Reports of Cases

ORDER OF THE VICE-PRESIDENT OF THE COURT

7 March 2013 *

(Appeal — Application for interim measures — Concentrations — European electricity market — Acquisition of control of Segebel SA by EDF — Decision declaring the concentration compatible with the common market, subject to compliance with the commitments given by EDF — Refusal by the Commission to grant EDF postponement of the deadline for compliance with some of those commitments — Concepts of urgency and of serious and irreparable harm)

In Case C-551/12 P(R),

APPEAL under Article 57, second paragraph, of the Statute of the Court of Justice of the European Union, brought on 30 November 2012,

Électricité de France SA (EDF), established in Paris (France), represented by A. Creus Carreras and A. Valiente Martin, abogados,

appellant,

the other party to the proceedings being:

European Commission, represented by C. Giolito and S. Noë, acting as Agents,

defendant at first instance,

THE VICE-PRESIDENT OF THE COURT,

after hearing the First Advocate General, N. Jääskinen,

makes the following

Order

1 By its appeal, Électricité de France SA (EDF) ('EDF') seeks to have set aside the order of the President of the General Court of the European Union of 11 October 2012 in Case T-389/12 ('the order under appeal'). By that order the President of the General Court rejected EDF's application for interim measures in relation to Commission decision C(2012) 4617 final of 28 June 2012 ('the contested decision'), refusing to grant it a postponement of the deadline to fulfil some of its commitments, set out in Decision C(2009) 9059 of 12 November 2009, which authorises the concentration operation whereby Électricité de France was to acquire exclusive control of the assets of the Belgian undertaking Segebel (Case COMP/M.5549 – EDF/Segebel).

* Language of the case: English.

Legal context, background to the dispute and procedure before the President of the General Court

2 The legal context and facts of the dispute were set out in paragraphs 1 to 5 of the order under appeal as follows:

> ‘1 By Decision C(2009) 9059 of 12 November 2009, the Commission of the European Communities authorised, under Article 6(1)(b) and (2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [(‘the EC Regulation on concentrations’)] (OJ 2004 L 24, p. 1), the concentration operation whereby the applicant, Électricité de France (EDF), was to acquire exclusive control of the assets of the Belgian undertaking Segebel, on condition that the applicant fulfil two commitments proposed by it to the Commission in order to dispel doubts as to the compatibility of the concentration with the common market (Case COMP/M.5549 – EDF/Segebel).
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> 2 By the divestment in July 2011 of the Dils-Energie project relating to the development of a power plant, the applicant fulfilled its first commitment.
>
> 3 The second commitment provided that the applicant was required to divest another project relating to the development of a power plant, the Nest-Energie project, to a suitable purchaser, in the event that it did not take a final decision, by 30 June 2012, to itself invest in that project.
>
> 4 Relying on significant and permanent changes in the conditions on the electricity market in Belgium since the adoption of Clearance Decision C(2009) 9059, and which could not have been anticipated in 2009, the applicant contacted the Commission by letter of 14 May 2012, in which it claimed that it was impossible for it, or for any other market player, to take a final investment decision regarding the Nest-Energie project by the deadline fixed for 30 June 2012. The applicant therefore requested the Commission to grant it a postponement of that deadline until 31 December 2014.
>
> 5 By [the contested] decision, the Commission refused to grant the request for postponement, but granted the applicant an additional period of three and a half months, that is until 15 October 2012 …’

3 By application lodged at the Registry of the General Court on 5 September 2012, the appellant brought an application for annulment of the contested decision.

4 By separate documents, lodged at the Registry of the General Court on the same day, the appellant applied for the case to be decided under an expedited procedure, pursuant to Article 76a of the Rules of Procedure of the General Court, and for the grant of interim measures, claiming that the President of the General Court should:

— order the postponement of the deadline by which the applicant has to make a final investment decision or divest the Nest-Energie project, pending a decision by the General Court in the main proceedings;

— order the costs to be reserved.

