EDF therefore considers that it cannot be claimed that a 'genuine situation of competition' existed in France or, indeed, in almost any European country, during the years 1987 to 1996.

140 EDF points out, in that regard, that many of the examples provided by the Commission in the contested decision for the purpose of concluding that there was trade between the Member States having an effect on competition relate to periods after 1997: that applies in particular to the acquisition of a third of the capital of the German undertaking EnBW Energie Baden-Württemberg AG and of the production and distribution capacity of London Electricity, to the takeover of the undertaking Fenice, to the creation of a partnership with Fiat to purchase Montedison and to a partnership with Véolia Environnement through the company Dalkia.

141 In conclusion, EDF considers that, although between 1987 and 1996 it had engaged in trade with other European national producers, linked primarily to long-term contracts which often allowed those operators to dispense with investments in production, since the large majority of EDF's 'counterparts' enjoyed a monopoly position in their respective countries, that trade in no way affected competition at the intra-Community level.

142 The Commission disputes that line of argument.

— Findings of the Court

143 Article 87(1) EC prohibits aid which affects trade between Member States and distorts or threatens to distort competition.

144 For the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 140, and the case-law cited).

145 Moreover, if the Commission has correctly explained how the aid in question was capable of having such effects, it is not required to carry out an economic analysis of the actual situation on the relevant market, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings and of the trade flows in question between Member States (see, in that regard, Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 102, and the judgment of 6 September 2006 in Joined Cases T-304/04 and T-316/04 *Italy and Wam* v *Commission*, not published in the ECR, paragraph 64).

146 When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (see *Cassa di Risparmio di Firenze and Others*, cited in paragraph 144 above, paragraph 141, and the case-law cited).

147 In that regard, the fact that an economic sector has been liberalised at Community level may serve to determine that the aid has a real or potential effect on competition

and affects trade between Member States (see *Cassa di Risparmio di Firenze and Others*, cited in paragraph 144 above, paragraph 142, and the case-law cited).

148 In addition, it is not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State (see *Cassa di Risparmio di Firenze and Others*, cited in paragraph 144 above, paragraph 143, and the case-law cited).

149 In this case, it should be noted that the Commission pointed out, in recitals 104 to 112 and 114 and 115 in the preamble to the contested decision, that there was, irrespective even of the directives intended to liberalise the electricity sector, a degree of competition in that sector, at least on certain markets, whether on the specific markets on which EDF operated at the material time or, in some Member States, on other markets not yet entirely open to competition

150 Those factors are not disputed by EDF.

151 Nor has EDF disputed that it exported electricity to other Member States whose electricity markets had already been opened up.

152 The fact that the French internal market, or at least a part of it, was closed to competition is therefore irrelevant, assuming that it is proven.

153 In consequence, it is necessary to conclude that the Commission cannot be criticised for failing better to establish that it was possible that the contested measure could have affected intra-Community trade.

154 Accordingly, EDF's line of argument on that matter cannot succeed.

155 In conclusion, the second part of the second plea must therefore be dismissed.

The third part of the second plea, based on, first, the classification of the measures at issue as a capital injection, and, secondly, the State's conduct as a prudent private investor in a market economy when it implemented them

— Arguments of the parties

156 EDF points out that in 1997 the State was its sole shareholder. At that time, EDF was 'significantly under-capitalised' and its balance sheet was 'manifestly unbalanced'. Its own capital was FRF 24,2 billion, it had debt from borrowings amounting to FRF 131,9 billion (that is a net debt/own capital ratio of 480%) and net assets of FRF 696,4 billion.

157 EDF submits that the State therefore sought to strengthen the own capital of the public undertaking and to change the financial balance between the State and the undertaking, with a view to approximating the position of the undertaking with that of its major competitors in the European electricity sector, in order to allow it to prepare itself for the 'upheaval in its economic and regulatory environment'. Accordingly, the

State acted as would a prudent private investor, that concept having to be interpreted, according to EDF, in the light of the very specific characteristics of the economic sector in which the undertaking operates.

158 EDF argues that, in that context, it was decided in 1997 to clarify the legal and financial regime applicable to the RAG, by bringing to an end its characteristic 'ambiguities' and, at the same time, its specific accounting treatment, which had been criticised by the French Cour des Comptes, and simultaneously to restructure EDF's balance sheet.

159 That two-fold objective of clarifying the legal and financial regime applicable to the RAG, with the resulting effects on its accounts, and of restructuring EDF's balance sheet was set out in the management contract of 8 April 1997 (see paragraph 31 above) and was presented 'without any ambiguity' in the context of the travaux préparatoires for Law No 97-1026.

160 EDF, supported by the French Republic, argues, in essence, that the reclassification of the grantor rights arising from Law No 97-1026 constitutes a capital injection, and points out that the French Republic consistently maintained that position during the administrative procedure, but that the Commission rejected that line of argument without examining its substance, on the two grounds set out in recitals 96 and 97 in the preamble to the contested decision.

161 According to EDF, the Commission thus displays a 'clear lack of understanding' of the economic nature of the recapitalisation operation. It therefore misinterpreted the concept of 'State aid' and infringed Article 87 EC.

162 EDF argues, in essence, that the recapitalisation operation — carried out by means of the allocation of the grantor rights directly from the liabilities item entitled 'Value in kind of assets operated under concession' to the liabilities item entitled 'Capital

injections' in the amount of FRF 14,119 billion as at 31 December 1996 — was implemented by 'neutral means' from an economic and tax standpoint and by the 'most natural manner in this case', that is to say the legislative process, making use, in the interests of effectiveness, of the same law as that by which EDF was deemed to have owned the RAG.

163 EDF points out that those accounting adjustments, by their very nature, actually required legislative intervention. The capital injection of the value of the assets in kind allocated under concession actually fell within the scope of legislation, since EDF's capital was laid down by Article 16 of Law No 46-628, which provides that it 'belongs to the nation', that 'it is inalienable' and that, 'in the event of operating losses, it must be reconstituted from the results of subsequent years'. According to Article 1 of Decree No 56-493 of 14 May 1956 concerning the capital injections provided to EDF and to GDF (JORF, 19 May 1956, p. 4613), they were subject to the same rules as those which are laid down by Article 16 of Law No 46-628.

