Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

16 January 2018*

(State aid — Aid granted by the French authorities to EDF — Reclassification, as a capital contribution, of accounting provisions created free of tax for the renewal of the high-voltage transmission network — Decision declaring the aid to be incompatible with the internal market — Authority of *res judicata* — Private investor test)

In Case T-747/15,

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

applicant,

supported by

French Republic, represented initially by G. de Bergues, D. Colas and J. Bousin, and subsequently by D. Colas and J. Bousin, acting as Agents,

intervener,

against

European Commission, represented by É. Gippini Fournier, B. Stromsky and D. Recchia, acting as Agents,

defendant,

APPLICATION pursuant to Article 263 TFEU for the annulment of Articles 1 to 5 of Commission Decision (EU) 2016/154 of 22 July 2015 on State aid SA.13869 (C 68/2002) (ex NN 80/2002) — reclassification as capital of the tax-exempt accounting provisions for the renewal of the high-voltage transmission network (RAG) implemented by France in favour of EDF (OJ 2016 L 34, p. 152),

THE GENERAL COURT (Third Chamber),

Composed of S. Frimodt Nielsen (Rapporteur), President, V. Kreuschitz and N. Półtorak, Judges,

Registrar: E. Coulon,

gives the following

* Language of the case: French.

Judgment

I. Background to the dispute

A. Introduction

1 By decision of 16 October 2002 (OJ 2002 C 280, p. 8, 'the opening decision'), the Commission of the European Communities initiated the formal investigation procedure provided for by Article 108(2) TFEU in connection with the advantage resulting from the non-payment of the corporation tax payable by the applicant, Électricité de France (EDF), when it restructured its balance sheet in 1997, on some of the accounting provisions created free of tax for the renewal of the *réseau d'alimentation général* (high-voltage transmission network, 'the RAG') which it reclassified as a capital injection.

2 By decision of 16 December 2003 (OJ 2005 L 49, p. 9, 'the initial decision'), the Commission declared the aid measure in favour of EDF to be incompatible with the internal market and ordered the recovery of the aid together with interest. The aid was reimbursed to the French Republic in February 2004.

3 By judgment of 15 December 2009, *EDF* v *Commission* (T-156/04, 'the judgment in Case T-156/04', EU:T:2009:505), the General Court annulled Articles 3 and 4 of the initial decision. Following that judgment, the French Republic repaid to EDF the amount of the aid which EDF had reimbursed it.

4 By judgment of 5 June 2012, *Commission* v *EDF* (C-124/10 P, 'the judgment in Case C-124/10 P' (EU:C:2012:318), the Court of Justice dismissed the appeal brought by the Commission against the judgment in Case T-156/04.

5 By decision of 2 May 2013 (OJ 2013 C 187, p. 73), giving notice to the parties concerned to submit their comments, pursuant to Article 108(2) TFEU, ('the extension decision'), the Commission extended the formal investigation procedure.

6 By Decision (EU) 2016/154 of 22 July 2015 on State aid SA.13869 (C 68/2002) (ex NN 80/2002) — reclassification as capital of the tax-exempt accounting provisions for the renewal of the high-voltage transmission network (RAG) implemented by France in favour of EDF (OJ 2016 L 34, p. 152, 'the contested decision'), the Commission once again declared the aid measure in favour of EDF to be incompatible with the internal market and ordered the recovery of that aid, together with interest. The aid was reimbursed to the French Republic on 13 October 2015.

7 By application lodged at the registry on 22 December 2015, EDF brought the present action.

B. The beneficiary of the aid

8 EDF was created by Law No 46-628 of 8 April 1946 on the nationalisation of electricity and gas (*JORF* (Official Journal of the French Republic) of 9 April 1946, p. 2651) which, in Article 1, nationalised the production, transport, distribution and import and export of electricity in France. That law entrusted the management of the nationalised electricity undertakings to a national public industrial and commercial establishment called 'Électricité de France (EDF), Service national'.

9 Article 16 of Law No 46-628 provided that the net balance of the assets, rights and obligations transferred to EDF constituted its capital, belonged to the nation, was inalienable and, in the event of operating losses, had to be reconstituted using the profits from subsequent years. Under Article 1 of Decree No 56-493 of 14 May 1956 on capital contributions to EDF (*JORF* of 19 May 1956, p. 4613),

capital contributions were made subject to the rules laid down by Article 16 of the abovementioned law. According to Article 2 of the decree, capital contributions were to give rise to the payment to the State of interest and a dividend.

10 By virtue of Law No 46-628, EDF had been, since its creation, and still was in 1997, a national public industrial and commercial establishment not governed by the provisions applicable to public limited companies. Law No 2004-803 of 9 August 2004 on the public electricity and gas service and on electricity and gas undertakings (*JORF* of 11 August 2004, p. 14256), altered that status, providing, in Article 24 thereof, that EDF, in which the State had to hold more than 70% of the capital, would be governed by the laws applicable to public limited companies, save as otherwise provided by statute. Article 47 of that law also provided for the subsequent conversion of the public establishment EDF into a public limited company, subject to the publication of a decree on its new status. Article 46 of the same law stated that the balance sheet of the company EDF of 31 December 2004 would be based on the balance sheet of 31 December 2003 and the profit and loss account of the public establishment EDF for the 2004 financial year.

11 The conversion of EDF into a public limited company became effective by application of Decree No 2004-1224 of 17 November 2004 on the statutes of the public limited company EDF (*JORF* of 19 November 2004, p. 19505). The statutes annexed to that decree provided that EDF would now be a public limited company governed by the laws and regulations applicable to commercial companies, in particular the Commercial Code, unless otherwise specified by more detailed provisions, including the statutes themselves.