5 In its written observations, the Commission contended that the President of the General Court should dismiss the application for interim measures.

The order under appeal

6 Having recalled, in paragraph 10 of the order under appeal, that the two conditions concerning, respectively, urgency and *fumus boni juris* (a prima facie case) are cumulative, the President of the General Court first examined, starting from paragraph 13 of the order, whether the urgency condition was satisfied.

7 In paragraph 14 of the order under appeal, the President of the General Court stated that, according to EDF, the urgency created by the contested decision was obvious by its very nature because that decision obliged it to dispose of certain assets in favour of a (potential) competitor and because, once the divestiture had taken place, it would not have been possible to go back to the previous situation. He added that, according to EDF's arguments, the harm thus caused was almost impossible to quantify, since EDF would have to bear it indefinitely and an immediate divestiture would imply a serious risk of sale at a loss.

8 Having recalled, in paragraph 15 of the order under appeal, that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable harm to the party requesting such measures, the President of the General Court stated, in paragraphs 16 to 18 of that order, that, where the harm relied upon is of a financial nature, the interim measures sought will be justified, according to well-established case-law, if it appears that, without such measures, the applicant would be in a position that could imperil its financial viability before final judgment is given in the main action, or that its market share would be substantially affected in the light, inter alia, of the size and turnover of its undertaking and the characteristics of the group to which it belongs. Therefore, the text of the application for interim measures must contain specific and precise particulars, substantiated by detailed documents which establish a faithful overall picture of the applicant's financial situation and which make it possible to determine the precise effects which would probably follow were the measures sought not granted.

9 In paragraphs 19 to 21 of the order under appeal, the President of the General Court held that the harm alleged in the present case had clearly to be categorised as harm of a purely financial nature, the appellant having merely expressed doubts as to its quantifiability. He then held that EDF had omitted to provide any information whatsoever on the size and turnover of its undertaking, thus failing to establish a faithful overall picture of its financial situation. In addition, the President of the General Court noted that EDF failed even to mention that it belongs to the EDF group or to provide any details concerning the EDF group's financial situation.

10 In paragraphs 22 to 24 of the order under appeal, the President of the General Court thus concluded that EDF had failed to establish that the alleged financial harm was sufficiently serious to justify the granting of the interim measures sought. He found that EDF had not, in particular, established that, in the absence of the interim measures sought, it would be in a position that could imperil its very existence or substantially affect its market share. Therefore, the President of the General Court considered that the alleged urgency had not been proved and that the financial harm alleged by the appellant did not justify the granting of the interim measures sought.

11 Finally, for the sake of completeness, the President of the General Court added, in paragraphs 25 and 26 of the order under appeal, that the alleged financial harm must have been less than the cost, estimated at EUR 800 million, of the investment required to set up the Nest-Energie project. Thus, in the light of the fact that, according to public sources, namely the 2011 report published by the EDF group on its website, the worldwide turnover of the group amounted in 2011 to more than EUR 65 billion, the President of the General Court ruled that it seemed inconceivable that the harm caused to the appellant, either by the disposal of the assets of the company charged with the development of the Nest-Energie project, or by the final decision to pursue itself the investment in that project, could be categorised as serious.

12 In paragraphs 27 and 28 of the order under appeal, the President of the General Court rejected EDF's application for interim measures on grounds of lack of urgency, without considering whether the alleged harm was irreparable.

Procedure before the Court and the forms of order sought by the parties

13 EDF claims that the Court should:

— set aside the order under appeal and grant the interim measures requested before the General Court in Case T-389/12 R, namely postpone the deadline by which EDF has to make a final investment decision or divest the Nest-Energie Project until the judgment of the General Court is given on the annulment action brought against the contested decision;

— in the alternative, set aside the order under appeal and refer the case back to the General Court;

— order the Commission to pay the costs; and

— hold a hearing in order to clarify the different issues of law involved.

