



Reports of Cases

Case C-124/10 P

European Commission
v
Électricité de France (EDF)

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

Summary of the Judgment

1. *State aid — Concept — Assessment according to the private investor test — State acting as shareholder of an undertaking — State acting as a public authority — Distinction in the light of the application of the private investor test*

(Art. 87(1) EC)

2. *State aid — Concept — Assessment according to the private investor test — Assessment in the light of all the relevant evidence of the disputed operation and its context — Member State’s obligation to provide objective and verifiable evidence to show the economic nature of its activity*

(Art. 87(1) EC)

3. *State aid — Concept — Awarding Member State which is the tax creditor and sole shareholder of a public undertaking benefiting from a capital increase by waiver of a tax claim — Applicability of the private investor test*

(Art. 87(1) EC)

4. *State aid — Concept — Assessment according to the private investor test — Applicability of the private investor test to tax measures*

(Art. 87(1) EC)

1. The conditions which a measure must meet in order to be treated as aid for the purposes of Article 87 EC are not met if the recipient public undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which is made available to it through State resources. In the case of public undertakings, that assessment is made by applying, in principle, the private investor test.

Concerning the situation in which the State, on the one hand, is shareholder of an undertaking and, on the other, acts as a public authority, in order to assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder — to the exclusion of those linked to its situation as a public authority — are to be taken into account.

The roles of the State as shareholder of an undertaking, on the one hand, and of the State acting as a public authority, on the other, must be distinguished. Consequently, for the private investor test to be applicable, it must be in its capacity as shareholder and not in its capacity as public authority, that the Member State concerned confers an economic advantage on an undertaking belonging to it.

In that context, the private investor test is not an exception which applies only if a Member State so requests, in situations characterised by all the constituent elements of State aid incompatible with the common market, as laid down in Article 87(1) EC. Where it is applicable, that test is among the factors which the Commission is required to take into account for the purposes of establishing the existence of such aid. Consequently, where it appears that the private investor test could be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that test are met, and it cannot refuse to examine that information unless the evidence produced has been established after the adoption of the decision to make the investment in question.

(see paras 78-81, 103, 104)

2. In a situation in which a Member State is shareholder of an undertaking and relies on the private investor test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as shareholder. That evidence must show clearly that, before or at the same time as conferring the economic advantage, the Member State concerned took the decision to make an investment, by means of the measure actually implemented, in the public undertaking. In that regard, it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances of the case, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine the future profitability of such an investment.

By contrast, for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen. If the Member State concerned provides the Commission with the requisite evidence, it is for the Commission to carry out a global assessment, taking into account — in addition to the evidence provided by that Member State — all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority of that Member State. In particular, the nature and subject matter of that measure are relevant in that regard, as is its context, the objective pursued and the rules to which the measure is subject.

(see paras 82-86)

3. Under Article 87(1) EC, any aid granted through State resources — in any form whatsoever — which, in terms of its effects, distorts or threatens to distort competition is incompatible with the common market in so far as it affects trade between Member States. Moreover, the private investor test is applied in order to determine whether, because of its effects, the economic advantage granted, in whatever form, through State resources to a public undertaking distorts or threatens to distort competition and affects trade between Member States.

The intention underlying Article 87(1) EC and the private investor test is thus to prevent the recipient public undertaking from being placed, by means of State resources, in a more favourable position than that of its competitors. However, the financial situation of the recipient public undertaking depends not on the means used to place it at an advantage, however that may have been effected, but on the amount that the undertaking ultimately receives.

The General Court may, therefore, without erring in law, focus its analysis of the applicability of the private investor test not on the fiscal nature of the means employed by the Member State concerned, but on the improvement in the undertaking's financial situation and on the effects of the measure in question on competition.

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

(see paras 88-92)

4. The private investor test may be applicable even where fiscal means have been employed. In that regard, in a situation where a private investor would not have been able in comparable circumstances to make an investment such as that made by the State, since it would have had to pay the tax and since only that State, as tax authority, could still have had at its disposal sums corresponding to that tax, it should be noted, first, that in respect of the accounting transaction in question, it is the private undertaking in the undertaking's situation which would have had to pay the tax, not its shareholder.

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

Secondly, the possibility that there might be a difference between the cost to the private investor and the cost to the State as investor does not preclude application of the private investor test. Rather, that test makes it possible to address precisely that point, that is to say, to establish, *inter alia*, that such a difference exists and to take it into account when assessing whether the conditions laid down by that test are met.

(see paras 94-96, 98)