164 EDF, supported by the French Republic, states — and they have confirmed this in their responses to the written questions addressed to them by the General Court — that the State had the choice between two approaches (called 'short plan' and 'long plan' by EDF) leading to exactly equivalent results: that is either to make a further capital injection by immediately reclassifying, by law, part of the tax-free accounting provisions for the renewal of the RAG, or, first of all, to allocate to EDF's capital a net amount after corporation tax, request EDF to pay a tax corresponding to the variation in net worth and to make a further capital injection of an amount equal to the tax paid.

165 According to EDF, the State took the view that the first approach was 'economically logical and financially just as neutral' as the second and that that approach had, furthermore, been approved by the French Cour des Comptes.

166 It follows clearly from the line of argument put forward by the Commission that if the State had taken the second approach when injecting the capital, the Commission would have applied the prudent private investor test. That shows, in EDF's view, that it was only the means chosen by the State to make the capital increase which led the Commission to reject, on principle, the application of the private investor test.

167 EDF argues that it is clear from recital 96 in the preamble to the contested decision and from the Commission's pleadings that it is the choice of means used to make the capital increase which the Commission criticises. Such a line of argument, it submits, is 'purely formulistic and wholly irrelevant'.

168 According to EDF, the statement in the contested decision that the Commission 'has to dismiss these arguments [relating to the recapitalisation]' on the ground that the private investor test 'can be applied only in the context of the pursuit of an economic activity, not in the context of the exercise of regulatory powers' constitutes, first, an interference in procedures of internal law, which are outside the scope of Community law, and entails, secondly, a formalism which is extraneous to competition law.

169 It is true that EDF recognises that the State, in order to make the capital increase, employed means which were not available to companies under ordinary law, namely the reclassification of the grantor rights by means of legislation. However, it did not act in the context of its regulatory powers or its prerogatives as a public authority.

170 First of all, to take the contrary view would be to disregard the fact that EDF's memorandum and articles of association and the definition of its capital are themselves laid down by legislation.

171 EDF states, in essence, that the State is required to use legislation to carry out that operation, in view of the particular nature of the undertaking. It takes the view that, since legislation was necessary for EDF to be deemed to be the *ab initio* owner of the RAG, there is no reason why the legislature should refrain from 'pursuing to its conclusion the logic' set out in the management contract of 8 April 1997 (see paragraph 31 above) in restructuring the undertaking's balance sheet by amending Article 16 of Law No 46-628.

172 Secondly, EDF claims, in essence, that, in so doing, the State in fact acted as 'prudent shareholder' in the undertaking, under normal market conditions, which must necessarily be assessed by reference to the objective and verifiable elements which are available (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).

173 Thirdly, EDF submits that, by automatically denying the French State the right to recapitalise a public undertaking by the means which it regards as most appropriate, the Commission also errs in law, infringing Article 295 EC which enshrines 'the neutrality of Community law as regards the Member States' rules governing the system of property ownership'.

174 Fourthly, EDF takes the view that, even if another means had been chosen, there is nothing to justify the excessive formalism displayed by the Commission, which rejected, without even discussing, the argument concerning the recapitalisation of the undertaking, on the sole ground that the means by which it was implemented qualified the State's intervention as State aid 'as a matter of principle'. EDF argues that, on the contrary, the immateriality of the form which a measure may take to its possible classification as State aid lies at the heart of the Community case-law.

175 EDF claims, essentially, that for the purpose of classifying a measure as State aid, the case-law attaches no importance to the form which it may take or to the State authority which adopts it, since those considerations are immaterial to the analysis carried out under Article 87(1) EC.

176 Moreover, EDF argues that, according to the Commission itself, when analysing the compatibility of aid with the common market, the Commission 'examines the compatibility of aid not in terms of the form which it may take, but in terms of its effect' [paragraph 7 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3)]. Accordingly, the Commission should not have rejected, without examining, the argument that the operation was a recapitalisation, solely on the basis of a purely formal consideration, namely the means used to carry out that recapitalisation.

177 EDF takes the view that, if the form in which a measure is implemented is irrelevant as regards its classification as State aid, that form may no longer be relied on by the Commission as an argument — and, in particular, as the sole argument — for rejecting the reasoning challenging that classification as State aid.

178 Fifthly, EDF points out that the Commission has already taken the view in a number of cases that a capital contribution may take various forms: the subscription to an undertaking's bonds [Commission Decision 94/662/EC of 27 July 1994 concerning the subscription by CDC participations to bonds issued by Air France (OJ 1994 L 258, p. 26)], the writing-off of a debt used to make a capital injection [Commission Decision 89/58/EEC of 13 July 1988 concerning aid provided by the United Kingdom Government to the Rover Group, an undertaking producing motor vehicles (OJ 1989 L 25, p. 92)], the conversion of loans into equity capital [Commission Decision 90/224/EEC of 24 May 1989 on aid granted by the Italian Government to Aluminia and Comsal, two State-owned undertakings in the aluminium industry (OJ 1990 L 118, p. 42)], the conversion of debts to equity, regarded as equivalent to an injection of capital of the same amount [Commission Decision 94/696/EC of 7 October 1994 on the aid granted by Greece to Olympic Airways (OJ 1994 L 273, p. 22)], the 'cancellation' of provisions created to cover future pension expenditure and their transfer to a revaluation reserve [Decision C (2003) 2508 (see paragraph 120 above)].

179 Moreover, according to EDF, the Commission has already applied the private investor in a market economy test to a measure implemented by legislation and therefore to a

measure arising from the exercise of State prerogatives, as in the Siciliana Acque Minerali Case [Commission Decision 2000/648/EC of 21 June 2000 on State aid which Italy is planning to implement for Siciliana Acque Minerali Srl (OJ 2000 L 272, p. 36)].

180 To conclude in that regard, the fact that a capital injection has been implemented by legislation is not capable of preventing the application of the private investor test to that measure.

181 According to EDF, the Commission was therefore obliged to examine whether the measures adopted following Law No 97-1026 constituted, as the French State submits, 'a lawful capital increase in terms of its procedure and amount'.

182 Moreover, EDF points out that, according to the Court, in order to determine whether a State measure constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (*Chronopost and Others* v *Ufex and Others*, cited in paragraph 172 above, paragraph 38).

183 According to EDF, the concept of 'normal market conditions' is also central when applying, in the case of measures benefiting a public undertaking, the principle of equal treatment. Indeed, pursuant to the principle that the public and private sectors are to be treated equally, capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid (Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 69).