14 In its observations lodged with the Registry of the Court on 21 December 2012, the Commission contends that the Court should dismiss the appeal or, in the alternative, reject the application for interim measures and order EDF to pay the costs.

15 On 28 January 2013, the parties made oral submissions and answered the questions put to them at the hearing requested by the appellant.

Consideration of the appeal

16 In support of its appeal, EDF relies on five grounds of appeal, alleging respectively:

— infringement of the right to an effective remedy;

— infringement of the right to a fair trial;

— infringement of the right to equality before the law;

— error of assessment of the legal concept of urgency;

— in the alternative, manifest error of appreciation of the relevant facts in the determination of the legal concept of urgency.

17 The examination should begin with the fourth ground of appeal, alleging an error of law with regard to the concept of urgency; this ground is divided into three branches.

18 First, EDF criticises the President of the General Court for considering that the conditions to be met for the grant of interim measures, more specifically those relating to a prima facie case and urgency, are completely distinct, whereas, in reality, they are interdependent, meaning that the prima facie case, which is very marked here, should have influenced the assessment of the urgency condition.

19 Second, the order under appeal is said to be vitiated by an error with regard to the concept of 'serious harm'. According to the case-law, serious harm is simply harm that is not insignificant. The analysis followed by the President of the General Court in the order under appeal is tantamount to holding,

wrongly, that harm caused to a large undertaking is never serious. EDF relies, in support of its arguments, on the order of the President of the Court in Case 3/75 R *Johnson & Firth Brown* v *Commission* [1975] ECR 1, by which the Court granted the applicant the interim measures sought, by suspending the obligation on the British Steel Corporation to resell certain assets. EDF also makes the point that, in the context of the case which led to the judgment of the General Court in Case T-77/02 *Schneider Electric* v *Commission* [2002] ECR II-4201, the Commission implicitly acknowledged the urgency of the situation in which the undertaking concerned was obliged to resell shares already acquired, reaching an amicable settlement with that undertaking which granted it an extension of the period within which to raise that income.

20 Third, it is argued that the President of the General Court erred in law by classifying the harm sustained by EDF as being 'purely financial'.

21 In that regard, to the extent that, by the first branch of its fourth ground of appeal, the appellant's argument is that the conditions to be met for the grant of interim measures are interdependent, meaning that the prima facie case, which is very marked in this instance, should have influenced the assessment of the urgency condition, it should be recalled that, according to the case-law and as the President of the General Court stated in paragraph 10 of the order under appeal, those conditions are cumulative, so that interim measures must be rejected if one of those conditions is not satisfied (orders of the President of the Court in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30; Case C-364/98 P(R) *Emesa Sugar* v *Commission* [1998] ECR I-8815, paragraph 47; and Case C-168/12 P(R) *Hassan* v *Council* [2012] ECR, paragraph 22).

22 In the context of that overall examination, the judge hearing the application for interim measures enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of European Union law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed (orders of the President of the Court in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 23, and in *Emesa Sugar* v *Commission*, paragraph 44).

23 Thus, it is not excluded that the judge hearing the application for interim measures may, where he considers it appropriate, take into consideration the relative strength of the pleas in law relied on in order to establish a prima facie case when assessing urgency and, where appropriate, when weighing up the interests involved (order in *Hassan* v *Council*, paragraph 24; see also, to that effect, order of the President of the Court in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 110).

24 However, while the relative strength of the prima facie case is not wholly without effect on the assessment of urgency, it remains true that, in accordance with Article 104(2) of the Rules of Procedure of the General Court, two separate conditions govern the obtaining of a suspension of operation of measures, and accordingly the appellant remains bound also to demonstrate the imminent threat of serious and irreparable harm (see orders of the President of the Court in Case C-404/10 P-R *Commission* v *Éditions Odile Jacob*, paragraph 27 and Case C-110/12 P(R) *Akhras* v *Council*, paragraph 26).