12 Article 6 of the EDF statutes provided for the company's share capital, which was initially wholly owned by the State, to be set at EUR 8.129 billion, divided into 1 625 800 000 shares of EUR 5 each. The share capital of the new public limited company EDF was set in November 2004 at the same amount as the accumulated capital and capital contributions of the publicly owned industrial and commercial establishment EDF at that time, that is to say, EUR 8.1 billion. This amount of capital and capital contributions was reached by application of Law No 97-1026 of 10 November 1997 on various economic and commercial measures (*JORF* of 11 November 1997, p. 16387), and it remained unchanged between 1997 and the date on which the contested decision was adopted.

13 Law No 2004-803 and the EDF statutes also provided that the State must at all times hold more than 70% of the company's capital. In November 2005, new shares in EDF were admitted to listing on Euronext in an 'Open Price Offering' (OPO), thus making EDF's capital open to ownership by shareholders other than the State.

C. The creation of accounting provisions for the renewal of the RAG

14 Under Article 36 of Law No 46-628 all the nationalised electricity concessions were transferred to EDF. In accordance with Article 37 of that law, the concessionaire was required to comply with a standard set of terms and conditions in relation to the concessions. In 1958, the various electricity transmission concessions that had been transferred to EDF by the State were converted into a single concession known as the RAG.

15 In the absence of specific accounting rules for the concessions, EDF took the view, in 1946, that it was the owner of the assets comprising the RAG and included those assets in its balance sheet.

16 Pursuant to Article 8 of the terms and conditions approved by Decree No 56-1225 of 28 November 1956, EDF was required to carry out, at its own expense, all the maintenance and renewal work needed to keep the concession structures in good working order.

17 In 1987, following a 1982 amendment to the General Accounting Plan laying down specific rules for assets that had to be returned to the State at the end of the concession, EDF changed its accounting treatment of the assets constituting the RAG, which had until then been regarded as own assets, and classified them under the balance sheet item 'Assets under concession'. EDF applied to those assets the special accounting rules established in France for assets under concession that have to be returned to the State at the end of the concession period, and created, under tax-free arrangements, provisions for the renewal of the RAG.

18 In a 1994 report, the French Court of Auditors took the view that, in the case of a single, permanent concessionaire from the State, appointed by law, such as EDF, the assets constituting the RAG could not really be regarded as having to be returned to the State at the end of the concession, as opposed to being own assets (the RAG) belonging to EDF. In other words, in the Court of Auditors' view, the accounting change made by EDF in 1987, which resulted in the creation of tax-exempt provisions, was not justified. Steps to regularise EDF's situation were therefore taken by the company and the supervisory authorities.

19 In 1997, EDF's accounts contained two types of tax-exempt provision for the renewal of the RAG: unused provisions amounting to 38.5 billion French Francs (FRF) and grantor rights corresponding to renewal operations already carried out, amounting to FRF 18.345 billion.

D. Reclassification of the accounting provisions

20 Law No 97-1026 clarified the status of the assets comprising the RAG. Article 4 of that law provides:

> 'I. The structures of the RAG shall be deemed to have been owned by EDF from the time it was granted the concession for that network.
>
> II. For the purposes of the application of paragraph I, on 1 January 1997, the value of the assets in kind comprising the RAG under concession which appear as liabilities in EDF's balance sheet shall be entered, net of the corresponding revaluation differences, under the item "Capital injections" …'

21 It is common ground that, for any alteration to be made to the capital of EDF, recourse to legislation was necessary, since Article 16 of Law No 46-628, in the version in force in 1997, provided that EDF's capital was inalienable and belonged to the nation. Accordingly, under French law, the capital injections resulting from the reclassification of the provisions for the renewal of the RAG were to be dealt with by legislation.

22 Law No 97-1026 established the ownership of the assets comprising the RAG. EDF's balance sheet was reorganised by that same law. The provisions which EDF had created between 1987 and 1996 for the renewal of the RAG, in contemplation of returning those assets to the State, whether or not used, became superfluous, since EDF was deemed to own the assets comprising the RAG.

23 A letter from the Minister for Economic Affairs, Finance and Industry, the Secretary of State for the Budget and the Secretary of State for Industry to EDF dated 22 December 1997 ('the letter of 22 December 1997') explained, in Annex 1 thereto, the way in which the upper part of EDF's balance sheet had been restructured pursuant to Article 4 of Law No 97-1026:

> 'Reclassification of "grantor rights" (FRF 18 345 563 605):
>
> – consolidation as capital contributions of the value of the assets in kind comprising the RAG under concession at FRF 14 119 065 335;

– amalgamation of the revaluation reserves for the RAG in 1959 (FRF 2 425 million) and 1976 (non-depreciable fixed assets: FRF 97 million) with the item "Revaluation reserves RAG", which is thus increased from FRF 1 720 million to FRF 4 145 million;

– amalgamation of the statutory provisions for the revaluation of depreciable fixed assets in 1976 (FRF 1 704 million), this item thus increasing from FRF 877 million to FRF 2 581 million;

– reclassification of the renewal provisions which have become unwarranted (FRF 38 520 943 408) as retained income, in accordance with National Accountancy Council Opinion No 97-06 of 18 June 1997 on the accounting changes.'

24 In the reorganisation of EDF's balance sheet, the French authorities had followed Opinion No 97-06 of the Conseil national de la comptabilité (the National Accountancy Council) (CNC) of 18 June 1997 on changes to accounting methods, changes to estimates, changes to tax options and the correction of errors ('the National Accountancy Council Opinion'), which stated that corrections to accounting errors, which by their very nature relate to the posting of past transactions, 'are to be posted in the profit and loss account for the financial year in which they are discovered'.