184 In EDF's argument, if the approach adopted by the Commission were to be accepted, EDF could not rely on that case-law, since the circumstances in which the contested measure was introduced do not correspond to normal market conditions on the sole

ground that the State's use of its fiscal authority falls outside the scope of the ordinary law. EDF nevertheless argues that, although it does not deny that the means used by the State fell outside the scope of the ordinary law, classification as State aid cannot be limited to that solely formal element and thereby dispense with the substance of the case.

185 EDF also considers that Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, which is relied on by the Commission in its pleadings — a judgment according to which a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority — in reality supports its position, in so far as it presupposes that a comparison is made between the respective actions of the State, acting as an investor, and of a private investor under normal market conditions. However, in the contested decision, the Commission refused *ab initio* to conduct such an analysis, which is contrary to the principle of neutrality.

186 In response to the Commission's line of argument that it was merely a 'tax gift' or a 'debt waiver' which EDF received, EDF submits that a private shareholder may also increase the capital of a subsidiary by a mechanism of incorporating a claim into the capital, a process which is, in essence, perfectly comparable, from an economic standpoint, with the 'debt waiver' criticised by the Commission.

187 According to the applicant, a parent company holding a claim against its subsidiary may choose simply to waive that claim, thus generating a profit for the subsidiary, which would in principle be taxable for the subsidiary, unless there are tax losses carried over. After taxation, that amount could be allocated by the subsidiary, at its discretion, towards paying the dividend, creating reserves, etc. However, the parent company could also choose to subscribe to a capital increase in the subsidiary in an amount corresponding to its claim. According to EDF, supported by the French Republic, that latter process generates no taxable profit for the subsidiary under French tax law.

188 EDF submits that, although that process differs from the contested recapitalisation operation on account of the means selected, the fact remains that, in essence, the State has, in this case, merely made what can be treated economically as a capital increase by incorporating the claim. Private undertakings may also avail themselves of that process.

189 EDF therefore submits that, in order to determine whether 'normal market conditions' exist, the Commission could not artificially limit itself solely to a formal examination of the means used, but should, on the contrary, have examined the substance of the case, namely the economic rationale for the operation, and must conduct that examination in the context of that time and refrain from any assessment based on a later situation.

190 EDF states that, in its judgment in *Chronopost and Others* v *Ufex and Others*, cited in paragraph 172 above, paragraph 38, the Court of Justice held that, in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, 'normal market conditions', which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available.

191 EDF claims that *Chronopost and Others* v *Ufex and Others*, cited in paragraph 172 above, was concerned with comparing costs, whereas this case is concerned with comparing the market conditions in which a capital increase occurs. However, normal market conditions, according to the actual wording of *Chronopost and Others*, should be assessed by reference to the objective and verifiable elements which are available. It follows, according to EDF, that the Commission cannot, without erring in law and without distorting the concept of 'State aid', 'dodge' that analysis on the purely formal pretext of the means used by the State to make that capital increase.

192 Finally, EDF claims, in essence, that the private investor test would have been satisfied if the Commission had applied it.

193 In support of its line of argument in that regard, as set out in the application and the reply, EDF produced, when submitting its observations on the statement in intervention of the French Republic, 'the Oxera Report', which provided the General Court with supplementary analyses confirming that the private investor test would have been satisfied if it had been applied by the Commission.

194 The Commission maintains that it was not possible to apply the private investor test in this case.

195 The Commission takes the view that by adopting the provisions of Law No 97-1026, the State acted as a regulatory authority in order to exempt EDF from payment of part of the tax owed. The State was not acting as a shareholder of EDF seeking to obtain medium- or long-term profits from the undertaking.

196 The Commission argues that, if it were to follow the logic supported by EDF, the State would, as a tax authority, be permitted to introduce without restriction any form of 'discrimination' by means of the fiscal powers available to it, by contrast with private investors. Indeed, the latter are able to raise capital with a view to making investments only after paying their tax obligations.

197 The Commission also submits, in essence, that allowing the State to rely on the application of the private investor test, where it is acting as a regulator using its fiscal powers, would lead to a 'dangerous situation', since the State could consequently claim that all tax exemptions granted to economically sound public undertakings should fall outside the State aid rules in so far as they satisfy the private investor test. Such a situation would give rise to 'discrimination against undertakings which do not have the opportunity to have the State as a shareholder and/or investor'.

198 According to the Commission, the reasoning adopted by EDF is therefore contrary to Article 87 EC, since it renders that provision completely ineffective, as is clear from recital 97 in the preamble to the contested decision.

199 The Commission takes the view that the very basis of the applicant's entire line of argument is vitiated by an erroneous premiss, which consists in considering that it is possible to apply the private investor test to the entire operation, that is to say not only to the alleged capital injection, but also to the preceding stage, when the State acted as a fiscal authority in order to introduce the 'tax exemption' which constitutes the contested measure.

200 According to the Commission, if the actions of the French State were to be compared to those of a private investor, the irregular creation of provisions by EDF in respect of grantor rights should have been subject to corporation tax before being injected into EDF's capital. Only such taxation of the provisions could have placed the French State 'on an equal footing' with a private investor and would have made it possible for the Commission to consider comparing the actions of the French State with those of a private operator. In so far as that premiss was absent, the Commission could not carry out such a comparison.

201 The Commission claims that, if the French State were actually placed 'on an equal footing' with a private investor, it would not be possible to dispute that a 'tax gift' from the 'State *qua* "regulator"' does not have the same cost as an investment by the 'State *qua* "investor"'. In the first case, in order to benefit an undertaking in the amount of EUR 100, it is sufficient for the State to waive taxes for the same amount. On the other hand, for an undertaking to benefit in the same amount from a private investor, it would be necessary, in particular, to add the tax burden incurred on that amount in order for the undertaking to be able to dispose of it freely. Thus, in this case, that amount of EUR 100 should have been subject to corporation tax at a rate of 41,66%. It follows that in order to provide EUR 100, a private investor would actually have had to raise EUR 141,66.

202 In that context, the Commission submits that the examples presented by EDF relating to the waiver of a parent undertaking's claim against its subsidiary do not fall within the scope of public authority powers, but concern instruments which may be used by a private investor on the market; they are actually commercial rather than fiscal claims. Accordingly, this is not a merely formal distinction, in so far as the expense for the State would necessarily have a lower cost than that for a private investor.