25 That being so, even if the President of the General Court had examined, or indeed accepted, the existence of a prima facie case, that would not have relieved him of the need to examine the urgency condition and could not, without more, have led him to grant the interim measures sought (order in *Hassan* v *Council*, paragraph 26).

26 It follows that paragraph 13 of the order under appeal, according to which it should first be examined whether the condition relating to urgency is satisfied, is not vitiated by any error of law. Therefore, the first branch of the fourth ground of appeal must be rejected.

27 By the second branch of the fourth ground of appeal, the appellant submits that the order under appeal is vitiated by an error of law concerning the notion of 'serious harm'. It claims, in particular, that the analysis followed by the President of the General Court in that order is tantamount to holding, wrongly, that harm caused to a large undertaking is never serious.

28 In that regard, it should be recalled that the President of the General Court first set out, in paragraphs 16 to 19 of the order under appeal, the premise that an applicant must, in order to establish the serious and irreparable character of financial harm which it may suffer, provide in the text of the application for interim measures specific and precise particulars, substantiated by detailed documents, which establish a faithful overall picture of the applicant's financial situation and which make it possible to determine the precise effects which would probably follow were the measures sought not to be granted.

29 Second, in paragraphs 20 and 21 of that order, the President of the General Court held that the appellant had omitted to provide, in the application for interim measures, any information whatsoever on the size and turnover of its undertaking. Finally, it stated that the appellant had not even mentioned that it belongs to the EDF group and did not provide any details concerning the EDF group's financial situation. He concluded, in paragraph 22 of the order, that the appellant had not alleged financial harm that was sufficiently serious to justify the granting of the interim measures sought and, that being so, found in paragraph 27 of the same order that it was not necessary to examine whether that harm was irreparable.

30 That reasoning is vitiated by an error of law concerning the concept of 'serious harm'.

31 First, considering that he was not in a position to assess the seriousness of the financial harm alleged by the appellant in its application for interim measures, in the absence of information capable of establishing a faithful overall picture of the appellant's financial situation, the President of the General Court bases his reasoning on a conception of seriousness that is purely comparative. That reasoning means that it is always essential to be able to compare the amount of any financial harm with the size of the undertaking which would sustain that harm in the absence of the adoption of the interim measures sought. However, that is not the case with regard to an application such as that made by the appellant in the present case which is based not on its financial situation but essentially on the obligation to make a commercial choice within a period alleged to be disadvantageous.

32 Admittedly, the size of the undertaking may have an influence on the assessment of the seriousness of the financial harm alleged, since that harm will be all the more serious where it is significant compared to the undertaking's size and correspondingly less serious if the contrary applies. Thus, in certain circumstances, the arguments concerning the seriousness of the harm alleged may be rejected by simply comparing it to the turnover of the undertaking which may suffer that harm (see, to that effect, orders of the President of the Court in Case 20/81 R *Arbed and Others* v *Commission* [1981] ECR 721, paragraph 14, and in Cases C-51/90 R and C-59/90 R *Comos-Tank and Others* v *Commission* [1990] ECR I-2167, paragraphs 25 and 26).

33 However, it cannot be excluded that financial harm which is objectively significant and which allegedly results from the obligation to make a final commercial choice of some magnitude within a disadvantageous time-scale, could be considered as 'serious', or even that the seriousness of such harm could be considered as obvious, even in the absence of information concerning the size of the undertaking concerned. Thus, the fact that the appellant failed to provide, in the application for interim measures, information concerning the size of the undertaking to which it belongs is not in itself sufficient to justify rejection of that application on the ground that the appellant failed to establish the seriousness of the alleged harm.

34 Second, to the extent that the order under appeal relies, in paragraph 22, on the fact that the appellant did not, inter alia, establish that, in conformity with the requirements laid down the case-law cited in paragraph 16 of that order, it would be in a position, in the absence of the interim measures requested, that could imperil its very existence or substantially affect its market share, those requirements relate, by their very nature, to the concept of the irreparable nature of the alleged harm rather than to the seriousness thereof. Given that the order under appeal is based exclusively on the fact that the existence of serious harm has not been established, without any examination of the irreparable nature of that harm having been carried out, those requirements are not relevant to the assessment of whether the reasoning followed in that order is well-founded.