25 In accordance with Law No 97-1026 of 10 November 1997 and the letter of 22 December 1997, the revaluation reserves were transferred to the item 'Own funds' without any tax implications since they corresponded to revaluation surpluses realised free of tax or under a tax neutrality arrangement pursuant to the 1959 and 1976 revaluation laws.

E. The tax implications of the reclassification of the accounting provisions

26 Annex 3 to the letter of 22 December 1997 also set out the tax implications of the reorganisation of EDF's balance sheet: a change in net assets resulted from the reclassification as a surplus carried forward of the unused provisions for renewal amounting to FRF 38.5 billion and this was subject to corporation tax at the rate of 41.66% applicable in 1997; the unused provisions amounting to FRF 38.5 billion were thus taxed by the French authorities. On the other hand, it appears on reading that annex that the part of the provisions for the renewal of the RAG that had actually been used, corresponding to the grantor rights, also created free of tax and consolidated as a capital contribution, was not taxed.

27 A memorandum from the Directorate-General for Taxation dated 9 April 2002 ('the Memorandum of 9 April 2002'), sent to the Commission by the French authorities, stated in this connection 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 company's liabilities, where it was incorrectly posted, to a net assets account, thereby resulting in a positive variation in net assets taxable under Article 38(2)' of the General Tax Code. The French authorities have stated that 'the tax advantage thus obtained [by EDF in 1997] may be estimated at FRF 5.88 billion (14.119 × 41.66%)'.

F. The opening decision

28 By the opening decision, the Commission initiated the formal investigation procedure provided for by Article 108(2) TFEU in connection with the advantage resulting from the non-payment by EDF of the corporation tax arising, when EDF restructured its balance sheet in 1997, on the part of the provisions corresponding to the grantor rights.

29 It should also be noted that, in recital 52 of the contested decision, the Commission stated that, since neither the Court of Justice nor the General Court had found the opening decision to be irregular, it could form the basis for a new final decision, that is to say the contested decision itself.

G. The initial decision of the Commission

30 In the initial decision, the Commission declared the aid measure in favour of EDF to be incompatible with the internal market and demanded that the aid be recovered, together with interest.

31 Among the reasons put forward by the Commission in support of the initial decision, the following in particular must be emphasised:

> '95. The French authorities claim … 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.'

H. The judgment in Case T-156/04

32 EDF, supported by the French Republic, brought an action for the annulment of the Commission's decision of 16 December 2003.

33 By its judgment in Case T-156/04, the General Court annulled Articles 3 and 4 of the initial decision.

34 In paragraphs 233 to 237 of the judgment in Case T-156/04, the General Court found that, in order to determine whether the Commission was required to use the private investor test for the purposes of analysing the investment made by the French State in EDF's capital, it had to be established whether that action on the part of the French State constituted, in the light of its nature and object and account being taken of the objective pursued, an investment which could be made by a private investor, hence an action to be attributed to the State acting as an economic operator in the same way as a private operator, or whether it constituted action taken by the State acting as a public authority, thus precluding application of the private investor test. In particular, the General Court

found that, in examining the measure at issue, it was inappropriate to focus solely on its form, since the use of legislation is not enough in itself to preclude the possibility that, through its intervention in the capital of an undertaking, the State is pursuing an economic objective which could also be pursued by a private investor.

35 In paragraphs 240 to 242 of the judgment in Case T-156/04, the General Court recalled that the 'grantor rights' had been allocated directly, in the amount of FRF 14.119 billion, to the capital injections item without flowing through the profit and loss account. The General Court stated that the Commission had found that only the failure to tax those rights prior to the capital injection constituted State aid, all the parties agreeing that tax was payable on the amount of FRF 14.119 billion before it was recorded under the item 'Capital injection'.

36 In paragraphs 243 to 245 of the judgment in Case T-156/04, the General Court found that, since the purpose of Article 4 of Law No 97-1026 was to restructure EDF's balance sheet and to increase EDF's own funds, it was not a tax measure per se, but an accounting measure with tax implications. On the other hand, the General Court noted that the Commission had examined only the tax implications of that measure and that the Commission had made clear that, because of the fiscal nature of the advantage which it had identified, it was not under a duty to take into consideration either the capital increase brought about or the private investor test, since a waiver of a tax claim — such as that at issue — stems from the exercise of public authority.

37 In paragraphs 247 to 250 of the judgment in Case T-156/04, the General Court found that, in the light of the fact that the objective pursued by the measure in question was the recapitalisation of EDF, the mere fact that the claim at issue was fiscal in nature did not mean that the Commission could legitimately decline to apply the private investor test. According to the General Court, the Commission was under an obligation to ascertain the economic rationale for the investment in question by undertaking an assessment as to whether, in the same circumstances, a private investor would have invested a comparable amount in EDF. That obligation was incumbent upon the Commission, whatever the form in which the capital had been provided by the State.

38 In paragraphs 251 and 252 of the judgment in Case T-156/04, the General Court stated that the possibility could not be ruled out that the form taken by an investment may give rise to differences in terms of the cost of raising the capital and in terms of the return on that capital, from which it could be concluded that a private investor would not have made such an investment. However, such a conclusion presupposed that an economic analysis had been carried out in the context of applying the private investor test. According to the General Court, an analysis of that nature was justified since, first, a capital increase could result from the incorporation of a claim held by a private shareholder against the undertaking in question and, secondly, it was possible to regard the use of legislation to that end as a necessary consequence of the fact that the rules governing EDF's capital were themselves laid down by statute.

39 Accordingly, in paragraph 253 of the judgment in Case T-156/04, the General Court concluded that, in view of the need to assess the contested measure in its context, the Commission could not confine its examination to the tax implications alone, but had at the same time to examine the merits of the argument that the waiver of the tax claim as part of the restructuring of EDF's balance sheet and increasing of EDF's capital could satisfy the private investor test.