203 The Commission points out that, according to the principle of neutrality of the system of ownership of undertakings provided for by Article 295 EC, its actions may neither favour nor disadvantage public authorities where they contribute capital to undertakings. However, in the Commission's view, neither it nor to its knowledge the Court of Justice or the General Court has ever accepted that a State *qua* shareholder, in making use of its fiscal powers falling outside the scope of ordinary law, may be treated in the same way as a private investor.

204 The Commission points out, in essence, that the unacceptability of 'tax gifts' is not dictated by a merely formal concern, but is justified on account of the fact that, in law, aid may take the form of a direct subsidy as well as the waiver of a claim. The automatic prohibition of such 'tax gifts' is simply the application of the aforementioned principle of neutrality, accepted by the Court of Justice, according to which 'a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority' (*Germany* v *Commission*, cited in paragraph 185 above, paragraph 134).

205 The Commission points out that, in that case, the issue was whether the 'State *qua* "investor"' could effectively rely on the application of the private investor test in order to avoid the application of Article 87(1) EC. To do so, it would be necessary to show that the State acted under conditions which would be regarded as normal for a private investor. However, according to the Commission, the Court of Justice points out in that judgment that the exercise of a public authority's prerogative is not a normal market condition.

206 The Commission also notes that, in a memorandum from the Directorate-General for Taxation sent on 9 April 2002, the latter took the view 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'. It clearly follows that it was a 'tax gift' and not an investment.

207 The Commission argues that, contrary to what is claimed by EDF, the contested operation bears no relation to the waiver of a claim by its incorporation into the undertaking's capital and that EDF wrongly tries to reduce the discussion to a merely formal approach by the Commission without any analysis of the economic rationale for the operation.

208 Having recalled that the reasoning which underlies the application of the private investor test is to avoid any 'discrimination' between public and private undertakings with a view to the proper application of the provisions of the EC Treaty relating to State aid, the Commission points out that, according to settled case-law, 'the test based on the conduct of a private investor operating in normal market-economy conditions ensues from the principle that the public and private sectors are to be treated equally, pursuant to which capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid' (*France* v *Commission*, cited in paragraph 183 above, paragraph 69, and Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 80).

209 Accordingly, in the context of applying the private investor test, although there was no doubt that the State could make capital available to an undertaking, such an operation may avoid classification as State aid only on condition that the circumstances in which it takes place 'correspond to normal market conditions'.

210 According to the Commission, it clearly follows from that case-law that the private investor test is applicable only in cases where the circumstances in which the State acts are comparable to those which correspond to normal market conditions. It also follows that the means used by the State form an integral part of those circumstances, in particular where the nature and the characteristics of the means used are not available to a private investor acting under normal market conditions.

211 Moreover, a tax exemption produces, by its very nature, effects which, in any event, cannot be disassociated from the role of the State as the sole holder of the sovereign power to impose and redistribute tax. Since that power is the 'most absolute expression of public authority', there is no equivalent to the exercise of it — whether taxation or exemption — which is available to a private investor.

212 With regard to *Chronopost and Others* v *Ufex and Others*, cited in paragraph 172 above, the Commission points out that it seems contradictory, on the one hand, to argue that it should apply the private investor test in this case and, on the other hand, to refer to that judgment in which the Court of Justice, having no possible means of comparison, adopted reasoning diametrically opposed to that of normal market conditions. The Commission notes that only the State may at the same time act as a fiscal authority and as an investor.

213 Finally, and in the alternative, the Commission submits, essentially, that in any event the contested measure would not have satisfied the private investor test if it had applied it.

214 In answer to the written questions raised by the General Court, the Commission confirms, in essence, first, that it considers that it was not required to apply the private investor test and, secondly, that it was appropriate to disregard 'the Oxera Report', on account, in particular, of the late submission of that report by EDF.

215 Moreover, at the hearing, the Commission put forward several further arguments.

216 First, it submitted that no private investor would have been able to raise such capital at the same cost. Therefore there is, in any event, no reference private investor.

217 Next, in response to the arguments of EDF and of the French Republic that the cost of applying each of the two solutions which the State could adopt (see paragraph 164 above) was identical, the Commission argued that the cost would not be the same under the 'long plan'. Indeed, according to the Commission, under the 'long plan', EDF would have first paid the taxes owed and the assessment of its financial value would have been different when applying the private investor test. Application of that 'long plan' would therefore — probably — have given different results if the private investor test had been applied.

218 Finally, at the hearing the Commission also submitted that it would have been necessary for the amount of the taxation to be paid to the State — if only for a brief period — before being passed on to EDF and for the tax which was owed to be posted in EDF's balance sheet.

219 The Commission also points out that, even if the General Court accepts the argument that the contested measure constitutes an investment in the form of a capital injection which should have been examined by applying the private investor test, which it disputes, the General Court should therefore annul the contested decision on the ground of a manifest error of assessment but without analysing whether or not the conduct of the French State satisfies that test, since that second stage of the examination of the contested measure must be carried out in the decision which the Commission would be required to take following any judgment annulling the contested decision. The General Court cannot in fact examine that question, since such an analysis falls outside the jurisdiction of the Community judicature.

220 At the hearing, Iberdrola, referring in particular to the Opinion of Advocate General Léger in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, I-7788, submitted that the prudent private investor in a market economy test could not, in principle, be applied where a State grants aid using the prerogatives of a public authority. According to the intervener, the purpose of applying that test is to ensure equal treatment between public and private undertakings. However, the application of that test to the conversion of a tax debt into a capital injection would have the effect of conferring on public undertakings an advantage which could never be enjoyed by private undertakings. The result would be a failure to accord equal treatment, solely to the benefit of public undertakings, linked to the form of the aid granted. The intervener takes the view that that formal aid is therefore decisive and that, in such cases, the private investor test can never be applied.

— Findings of the Court

221 It must be borne in mind that the aim of Article 87 EC is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products. The notion of 'aid' can thus encompass not only positive benefits such as subsidies, loans or direct investment in the capital of enterprises, but also interventions which in various forms mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect (see Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 35, and the case-law cited). When assessing a measure in the light of Article 87 EC, account must be taken of all the relevant features and their context (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited in paragraph 101 above, paragraph 270).