35 Since the second branch of the fourth ground of appeal is well founded, the order under appeal must be set aside in so far as the President of the General Court erred in law with regard to the concept of 'serious harm'. Therefore, it is not necessary to examine the third branch of the fourth plea in law, nor the first, second, third or fifth pleas in law.

36 Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

37 The abovementioned provision also refers to appeals brought under the second paragraph of Article 57 of the Statute of the Court (see orders of the President of the Court in Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 45, and in Case C-644/11 P(R) *Qualitest FZE* v *Council* [2012] ECR, paragraph 59).

38 Since the state of the proceedings so permits, it is appropriate to adjudicate on EDF's application for interim measures.

Consideration of the application for interim measures

39 In accordance with Article 104(2) of the General Court's Rules of Procedure, an application for the adoption of interim measures 'shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for'. In addition, an application for interim measures must be sufficiently clear and precise in itself to enable the defendant to prepare its observations and the judge hearing the application to give a ruling, where necessary, without other supporting information, it being necessary for the essential facts and points of law on which the applicant relies to be set out in a coherent and comprehensible fashion in the actual application for interim measures (order of the President of the Court of 30 April 2010 in Case C-113/09 P(R) *Ziegler* v *Commission*, paragraph 13).

40 It is for the applicant to prove that it cannot wait until the conclusion of the proceedings on the substance without suffering serious and irreparable harm (see, to that effect, orders of the President of the Court in Case C-225/91 *Matra* v *Commission* [1991] ECR I-5823, paragraph 19 and *SCK and FNK* v *Commission*, paragraph 30). While the imminence of the harm does not have to be proved with absolute certainly, its occurrence must be foreseeable with a sufficient degree of probability (order in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, paragraphs 32 and 34 and the order of the President of the Court in Case C-335/99 P(R) *HFB and Others* v Commission [1999] ECR I-8705, paragraph 67).

41 In addition, when suspension of the operation of a European Union act is sought, the grant of the interim measures requested is justified only where the act at issue constitutes the decisive cause of the alleged serious and irreparable harm (orders in *Akhras* v *Council*, paragraph 44, and *Hassan* v *Council*, paragraph 28). Whilst, in the present case, the application for interim measures does not formally seek suspension of the operation of a measure, the interim measures sought resemble such a suspension

since the appellant seeks to obtain an additional period of more than two years in order to choose between the two options laid down in the commitments given by it with regard to the Nest-Energie project. Thus, such interim measures can be adopted only if the Commission's refusal to grant the extension sought by the appellant is considered to be the decisive cause of the alleged serious and irreparable harm.

42 In that regard, it should be stated, first, that the part of the application for interim measures concerning the alleged serious and irreparable harm that the appellant would suffer fails to present any estimate of the extent of the alleged harm and relates only to the consequences which, according to the appellant, will flow from the immediate disposal of the Nest-Energie project, to the exclusion of those which would flow, were that option chosen, from a decision to invest in that project, whereas, under the commitment in question, the appellant could choose between those two options. In addition, with regard to urgency, the appellant states in its application for interim measures that '[t]he urgency created by the Contested Decision imposing a divestiture process to be initiated by October 16, 2012 is obvious by its very nature, as it involves the disposal of some assets by a company, EDF, in favour of a (potential) competitor, a suitable acquirer.'