40 The General Court went on to reject, in paragraphs 254 to 259 of the judgment in Case T-156/04, the Commission's argument that the private investor test could not be applied in the circumstances since the French State had exercised its prerogatives as a public authority by using legislation to waive payment of the tax claim. In that connection, the General Court found that, in the circumstances, the French State had not been under any obligation in its capacity as a public authority and that it was not a case of assessing certain costs which the State had incurred as a result of its obligations as a public authority.

41 In paragraphs 260 to 263 of the judgment in Case T-156/04, the General Court rejected the Commission's argument that the private investor test could not be applied to the conversion into capital of a tax claim, since a private investor could never hold a tax claim against an undertaking, but only a civil or commercial claim. According to the General Court, the purpose of the private investor test was to establish whether, despite the fact that the State has at its disposal means which are not available to the private investor, the private investor would, in the same circumstances, have taken a comparable investment decision. It followed that neither the nature of the claim, nor the fact that a private investor could not hold a tax claim, was of any relevance.

42 In paragraphs 264 to 277 of the judgment in Case T-156/04, the General Court rejected the Commission's argument that a private investor would have had to pay tax in a comparable situation, thereby incurring higher costs, since, in order to provide EUR 100, a private investor would have actually had to raise EUR 141.66.

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

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

45 Thirdly, the General Court found that the Commission's argument that a private investor would have had to pay tax in a similar situation was inconsistent, since the Commission acknowledged that it would have examined the additional capital injection of several billion French Francs, if EDF had previously paid tax on that amount and if the French State had then returned that same amount to EDF, since the cost borne by the State could then, and only then, have been compared with the cost borne by a private investor. The General Court found, however, that in such circumstances the cost to the State would have been the same and the amount received by EDF would have been the same as the amount which EDF had received as a result of the measure at issue.

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

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

48 In paragraph 283 of the judgment in Case T-156/04, the General Court rejected the Commission's argument that accepting application of the private investor test could have the effect of justifying any form of tax exemption implemented by Member States. In that regard, the General Court stated that, in its view, it was not a case of a simple tax exemption granted to an undertaking, but rather the

waiver of a tax claim in the context of a capital injection into an undertaking of which the State was sole shareholder, and also that it was not possible to prejudge the outcome of the application of that test, in the absence of which it would be pointless.

I. The judgment in C-124/10 P

49 On 26 February 2010, the Commission brought an appeal against the judgment in Case T-156/04.

50 By judgment in Case C-124/10 P, the Court of Justice dismissed that appeal on the following grounds:

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

…

19. Article 3 of [Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (OJ 2005 L 49, p. 9)] states:

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

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

…

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

"(88) The [letter of 22 December 1997] setting out the tax implications of the restructuring of EDF's balance sheet shows that the unused provisions for renewal of the RAG were subjected by the French authorities to corporation tax at 41.66%, the rate applicable in 1997.

(89) On the other hand, pursuant to Article 4 of [Law No 97-1026], some of those provisions, namely the grantor rights, corresponding to renewal operations already carried out, were reclassified as capital injections amounting to FRF 14.119 billion without being subjected to corporation tax. … In [the memorandum of 9 April 2002] addressed … to the Commission, the French authorities … noted that 'the tax concession thus obtained [by EDF in 1997] can be estimated at FRF 5.88 billion (14.119 x 41.66%)', equivalent to EUR 888.89 million …

…

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

…

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

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

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

…

35. … in paragraph 253 of [the judgment in Case T-156/04], the General Court concluded that, in view of the need to assess the contested measure in its context, the Commission could not confine its examination to the tax implications alone, but had at the same time to examine the merits of the argument that the waiver of the tax claim as part of the restructuring of EDF's balance sheet and increasing of EDF's capital could satisfy the private investor test.

…

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

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

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

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

Arguments of the parties

…

Findings of the Court

75. The Commission, the EFTA Surveillance Authority and Iberdrola claim, in essence, that, in examining whether the private investor test was applicable in the circumstances, the General Court took into account, for that purpose, the objective pursued by the French State when it

adopted the contested measure; secondly, it confused the roles of the State as shareholder and the State exercising its powers of taxation; thirdly, it acted in breach of the principle of equal treatment as between public and private undertakings; and, fourthly, it infringed the rules regarding allocation of the burden of proof.

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

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

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

79. In particular, it is clear from case-law that, in order to assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder — to the exclusion of those linked to its situation as a public authority — are to be taken into account (see, to that effect, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 14; Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, paragraph 13; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 22; and Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 134).

80. It follows that the roles of the State as shareholder of an undertaking, on the one hand, and of the State acting as a public authority, on the other, must be distinguished, as has been correctly argued by the Commission, the EFTA Surveillance Authority and Iberdrola and as the General Court held in paragraphs 223 to 228 of [the judgment in Case T-156/04].

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

82. It follows that, if a Member State relies on that test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as shareholder.

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

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

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

86. If the Member State concerned provides the Commission with the requisite evidence, it is for the Commission to carry out a global assessment, taking into account — in addition to the evidence provided by that Member State — all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority. In particular, as the General Court held in paragraph 229 of [the judgment in Case T-156/04], the nature and subject matter of that measure are relevant in that regard, as is its context, the objective pursued and the rules to which the measure is subject.

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

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

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

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

91. However, the financial situation of the recipient public undertaking depends not on the means used to place it at an advantage, however that may have been effected, but on the amount that the undertaking ultimately receives. Consequently, when considering whether the private investor test was applicable, the General Court did not err in law by focusing its analysis, not on the fiscal nature of the means employed by the French State, but on the improvement — with a view to the opening up of the electricity market — in EDF's financial situation and on the effects of the measure in question on competition.