222 It is settled case-law that investment by the public authorities in the capital of an undertaking, in whatever form, may constitute State aid where all the conditions set out in Article 87(1) EC are fulfilled (see *Italy and SIM 2 Multimedia* v *Commission*, cited in paragraph 221 above, paragraph 36, and the case-law cited). However, pursuant to

the principle that the public and private sectors are to be treated equally, this cannot be the case where capital is placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions (see *Italy and SIM 2 Multimedia* v *Commission*, paragraph 37, and the case-law cited).

223 It is apparent from the case-law that in the field of State aid the Court of Justice distinguishes between two categories of situation: those where the intervention of the State is of an economic nature and those where it forms part of the exercise of public powers (see, to that effect, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 22, and *Germany* v *Commission*, cited in paragraph 185 above, paragraph 134; Opinion of Advocate General Léger in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 220 above, paragraph 20).

224 The private operator criterion applies only to the first category of situations which covers cases in which the public authorities contribute capital to an undertaking (see, to that effect, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 14; *Tubemeuse*, cited in paragraph 94 above, paragraph 26, and Case C-305/89 *Italy* v *Commission*, '*Alfa Romeo*', [1991] ECR I-1603, paragraph 19), grant a loan to certain undertakings (see, to that effect, Case C-301/87 *France* v *Commission*, '*Boussac*', [1990] ECR I-307, paragraphs 38 to 41, and Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraphs 8 and 51), provide a State guarantee (see, to that effect, Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraphs 67 and 68), sell goods or services on the market (see, to that effect, Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 28 to 30; Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 10, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 59 to 62), or grant facilities for the payment of social security contributions (see, to that effect, Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 46) or for the repayment of wage costs. In such situations the private operator criterion is material because the conduct of the State is capable of being adopted, at least in principle, by a private operator acting with a view to profit (see, to that effect, the Opinion of Advocate General Léger in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 220 above, paragraph 20 et seq.).

225 By contrast, the criterion of the private operator is not material where the intervention by the State has no economic character. That is the case where the public authorities pay a subsidy directly to an undertaking, grant an exemption from tax (see, to that effect, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14; Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 16, and Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 25 to 28) or agree to a reduction in social security contributions (Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraphs 24 and 25, and Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 110).

226 In situations of this kind, the intervention by the State cannot be adopted by a private operator acting with a view to profit but falls within the exercise of public powers of the State, such as tax policy or social policy (see, to that effect, the Opinion of Advocate General Léger in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 220 above, paragraph 20 et seq.).

227 The same is likewise true both of the costs incurred by the State arising from redundancies, the payment of unemployment benefits and other social security benefits (see, to that effect, Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 119), and of aid for the restructuring of the industrial infrastructure, loans granted by the State on non-standard terms or the costs of reclaiming a site in order to create a technology park (see, to that effect, *Spain* v *Commission*, cited in paragraph 223 above, paragraph 22; *Germany* v *Commission*, cited in paragraph 185 above, paragraph 140, and Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraph 108).

228 Interventions by the State which are intended to honour its obligations as a public authority cannot be compared to those of a private investor in a market economy.

229 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 (see, to that effect, Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30).

230 Accordingly, in the case of an undertaking whose share capital is owned by the public authoritiesit must be considered whether, in similar circumstances, a private investor of a stature comparable to that of the bodies administering the public sector would have provided contributions of capital of the same size, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations (see, to that effect, *Belgium* v *Commission*, cited in paragraph 224 above, paragraph 14, and *Italy and SIM 2 Multimedia* v *Commission*, cited in paragraph 221 above, paragraph 38, and the case-law cited).

231 Finally, it must be pointed out that the fact that the actions of the State as shareholder are assessed by the yardstick of a prudent private investor, whereas the actions of any normal private investor are not, does not constitute a failure to treat the State and such a private investor equally, since the State as shareholder is not in the same situation as a private investor. Unlike a private investor, who can count only on his own resources in order to finance his investments, the State has access to financial resources flowing from the exercise of public power, in particular from taxation (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited in paragraph 101 above, paragraphs 271 and 272).

232 Consequently, the mere 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.

233 In the light of the foregoing, it is necessary to establish, taking into account the circumstances of each individual case, 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 which case, the actions of a State are not comparable with those of an economic operator or a private investor in a market economy.

234 Therefore, the view must be taken that, if the State's intervention, having regard to its nature and object and taking into account the objective pursued, is not an investment which may be made by a private investor, that intervention may constitute intervention by the State as a public authority, thus precluding application of the prudent private investor test.

235 By contrast, if the State's intervention, having regard to its nature and object and taking into account the objective pursued, is an investment comparable to that which a private investor would make, that intervention must be examined by applying the prudent private investor test. The purpose of that examination is to ascertain whether such an investor would, in similar circumstances and having regard to the foreseeability of obtaining a return, have provided contributions of capital of the same size, irrespective of the form taken by that State intervention and of the fact that the State has access to resources flowing from the exercise of public power, such as those from taxation, which could not be accessed by a private investor.

236 In other words, the measure must be examined not solely according to its form, but on the basis of its nature, its object and its objectives, which presupposes that all aspects of it are examined and that its context is taken into consideration.

237 Furthermore, it follows that the fact that the intervention by the State takes the form of legislation is not, in itself, sufficient to rule out the possibility that the intervention

by the State in the capital of an undertaking pursues an economic objective which could also be pursued by a private investor.

238 In this case, it is established that the French Republic was EDF's sole shareholder in 1997.

239 It should also be pointed out that, prior to the adoption of Law No 97-1026, EDF's balance sheet was presented as follows:

— the assets side included one item entitled 'Fixed assets operated under the concession' in the amount of FRF 285,7 billion, some FRF 90 billion of which related to the RAG;

— the liabilities side included, first, an item entitled 'Provisions', some FRF 38,5 billion of which related to the RAG, recording amounts provided for future renewal expenditure, and, secondly, an item entitled 'Value in kind of assets operated under concession' recording renewal costs actually incurred. That item — which reflected a debt owed by EDF to the State — stood, prior to the adoption of Law No 97-1026, at FRF 145,2 billion, FRF 18,3 billion of which related to the RAG.

240 It is common ground that, by Law No 97-1026, the French Republic restructured EDF's balance sheet and recapitalised the undertaking. As a result, following that recapitalisation, first, the assets constituting the RAG were reclassified, in the amount of FRF 90,325 billion, as 'own assets' of the undertaking. 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 being allocated to the reserves. These reclassifications were liable to taxation under Article 38(2) of the General Tax Code. Thirdly and finally, the 'grantor rights' — that is to say the 'value in kind of the assets under concession' — 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.