43 However, it may be deduced from the application for interim measures, read in its entirety, that the harm alleged by the appellant does consist in the fact that it must choose, before 30 June 2012, that deadline having been extended to 15 October 2012 by the contested decision, between the two options provided for pursuant to its second commitment, that is, first, the disposal of the Nest-Energie project to a suitable purchaser or, second, the adoption of a final decision itself to invest in that project, whereas each of those options would entail its making a financial loss. The appellant maintains that the investment in the Nest-Energie project amounting to an estimated cost of EUR 800 million could cover its annual fixed and variable costs but would certainly not cover its initial investment nor reach the profitability threshold required, whereas the immediate disposal of the project to a competitor would constitute a serious risk of sale at a loss and would be irreversible in that the appellant would lose the opportunity to invest in the project itself.

44 Notwithstanding that reading of the application for interim measures, the appellant has failed to submit evidence establishing the existence of serious harm the occurrence of which would be foreseeable with a sufficient degree of probability, in accordance with the requirements arising from the case-law referred to in paragraphs 39 and 40 above.

45 The appellant does not provide any relevant information, in the application for interim measures, concerning the nature or extent of the harm it would be likely to suffer in one or other of the situations corresponding to the two options between which it could freely choose. As stated by the Commission at the hearing, the current value of the project in question, which also depends to a large extent on how profitable it is likely to be, is in principle equivalent to the price which a purchaser would be prepared to pay in case of its disposal in the context of a divestiture procedure, whereas any other assessment of that value would necessarily contain a purely speculative element. That finding means that, were the appellant to dispose of the Nest-Energie project immediately, that would not cause it, in principle, any harm because by that disposal it would receive an amount corresponding to the current value of its property.

46 To the extent that the appellant nevertheless considers, first, that the current conditions on the market do not allow it to take an affirmative decision to invest in the project before 30 June 2012, or even before 15 October 2012, and, second, that to dispose of the Nest-Energie project in those circumstances would result in the making of a loss, its arguments concerning the occurrence of serious and irreparable harm are therefore based, with regard to each of the possible courses of action, on the assumption that the project in question was likely to become only more profitable and that its current value was abnormally low.

47 It follows that the alleged harm can exist only where an improvement of the conditions on the Belgian electricity market from the point of view of electricity producers transpires before the end of 2014, such that the appellant could invest in the project Nest-Energie or dispose of it in market conditions more suitable for those transactions. Otherwise, the applicant will not have suffered any harm because it would not have derived any benefit from the possibility of waiting until the end of 2014 to make its choice, since it would have to make that choice in market conditions similar to, or even more unfavourable than, the current conditions.

48 Applying the principles of the case-law noted in paragraph 40 above, the existence of harm such as that alleged in the present case, as well as its size and therefore its seriousness, can be considered as sufficiently foreseeable only where it is established that it is probable that the circumstances giving rise to that harm, that is to say the predicted improvement in the Belgian electricity market, will occur. It is therefore for the appellant, should it wish to rely on the seriousness of such harm in order to establish the urgency of its application for interim measures, to furnish arguments and evidence capable of establishing that it is probable that the Belgian electricity market would improve from the point of view of electricity producers before the end of 2014 to a degree where it would have the possibility of exercising the commercial choice imposed on it by the commitment in question in significantly more favourable conditions if the interim measures sought were to be granted.

49 In that regard, it must be held that the applicant has failed to provide such arguments or evidence in its application for interim measures. On the contrary, it described as 'significant and permanent' the changes on the Belgian electricity market between 2009 and 2012 which have given rise to the current situation on that market.

50 Furthermore, the appellant also failed to set out, in its application for interim measures, why the supposedly negative consequences arising from the obligation to exercise, in 2012, the commercial choice that it is bound to make between the divestiture of the Nest-Energie project and the adoption of a final decision to invest in that project represents serious harm which is decisively caused by the Commission's refusal to extend the period provided for making that choice.

51 Whilst a decision to extend the period laid down in the commitment in question would have made it possible to defer, if not to avoid, those consequences, developments on the Belgian electricity market between the year 2009 and the year 2012 and the initial choice made by the appellant itself, in 2009, to give that commitment, are to no lesser an extent the direct causes thereof. Indeed, had the period initially laid down or the developments on the market been different, there would have been no need for the request for an extension or for the contested decision underlying the present proceedings. Consequently, the Commission's refusal to extend that time-limit cannot be considered as the decisive cause of the alleged harm, within the meaning of the case-law cited in paragraph 41 above.