92. Accordingly, it follows from all of the foregoing that, in view of the objectives underlying Article 87(1) EC and the private investor test, an economic advantage must — even where it has been granted through fiscal means — be assessed inter alia in the light of the private investor

test, if, on conclusion of the global assessment that may be required, it appears that, notwithstanding the fact that the means used were instruments of State power, the Member State concerned conferred that advantage in its capacity as shareholder of the undertaking belonging to it.

93. It follows that the finding made by the General Court in paragraph 250 of [the judgment in Case T-156/04], to the effect that the obligation for the Commission to verify whether capital was provided by the State in circumstances which correspond to normal market conditions exists regardless of the way in which that capital was provided by the State, is not vitiated by an error of law.

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

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

96. Secondly, as the General Court pointed out in paragraphs 275 and 276 of [the judgment in Case T-156/04], the possibility that there might be a difference between the cost to the private investor and the cost to the State as investor does not preclude application of the private investor test. Rather, that test makes it possible to address precisely that point, that is to say, to establish, inter alia, that such a difference exists and to take it into account when assessing whether the conditions laid down by that test are met.

97. It follows that — contrary to the assertions made by the Commission, the EFTA Surveillance Authority and Iberdrola — the analysis carried out by the General Court is not inconsistent with the principle of equal treatment between public and private undertakings; it does not cause distortion of competition; and it does not go against the objective pursued by the private investor test.

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

99. It should be added that, by [the judgment in Case T-156/04], the General Court did not prejudge the applicability of that test to the present case; nor, as was noted in paragraph 283 of that judgment, did the General Court prejudge the outcome of applying that test.

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

101. As to the question whether, in the present case, it was necessary to define a reference investor, it should be noted that the case-law relied upon in that regard by the Commission, the EFTA Surveillance Authority and Iberdrola concerns a situation marked by the impossibility of comparing the position of a public undertaking operating in a reserved sector with that of a

private undertaking not operating in a reserved sector (see, to that effect, Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* v *Ufex and Others* [2003] ECR I-6993, paragraph 38).

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

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

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

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

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

The first ground of appeal: distortion of the facts

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

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

109. In those circumstances, even if it were established, the alleged distortion of the facts would not, in any event, be such as to affect the soundness of [the judgment in Case T-156/04]. It follows that the first ground of appeal must be rejected as ineffective.

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

J. The extension decision

51 Following the judgment in Case C-124/10 P, the Commission adopted the extension decision.

52 It is necessary to have particular regard to paragraphs 58 to 73 of the letter to the French Republic appended to the extension decision, in which the Commission discussed, first, the applicability of the private investor test and, secondly and in the alternative, the application of that test to the measure in question.

53 As regards the applicability of the text, the Commission expressed the following view:

> '66. It follows from the foregoing that, at this stage, and subject to further clarification which the French Republic is invited to furnish regarding the rules which applied to the earmarking of fiscal resources for an investment by way of a capital contribution to an undertaking such as EDF in 1997, and subject to other objective and verifiable evidence relating to its intention to make an investment by means of the fiscal measure in question, an overall assessment of the facts of this case appears to indicate that that measure was taken by the French Republic in its capacity as a public authority, which, according to the criteria set out by the Court of Justice, would render the private investor test inapplicable.'

54 As regards application of the test, the Commission concluded:

> '71. In the absence of evidence [of the kind mentioned in the judgment in Case C-124/10 P as being necessary], it has … not yet been established that a private shareholder would, in similar circumstances, have invested a sum equal to the tax due in an undertaking in a similar position to that of EDF. Therefore, in 1997, the non-payment by EDF of EUR 888.89 million in corporation tax appears not to have been a productive investment on the part of the public shareholder, but rather a tax exemption measure likely to have a conferred an economic advantage on EDF.
>
> 72. Such an advantage necessarily reinforced EDF's position vis-à-vis its competitors, since the amount of equity capital an undertaking has determines, along with other factors, its ability to raise external funding. It therefore created a distortion of competition within the meaning of Article 107(1) TFEU. The advantage was necessarily selective, since the non-payment of corporation tax on part of the accounting provisions constituted a derogation from the normal rules of taxation which apply to such operations and, in the present case, that derogation applied to a single undertaking, EDF.'

K. The contested decision

55 By the contested decision, the Commission declared the aid measure in favour of EDF to be incompatible with the internal market and demanded the recovery of the aid, together with interest.

56 The reasons put forward by the Commission in the contested decision are the following.

57 First, the Commission set out, in recitals 62 to 108 of the contested decision, the argument put forward by the French Republic and EDF during the extended formal investigation procedure which followed the extension decision.

58 Secondly, after summarising the content of the measure at issue in recitals 113 to 123 of the contested decision, the waiver of the tax due on the reclassification of the grantor rights as capital constituted prima facie a selective advantage in EDF's favour.

59 Thirdly, in recital 124 of the contested decision, the Commission referred to the argument which the French Republic had put forward in its comments of 11 December 2002 to the effect that the waiver of the tax was the same thing as a further capital contribution in the same amount as the tax owed.

60 Fourthly, the Commission pointed out that, in paragraph 99 of the judgment in Case C-124/10 P, the Court of Justice had held that the General Court had not prejudged the applicability to the present case of the prudent private investor in a market economy test or the outcome of applying that test to the measure at issue.

61 Fifth, the Commission went on to examine, in recitals 126 to 153 of the contested decision, the applicability of the private investor test in the light of the guidance provided by the Court of Justice in that regard in its judgment in Case C-124/10 P. To that end, it analysed the evidence relating to the alleged investment decision, the economic assessments that had supposedly been carried out in order to establish the profitability of the investment, the nature and purpose of the measure at issue, and the context in which the decision had been taken, as well as the rules to which it was subject.