241 However, only the failure to tax the 'grantor rights' prior to the capital injection was regarded by the Commission as constituting State aid. Neither the fact that EDF had been deemed to have owned the RAG with retrospective effect since 1956, nor the reclassification of the unused provisions, from the point when they had become subject to tax, nor the capital injection in the amount of FRF 14,119 billion was regarded as State aid by the Commission.

242 It must be noted that all the parties agree that tax would have been payable on the amount of FRF 14,119 billion before it was recorded under the item entitled 'Capital injection'. Irrespective of whether that analysis is well founded, it must be pointed out that the tax provisions which it was necessary in principle to apply to the grantor rights are therefore not called into question by the parties.

243 Nevertheless, it must be pointed out that the purpose of Article 4 of Law No 97-1026 is to restructure EDF's balance sheet and to increase its own funds. Consequently, the provisions of that article are not tax provisions *per se*, but rather accounting provisions having tax implications, as is shown by the letter sent to EDF by the Minister for Economic Affairs, Finance and Industry, the State Secretary for the Budget and the State Secretary for Industry on 22 December 1997.

244 It must further be noted that the Commission examined only the tax implications of Article 4 of Law No 97-1026, and that it made clear that it was not incumbent on it to have regard either to the capital increase brought about by those legislative provisions

or to the explanations provided by the French Republic to justify the economic rationale for the operation taken as a whole.

245 The Commission justifies that approach by reference to the fiscal nature of the advantage which it identified and explains — as is clear both from the contested decision and from its pleadings as well as from its answers to the questions put by the General Court — that the private investor test could not be applied to a capital increase carried out by means of the waiver of a tax claim, since such a waiver stems from the exercise by the State of its regulatory powers or even of its prerogatives as a public authority.

246 It is therefore necessary to examine whether a Member State which is both the tax creditor of a public undertaking and its sole shareholder can reasonably rely on the application of the private investor test where it increases the capital of that undertaking by waiving that tax claim, or whether it is necessary to consider that, in the light of the fiscal nature of the claim and the fact that the State used its prerogatives as a public authority when waiving that claim, the Commission was entitled not to apply that test in connection with the capital increase at issue.

247 In that regard, it must be considered that, in the light of the objective of recapitalising EDF pursued by Law No 97-1026, the mere fact that the claim held by the French State against that undertaking is fiscal in nature and the sole fact that the French State used legislation do not allow the Commission to refuse to ascertain whether, in similar circumstances, a private investor could have been persuaded to inject the same amount of capital and, therefore, whether the capital was provided by the State in circumstances corresponding to normal market conditions.

248 It follows that the application of the private investor test cannot be dismissed solely on the ground that EDF's capital increase stemmed from the waiver by the State of a tax claim which it held against that undertaking.

249 In such circumstances, it was for the Commission to determine whether a private investor would have invested a comparable amount in similar circumstances, irrespective of the form of the intervention by the State to increase EDF's capital and the possible use of tax resources to that end, with a view to ascertaining the economic rationale for that investment and to comparing it to the actions such an investor would have taken with respect to the same undertaking in the same circumstances.

250 Such an obligation on the part of the Commission to determine whether the capital was provided by the State in circumstances corresponding to normal market conditions actually exists irrespective of the form in which the capital was provided by the State, regardless of whether it is similar to that which a private investor could have used.

251 The assessment of normal market conditions is based on a comparative economic analysis of the investment made by the State. In that connection, it is necessary to analyse whether a private investor would have invested a similar amount if the financial prospects and prospects of profitability were comparable. The form taken by that investment — a direct capital injection, by means of funds deriving from taxes or State borrowing, or the conversion of debts into capital — is irrelevant. By contrast, it cannot be ruled out, as the Commission submitted at the hearing, that the form taken by the 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 in comparable conditions. However, this presupposes an economic analysis in the context of the application of the private investor test, which the Commission deliberately did not apply in this case.

252 Such an analysis was justified, in view of the facts in this case, since, first, as EDF and the French Republic have submitted and the Commission has not disputed, a capital increase may result from the incorporation of a claim held by a private shareholder against the undertaking in question, which French law allows in this case, and, secondly, it was possible to regard the use of legislation to that end as the necessary consequence of the fact that the rules governing EDF's capital were themselves laid

down by legislation, a fact which the Commission has not disputed. That latter fact, which characterises the nature of the contested measure, was incapable of calling into question the application of the private investor test to this case.

253 In view of the need to assess the contested measure in its context, the Commission could not therefore examine merely the tax implications of the provisions adopted by the French Republic without at the same time examining — and possibly rejecting after that examination — the merits of the line of argument put forward by the French Republic that the waiver of the tax claim as part of the restructuring of EDF's balance sheet and the increase in EDF's capital, which was the purpose of Article 4 of Law No 97-1026, could be regarded as an operation satisfying the private investor test.

254 In that regard, first, the Commission's argument that, having regard to the case-law of the Court in Case C-334/99 *Germany* v *Commission*, cited in paragraph 185 above, the private investor test could not be applied, since in this case the French State had exercised its prerogatives as a public authority by using legislation to waive the payment of a tax claim and that it had therefore not acted as a private shareholder, cannot be accepted.

255 The case-law does, it is true, show that, for the purposes of the application of the private investor test, a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority (*Germany* v *Commission*, cited in paragraph 185 above, paragraph 134).

256 In particular, it follows from the judgments in which that test has been applied (*Spain* v *Commission*, cited in paragraph 223 above; *Germany* v *Commission*, cited in paragraph 185 above, and *Technische Glaswerke Ilmenau* v *Commission*, cited in paragraph 227 above) that, in the cases which gave rise to those judgments, the fact that the State's obligations in its capacity as a public authority were at issue precluded the application of the private investor test in relation to the charges resulting therefrom.

Those charges related to the costs arising from redundancies, to the payment of unemployment benefits, to aid for the restructuring of the industrial infrastructure, to loans granted by the State on non-standard terms and, lastly, to the reclaiming of a site in order to create a technology park. Therefore, they could not be taken into account when assessing the cost of liquidating an undertaking as opposed to the cost of purchasing that undertaking, since they stem from obligations for which a private shareholder would not be responsible.

257 However, in this case, unlike the situations described in paragraph 256 above, and as the Commission acknowledged at the hearing, there was strictly speaking no obligation on the State as a public authority within the meaning of that case-law, and it was not a case of assessing certain costs to the State stemming from its obligations as a public authority.