52 It follows from the foregoing that the appellant has not established that it is likely to sustain serious harm in the absence of the granting of the interim measures sought.

53 It should be added that, in any event, the alleged harm cannot, in the present case, be regarded as irreparable.

54 Where the harm referred to is of a financial nature, the interim measures sought are justified where, in the absence of those measures, the appellant would be in a position that would imperil its financial viability before final judgment is given in the main action, or where its market share would be affected substantially in the light, inter alia, of the size and turnover of its undertaking and the characteristics of the group to which it belongs (see, to that effect, order of the President of the Court in Case C-43/98 P(R) *Camar* v *Commission and Council* [1998] ECR I-1815, paragraph 36).

55 In this case, since the criterion concerning loss of market share is not relevant, it must be examined whether, in the absence of the interim measures sought, the appellant would be in a position that could imperil its financial viability.

56 The harm alleged is quantified in terms of sale at a loss and reduced profit expectations with regard to an investment which amounts to only EUR 800 million, whereas, according to public sources, namely the 2011 report published by the EDF group on its website, the worldwide turnover of the group amounted in 2011 to more than EUR 65 billion.

57 In the light of that financial strength of the EDF group, it must be held that the harm caused to the appellant, either by disposal of the assets of the company responsible for developing the Nest-Energie project or by the definitive decision to invest in that project itself, could not imperil the appellant's financial viability.

58 That finding cannot be invalidated by the argument presented by the appellant in the fifth ground of appeal to the effect that, in essence, it is not appropriate to compare the global turnover of the EDF group, namely EUR 65 billion, with the cost of the investment in question, namely EUR 800 million, for the purposes of assessing the seriousness of the harm alleged in the present case. It must, on the contrary, be held that such a comparison is, on any view, relevant in the context of an assessment of the irreparable nature of that harm. Harm allegedly resulting from losses which may be made in the context of an investment the cost of which would be EUR 800 million could not be held to imperil the financial viability of an undertaking whose turnover exceeds EUR 65 billion.

59 Finally, with regard to the argument that the alleged harm is impossible to quantify and thus irreparable, it cannot succeed because, as is apparent from paragraphs 42 to 49 of this order, the appellant has failed to explain adequately, in its application for interim measures, the nature and extent of that harm.

60 It is true that harm of a financial nature is considered to be serious and irreparable if it cannot be wholly recovered, which may in particular be the case if the harm, even when it occurs, cannot be quantified (*Comos-Tank and Others* v *Commission*, paragraph 24).

61 However, it is not possible to rule on whether harm can be quantified where the nature and extent of such harm have not been specified, to the greatest extent possible, in the application for interim measures. It is for the appellant to present precise and convincing arguments and evidence in that regard if it wishes to rely on that case-law, which it has failed to do in the present case.

62 Therefore, it is not proved that the harm alleged by the EDF can be regarded as irreparable.

63 It follows from all of the foregoing considerations that the appellant has failed to establish that it is urgent to grant the interim measures sought. Consequently, its application for interim measures must be rejected.

Costs

64 Under Article 184(2) of the Rules of Procedure of the Court, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to the costs.

65 Under Article 138(3) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

66 In this case, each of the parties must bear the costs it has incurred before the Court in these appeal proceedings.

On those grounds, the Vice-President of the Court hereby orders:

1. Paragraph 1 of the operative part of the order of the President of the General Court of the European Union of 11 October 2012 in Case T-389/12 R *Électricité de France* v *Commission* is set aside.

2. The application for interim measures is rejected.

3. Électricité de France SA (EDF) and the European Commission are to bear the costs incurred by them before the Court of Justice of the European Union in this appeal.

[Signatures]