62 The Commission concluded that analysis as follows:

> '(154) The vast majority of the evidence described above clearly shows that [the French Republic] did not, either before or at the same time as conferring the economic advantage resulting from the non-payment of the corporation tax, take a decision to make an investment in EDF by way of the tax exemption. Accordingly, the prudent private investor in a market economy principle does not appear to be applicable to this measure. The considerations set out below on the application of the private investor test are therefore provided in the alternative.'

63 The Commission then went on to examine, in the alternative, in recitals 155 to 193 of the contested decision, whether the private investor test would, if it were applicable, be met in this case.

64 The Commission concluded that analysis as follows:

> '(191) Even if the principle of the prudent private investor in a market economy were applicable, in the light of the documents provided by the French authorities shedding light, according to them, on the profit expectations and risks attached to the alleged investment in the form of a tax exemption, application of the test of the private investor in a market economy leads to the conclusion that a prudent private investor would not have invested an amount equal to the tax due in the EDF capital increase in 1997.
>
> (192) The non-payment by EDF of FRF 5.88 billion in corporation tax does not appear to be a productive investment by the State as shareholder in application of the principle of the prudent private investor in a market economy. It appears rather to be an ad hoc derogating tax exemption that provided an economic advantage to EDF equal to the amount of tax not paid. Such an advantage necessarily strengthens the position of EDF vis-à-vis its competitors, since the amount of equity capital determines, among other factors, the external financing capacity and conditions of an undertaking while, moreover, the resources saved in this way could be used for other purposes such as, for example, investment in France or in other Member States where competitors conducted their business in 1997.
>
> (193) The economic advantage therefore distorts competition within the meaning of Article 107(1) of the TFEU. The advantage is 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 an operation and, in the present case, this exception was applied only to EDF.'

65 After concluding that State resources had been used (recitals 194 and 195 of the contested decision), that competition had been distorted and that trade between Member States had been affected (recitals 196 to 206 of the contested decision) and that the aid was incompatible with the internal market (recitals 207 to 215 of the decision), the Commission declared that the measure at issue was aid incompatible with the internal market and ordered its recovery.

II. Procedure and forms of order sought by the parties

66 By application lodged at the Registry of the General Court on 22 December 2015, EDF brought the present action.

67 By document lodged at the Registry of the General Court on 20 April 2016, the French Republic applied for leave to intervene in the present proceedings in support of the form of order sought by EDF. By decision of 24 May 2016, the President of the Third Chamber of the General Court granted it leave to intervene. The intervener lodged its statement in intervention and the main parties lodged their observations on that statement within the period prescribed.

68 As a result of changes in the composition of the chambers of the General Court pursuant to Article 27(5) of the Rules of Procedure of the General Court, the Judge-Rapporteur was assigned to the Third Chamber, to which the present case was accordingly allocated.

69 The parties were notified on 26 September 2016 that the written part of the procedure had been concluded. No request for a hearing was made by the parties within three weeks of that notification, as is prescribed by Article 106(2) of the Rules of Procedure.

70 By decision notified to the parties on 19 May 2017, the General Court, taking the view that it had sufficient information from the documents in the file, decided, in the absence of any request from the parties in this regard, to give its ruling without opening the oral part of the procedure, in accordance with Article 106(3) of the Rules of Procedure.

71 By document sent to the Registry of the General Court on 19 May 2017, the applicant requested that an audience be held in view of the importance of the case to it and, in particular, the financial consequences it could have.

72 By document notified on 22 June 2017, the applicant was informed that the time limit for requesting a hearing had expired on 31 October 2016 and that its request had therefore been made outside the period prescribed by Article 106 of the Rules of Procedure, the applicant having given no information indicating unforeseeable circumstances or *force majeure* in accordance with Article 45 of the Statute of the Court of Justice of the European Union, which applies to legal time limits such as that at issue.

73 On 20 September 2017, the Court of Justice delivered its judgment in *Commission* v *Frucona Košice*, C-300/16 P, (EU:C:2017:706) 'the judgment in *Frucona Košice*'), by which it dismissed the appeal brought against the judgment of 16 March 2016, *Frucona Košice* v *Commission* (T-103/14, EU:T:2016:152).

74 By document lodged at the Registry of the General Court on 3 October 2017, the applicant requested that an oral or written discussion between the parties be held on the consequences to be drawn from the judgment in *Frucona Košice* for the present case.

75 By decision of 12 October 2017, the General Court decided the reopen the written part of the procedure and to place the applicant's request on the file and requested the parties to submit their written observations on the consequences they considered should be drawn from the judgment in *Frucona Košice* for the present case.

76 The parties complied with that request within the prescribed period.

77 On 9 November 2017, the President of the Third Chamber decided to close the written part of the procedure. That decision was notified to the parties which were also informed that the notification did not cause time to run for the purpose of lodging a request for a hearing as provided for by Article 106 of the Rules of Procedure.

78 EDF, supported by the French Republic, claims that the General Court should:

– annul Articles 1 to 5 of the contested decision;

– in the alternative, annul Articles 1 to 3 of the contested decision;

– order the Commission to pay the costs.

79 The Commission contends that the General Court should:

– dismiss the action;

– order EDF to pay the costs and order the French Republic to pay the costs occasioned by its intervention.

III. Law

80 In support of its action EDF puts forward four principal pleas in law and two further pleas in the alternative.

81 The first of the principal pleas in law alleges infringement of Article 266 TFEU, in that the Commission disregarded both the operative part of the judgment in Case T-156/04 and the reasons underlying it.

82 The second principal plea in law alleges infringement of Article 107 TFEU, in that the Commission made both legal and factual errors in its examination of the applicability of the private investor test.

83 The third principal plea in law alleges infringement of Article 107 TFEU in that the Commission made both legal and factual errors in its examination of the application of the private investor test.