258 Where, as in this case, the State, the sole shareholder of an undertaking, injects capital into that undertaking with a view, inter alia, to correcting the imbalances affecting that undertaking's balance sheet, the inevitable conclusion is that it is acting as a private investor could act and that it cannot be ruled out a priori that it may be acting with an aim comparable to that of such an investor. It is with a view to establishing whether that was indeed the case, which would mean that the classification of the contested measure as aid could be ruled out, that it is necessary to determine whether or not the private investor test is satisfied, which the Commission refused to do.

259 In that regard, it must be borne in mind that, first, the purpose of Article 4 of Law No 97-1026 was to restructure the balance sheet and to increase the own capital of EDF, which tends to show that the State was pursuing an investment objective comparable to that of a private investor, and that, secondly, the fact that the capital increase at issue was partly the result of the waiver of a tax claim and that it therefore had tax implications did not in itself justify the non-application of the private investor test. In those circumstances, and having regard to the fact that legislation was required to

make accounting adjustments resulting in changes to the undertaking's own capital, it cannot be considered in this case that the form of the State's intervention precluded from the outset the application of the private investor test.

260 Secondly, it is also necessary to reject the Commission's line of 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 such a claim against an undertaking, but only a civil or commercial claim, and that there would be a failure to treat the State and such an investor equally if a comparison of those two situations were to be carried out. To uphold such a line of argument would be tantamount to holding that it is only if the State held a civil or commercial claim against an undertaking that it could carry out such an operation in conditions comparable to a private investor.

261 The very 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 a private investor, the latter would, in the same circumstances, have taken an investment decision comparable to that taken by the State. The nature of the claim converted into capital and, therefore, the fact that a private investor cannot hold a tax claim are therefore irrelevant to the issue of whether or not the private investor test must be applied.

262 That also leads to a rejection of the Commission's line of argument that the operation amounts to a 'tax gift' made to EDF and cannot be regarded as an investment. Like any creditor who is the owner of a company, the State can waive a claim by converting that claim into capital of an equivalent amount. That operation, whereby the owner of a company increases the company's capital by waiving a claim which it holds against that company, constitutes a form of set-off which a prudent private investor is also capable of effecting under normal market conditions.

263 Therefore, in the light of all the facts of this case, the Commission was not justified in rejecting the French Republic's argument and the application of the private investor test on the basis of its line of argument referred to in paragraph 262 above.

264 Thirdly, with regard to the Commission's line of argument that a private investor, for his part, would have had to pay tax in a comparable situation, first, it must be noted that the contested decision merely states that '[t]he advantage is necessarily selective, since the non-payment of corporation tax on some of the accounting provisions constitutes an exception to the tax treatment normally applicable to such a transaction'.

265 Secondly, it must be pointed out that, in its pleadings and in the answers it gave to the questions put to it by the General Court, the Commission stated that a private investor would have had to pay the tax beforehand if it had intended to inject capital through the incorporation of a claim which it held against an undertaking of which it was a shareholder. In the Commission's view, the result of this would necessarily have been a higher cost for a private investor since, in order to provide EUR 100, a private investor would actually have had to raise EUR 141,66. The Commission takes the view that only the prior payment of that tax would have allowed it to apply the private investor test when examining the capital injection of FRF 5,6 billion.

266 Although it should be pointed out that both the French Republic and EDF acknowledged that, in this case, taxes should have been owed by EDF, it must be noted that they dispute the Commission's interpretation of French tax law and of Article 38(2) of the General Tax Code, in particular as regards the tax implications of a capital contribution provided through the incorporation of a claim by the shareholder of a company.

267 In their answers and their oral submissions, the French Republic and EDF submitted that, under Article 38(2) of the General Tax Code, the variation in net worth resulting

from a capital increase through the incorporation of a claim held against an undertaking by a shareholder of that undertaking is not to be taken into account when calculating corporation tax and that, consequently, under that provision, that conversion of the claim into capital does not give rise to taxation having as its basis of assessment the amount of that claim.

268 In the first place, it must be borne in mind that, in paragraph 51 of the decision initiating the procedure, the Commission itself considered that 'since … the capital increases are not regarded as constituting an increase in the net assets of the company for the purposes of calculating corporation tax, [the] reclassification [of the grantor rights as a capital injection] consolidated the tax relief which [EDF received on those provisions over the years 1987 to 1996]'.

269 It therefore appears that, in that paragraph of the decision initiating the procedure, the Commission concurred, albeit in general terms, with the analysis of the French Republic and EDF on the tax implications of a variation in net worth resulting from a capital increase through the incorporation of a claim. From that perspective, the cost to a private investor in a market economy and the cost to the State appear to be identical.

270 In the second place, the Commission's line of argument leads in reality to an examination of the overall cost borne by a private investor in order to invest FRF 14,119 billion — the amount corresponding to the grantor rights — whereas the reclassification of the grantor rights, in the amount of FRF 14,119 billion, was not regarded as constituting aid by the Commission — nor was the fact that EDF was deemed to have owned the RAG, which originally belonged to the State —, since only the waiver of the right to levy tax on those rights was taken into consideration in the contested decision. Moreover, the Commission's line of argument, which leads in reality to the sum of FRF 14,119 billion being included in the analysis, conflicts with the advantage which it identified in the contested decision. That line of argument must therefore be rejected.

271 In the third place, it must be noted that the Commission's line of argument is, in any event, inconsistent. The Commission acknowledges that it would have examined the additional capital injection of FRF 5,6 billion if EDF had previously paid tax on that amount and if the French Republic had then returned that same amount to EDF, since the respective cost to the State and to a private investor could then — and only then — have been compared.

272 In such circumstances, the cost to the State and the amount received by EDF would have actually been the same as the amount which it received under the solution chosen by the French Republic in Law No 97-1026. Indeed, by that law, the State made a capital injection of FRF 14,119 billion. If the Commission's reasoning is adopted, the cost of that operation would be only FRF 14,119 billion, whereas if EDF had paid the tax, the cost to the State would have been different and the private investor test could have been applied. However, the fact remains that if the State had injected FRF 14,119 billion into the capital of EDF and then levied tax amounting to FRF 5,6 billion before returning the latter amount to EDF, the overall cost to the State would still have been FRF 14,119 billion — the amount of tax collected being cancelled out by the reimbursement of that same amount to EDF. As for EDF, it would have received a total of FRF 14,119 billion, that is to say an amount identical to that received under Law No 97-1026.