84 The fourth principal plea in law alleges that the contested decision contains an inadequate statement of reasons.

85 The first plea in law put forward in the alternative alleges, first, that, even if the measures at issue may be classified as aid, they must, for the most part, be regarded as existing aid, in accordance with Article 1(b)(v) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), since they were implemented before the effective liberalisation of the electricity sector and, secondly, that, for the most part, they must be regarded as falling outside the limitation period, within the meaning of Article 15(1) of that regulation.

86 By the second plea in law put forward in the alternative, EDF maintains that, in any event, the contested decision contains several calculations errors which render it invalid.

87 The French Republic submits that EDF's pleas in law are well founded. However, the observations which it has made relate solely the three main pleas in law raised.

A. The first plea in law

1. Arguments of the parties

88 EDF, supported by the French Republic, argues that the Commission infringed Article 266 TFEU by failing to comply with the judgment in Case T-156/04 inasmuch as, first of all, it stated in the contested decision that the opening decision was not irregular and could therefore form the basis for a new decision, whereas, in EDF's submission, the opening decision is based on an incorrect presentation of the facts which specifically led the General Court to annul the final decision, which was based on the same incorrect presentation of the facts. The contested decision is thus vitiated by the same errors and material inaccuracies as those which justified the annulment of the final decision.

89 Secondly, according to EDF, the Commission persisted in basing its analysis in the contested decision on a measure, a 'tax gift' resulting from undue tax relief from which it allegedly benefited, whereas that presentation of the facts was expressly rejected by the General Court in its judgment in Case T-156/04.

90 According to EDF, the Commission has in fact continued, including in its defence, to draw a distinction between the measure actually implemented, that is to say the increase in its capital resulting from the posting of the provisions for renewal to the balance sheet item 'Capital injections', and one of its tax implications, namely the non-taxation of the 'grantor rights', whereas the General Court rejected that approach, characterising the letter of 22 December 1997 as a document explaining the measure implemented, which was, according to the General Court, the recapitalisation of the company brought about by Law No 97-1026. Indeed, EDF submits that the General Court never drew such a distinction, with regard to the recapitalisation measure, between the various components of the provisions for renewal in terms of their nature and the way in which they were treated.

91 EDF considers that the Commission's reasoning is therefore based on a confusion between the classification of the measure at issue, that is to say, whether or not it was State aid, and the identification of that measure. According to EDF, the General Court left open the question of the classification of the measure at issue in the light of the applicability of, or the application of the private investor test, although it did, on the other hand, identify the measure precisely. Such a finding of fact is, however, not only an essential prerequisite for any subsequent legal analysis; it is also, and above all, a prerogative of the General Court, which is the final arbiter of the facts. Consequently, the Commission's argument that the General Court did not arrive at a final assessment of the facts is factually incorrect.

92 EDF states that it is necessary to examine to what extent the description of the facts given in the contested decision differs from that given by the General Court, and then to consider whether the General Court's findings of fact provided a sufficient basis for its annulment of the initial decision in 2009.

93 According to EDF, the General Court identified the measure at issue as consisting in the recapitalisation of the company brought about by Law No 97-1026, but it drew no distinction between the various provisions that were reclassified as capital contributions. The Commission, however, persists in focusing solely on the non-taxation of part of those provisions. EDF infers from that that, while the Commission did indeed 'take account' of the recapitalisation effected by Law No 97-1026, it regarded it merely as a circumstantial fact, not as constituting in and of itself the measure at issue.

94 The fact that the Commission only partly identified the measure at issue was the starting point for, and indeed the matter that determined the General Court's reasoning and resulted in the annulment of the initial decision. Consequently, the matter of the identification of the measure is a point of law that the General Court actually and necessarily decided, and it is therefore a ground which constituted the *ratio decidendi* of the operative part of the judgment in Case T-156/04.

95 The Commission disputes that line or argument.

2. Findings of the General Court

96 It is important to bear in mind that, regarding the principle of *res judicata*, the Court of Justice has held that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted, or after expiry of the time limits provided to exercise those rights, can no longer be called into question (judgment of 19 April 2012, *Artegodan* v *Commission*, C-221/10 P, EU:C:2012:216, paragraph 86).

97 Moreover, *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question. Furthermore, the force of *res judicata* attaches not only to the operative part of that decision, but also to the *ratio decidendi* of that decision which is inseparable from it (judgment of 19 April 2012, *Artegodan* v *Commission*, C-221/10 P, EU:C:2012:216, paragraph 87).

98 The scope of the force of *res judicata* of the judgment in Case T-156/04 must therefore be determined in the light of the judgment in Case C-124/10 P which followed the appeal brought by the Commission against the judgment in Case T-156/04 (see, to that effect, the judgment of 19 April 2012, *Artegodan* v *Commission*, C-221/10 P, EU:C:2012:216, paragraph 88).

99 In this instance, it must be recalled, first of all, that, in paragraphs 50 and 51 of the letter appended to the opening decision, the Commission stated the following:

> '50. … a distinction must be drawn between the provisions already used and the unused provisions, which stood at FRF 18 345 million and FRF 38 521 million respectively at the end of 1997.
>
> 51. Out of the total of used provisions, FRF 14 119 million was reclassified under the balance sheet item "Capital injections", the remaining FRF 4 226 million being posted to various revaluation accounts. Since that reclassification did not flow through the profit and loss account and the capital increase was not treated as an increase in the company's net assets for the purposes of the calculation of corporation tax, that reclassification resulted in the tax relief from which EDF benefited in respect of the renewal provisions.
>
> According to the French authorities, the advantage which EDF obtained in terms of tax relief can be estimated at FRF 5 883 million [14 119 x 41.67%].'