273 In the fourth place, even if the Commission's interpretation of French tax law — and, in particular, the interpretation of Article 38(2) of the General Tax Code — were correct and the French authorities' interpretation of that same law erroneous, it would be necessary to take the view that the cost of a capital injection by means of the incorporation of a claim by a private investor, if he were indeed required to pay tax in such circumstances, would, for him, be FRF 5,6 billion.

274 However, it must be noted that, by waiving the right to levy tax amounting to FRF 5,6 billion, when reclassifying the grantor rights as a capital injection, the State would have incurred a cost which would clearly have also amounted to FRF 5,6 billion, since

the waiver of a tax claim is not without cost to the State, contrary to what the Commission claims. The resulting cost would therefore have been identical to that incurred by a private investor. Accordingly, the difference in cost alleged by the Commission does not seem to be established, and the same is true of the conclusions it draws therefrom regarding the application of the private investor test.

275 In addition, it must be pointed out that only by applying the private investor test is it possible to examine and, where appropriate, to establish the existence of any difference in cost.

276 In the fifth place, even if the cost of a recapitalisation operation in the amount of FRF 14,119 billion — which in the Commission's view does not constitute aid — were FRF 0 to the State and FRF 5,6 billion to a private investor, that difference in cost would not in any event prevent the application of the private investor test. In that case it would be for the Commission to determine, by applying that test, whether such a private investor would have borne a cost of FRF 5,6 billion in order to carry out such a recapitalisation operation, and it cannot be ruled out that, following that examination, the Commission would conclude that that would not be the case, but that presupposes that the Commission first conducts that analysis.

277 Lastly, in so far as, by that argument, the Commission is in fact attempting, on the one hand, to show that a different cost would have resulted for EDF, obliged to pay the tax in the one case and not the other, which is capable of affecting the value of the undertaking, and, on the other hand, in the event that the tax were paid, to rule out the possibility that a private investor would in fact have invested such an amount in the undertaking whereas the State merely waived its tax claim, it must be noted that that argument seeks to establish that the cost of the investment and any prospects of a return on it were different for the State and for a private investor. However, in order to take that evidence into account, it would be necessary to apply the private investor test, which the Commission refused to do.

278 Fourthly, it is necessary to reject the argument put forward by the Commission at the hearing that there would not, in any event, be any reference private investor capable of raising as much capital as the State since, first of all, the Commission has failed to establish that there is no reference private investor with whom to compare the public investor in this case. Furthermore, the absence of a reference private investor does not preclude the need to examine the operation in the light of 'normal market conditions', which are necessarily hypothetical and must be assessed by reference to the objective and verifiable elements which are available (see, to that effect, *Chronopost and Others* v *Ufex and Others*, cited in paragraph 172 above, paragraph 38).

279 Fifthly, it must be noted that the Commission has failed to provide any evidence in support of its line of argument — put forward for the first time at the hearing and disputed by the French Republic — that a capital increase could not, under French law, be effected by the incorporation of a tax claim. That line of argument therefore cannot be upheld.

280 Sixthly, the Commission's line of argument — likewise put forward for the first time at the hearing — that the tax should have been posted in the undertaking's balance sheet must be rejected on two grounds.

281 First, that line of argument seeks in reality to claim that the French Republic failed to fulfil its obligations under Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35). Even if it were possible to claim such a failure to fulfil obligations by the French Republic, the fact remains that that failure is unrelated to the line of argument put forward by the Commission in recitals 96 and 97 in the preamble to the contested decision and has no bearing on the issue of whether the private investor test should have been applied.

282 Secondly, the Commission has been unable to explain in which balance sheet the tax owed should have been posted. Indeed, before Law No 97-1026 was adopted and EDF was deemed to own the RAG, no tax was owed. Furthermore, since the French Republic waived the right to levy the tax, that tax was no longer owed and therefore could not be posted in the balance sheet as a debt owed by the undertaking.

283 Seventhly and lastly, with regard to the Commission's line of argument that accepting the application of the private investor test could have the effect of justifying any form of tax exemption implemented by the Member States, because they would always satisfy that test, first it must be pointed out that this is 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 is the sole shareholder. Secondly, it is not possible to prejudge the outcome of the application of that test, in the absence of which it would be pointless or inappropriate. Thirdly, in any event, it cannot be ruled out that, in this case, the application of the private investor test might lead to a finding that the State's intervention did not correspond to conduct which a private investor could have adopted. The Commission's line of argument is therefore irrelevant.

284 In conclusion, none of the arguments put forward by the Commission, which is supported by Iberdrola, can be upheld and it must be considered that, by refusing to examine the contested measure in its context and to apply the private investor test, the Commission erred in law and infringed Article 87 EC.

285 Since the General Court has held that the Commission wrongly refused to apply that test, it is for the Commission to take the necessary measures to comply with the judgment. Where an action for annulment is brought before it, the Community judicature does not have jurisdiction in matters of State aid to reverse decisions the

legality of which it reviews and, in that case, to carry out itself the analysis involved in applying the private investor test. If it considers it to be justified, it is therefore for the Commission to adopt a new decision in compliance with the considerations set out in paragraphs 220 to 253 above.

286 In the light of the foregoing considerations, Articles 3 and 4 of the contested decision must be annulled on the ground of infringement of Article 87 EC, and it is not necessary to examine the other pleas and parts of pleas in law raised by the applicant or the applications for measures of organisation of procedure concerning the 'Oxera Report'.

Costs

287 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear the costs incurred by the applicant, in accordance with the form of order sought by the latter.

288 Under the first subparagraph of Article 87(4), Member States which intervene in proceedings are to bear their own costs. It therefore follows that the French Republic must bear its own costs.

289 Under the third subparagraph of Article 87(4), the General Court may order an intervener to bear its own costs. In this case, Iberdrola, which has intervened in support of the Commission, must bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls Articles 3 and 4 of the Commission Decision on aid measures in favour of EDF and the electricity and gas industries (C 68/2002, N 504/2003 and C 25/2003) adopted on 16 December 2003;**

2. **Orders the European Commission to bear its own costs and those incurred by Électricité de France (EDF);**

3. **Orders the French Republic to bear its own costs;**

4. **Orders Iberdrola SA to bear its own costs.**

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 15 December 2009.

[Signatures]

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