100 Secondly, in recitals 91 and 99 of the initial decision, the Commission took 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', that that meant 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', that, 'by not paying all the corporation tax due when it restructured its balance sheet, EDF saved EUR 888.89 million' and that 'the non-payment by EDF, in 1997, of EUR 888.89 million in tax therefore [constituted] an advantage for the group'.

101 On completing its examination, the Commission concluded that '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, [constituted] State aid that [was] incompatible with the common market' (Article 3 of the initial decision).

102 Thirdly, in its judgment in Case T-156/04, the General Court stated that:

> '111. … both in the [opening decision] and in the [initial 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 … and that, therefore, in that regard, the framework of the investigation [was] the same in the two decisions.'

103 In the judgment in Case T-156/04, the General Court then held that:

> '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.'

104 It must be noted that the measure at issue, as identified by the General Court, was 'the treatment for tax purposes of the grantor rights when EDF's balance sheet was restructured by Law No 97-1026' and that the General Court took issue with the Commission for declining to consider the private investor test solely because of the fiscal nature of the measure, which, in its view, had been taken by the French Republic in its capacity as a public authority, and also for failing to examine the measure at issue in its context, that is to say, the recapitalisation of EDF, in order to determine whether the private investor test was applicable in this case, while the fiscal nature of the measure did not, in principle, prevent the State from invoking that test.

105 Fourthly, it is necessary to bear in mind paragraphs 16, 19, 21 and 35 of the judgment in Case C-124/10 P (see paragraph 50 above), in which the Court of Justice described the content of the advantage as it had been identified by the Commission and the General Court, and to remember that, in paragraph 99 of that judgment, the Court held that, in its judgment in Case T-156/04, the General Court had prejudged neither the applicability of the private investor test nor the outcome of applying that test.

106 Contrary to EDF's assertion, it cannot be inferred from the judgment in Case T-156/04, read in the light, in particular, of paragraphs 87, 92, 93, 98, 99, 100 and 108 of the judgment in Case C-124/10 P (referred to in paragraph 50 above), that the measure that had to be examined was in reality not the waiver of tax on the grantor rights but 'the recapitalisation of EDF brought about by Law No 97-1026, with no distinction being drawn between the various provisions reclassified as capital injections' (paragraph 9 of the application and paragraphs 7 and 17 of the reply) or '… a measure recapitalising an undertaking in which the State is a shareholder' which, 'by nature [would have been regarded by the General Court as tending] to demonstrate that "the State was pursuing an investment objective comparable to that of a private investor"' (paragraph 86 of the application).

107 Consequently, the Commission did not make a mistake, or disregard the force of *res judicata* of the judgment in Case T-156/04 when, on resuming the administrative procedure, it addressed, in the contested decision, the applicability of the private investor test to the measure by which the French Republic waived the tax that became payable on the reclassification of the grantor rights as a capital injection (recitals 117 and 188 and Article 1 of the contested decision), which, as the Commission

emphasises, is the measure which the French Republic plainly and unequivocally identified as being the measure at issue in the memorandum of 9 April 2002 sent to the Commission (see paragraph 27 above).

108 The present plea in law must therefore be dismissed.

B. The second plea in law

109 The second principal plea in law put forward by EDF, by which it argues, in essence, that the Commission was wrong to take the view that the private investor test did not apply in this case, falls into five parts.

110 In support of the first part of the plea, EDF argues that, when it assessed the applicability of the private investor test, the Commission unjustifiably omitted to take into consideration numerous documents and pieces of evidence which had been submitted to it.

111 By the second part it alleges that, disregarding the judgment in Case C-124/10 P, the Commission systematically confused matters which related to the applicability of the private investor test with matters which related to the application of that test.

112 By the third part of the plea, EDF maintains that the Commission wrongly concluded that the private investor test did not apply because the French Republic had taken into account considerations relating to its status as a public authority alongside considerations relating to its status as shareholder.

113 In support of the fourth part of the plea EDF argues that the Commission erred in taking the view that a formal business plan was a necessary prerequisite in order for the private investor test to be applicable.

114 Lastly, in support of the fifth part of the plea, EDF argues that, if the Commission had not made these various errors of fact and law, it would necessarily have concluded that the private investor test was applicable, having regard to the nature and subject matter of the measure, its context and the objective which it pursued, and the rules to which it was subject.

1. The contested decision

115 After describing the content of the measure at issue in recitals 113 to 123 of the contested decision, the Commission examined, in recitals 126 to 154 thereof, the applicability of the private investor test to that measure, in the following terms:

‘(126) To determine whether the principle of the prudent private investor in a market economy is applicable, an overall assessment must be made of whether the French Republic granted the tax exemption in its capacity as shareholder or in its capacity as public authority. In its judgment [in Case C-124/10], the Court of Justice set out a number of factors that should be taken into account in this overall assessment. These factors, examined in more detail below in relation to the circumstances of the case, are:

the Member State 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 have to produce evidence showing that the decision was based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability; the Commission may refuse to examine evidence established after the decision to make the investment in question;

the nature and subject matter of the measure are relevant in that regard, as is its context, the objective pursued and the rules to which the measure is subject;

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

(127) In their comments of 11 December 2002 referred to in recital 42, the French authorities argued that it was thought to be more efficient and more neutral for EDF to allocate the grantor rights directly, and in their full amount, to own funds, without paying corporation tax. However, none of the documents prior to or contemporaneous with the supposed decision not to levy tax, that were submitted by [the French Republic] or EDF in support of their comments on the decision to extend the formal investigation procedure, made any direct or indirect mention of the supposed decision to invest, with its implications, benefits or costs, or of the corresponding decision to increase the amount of contributed capital by not levying tax. The documents submitted by the French authorities as described in recitals 87 to 108 do not mention, still less analyse, the benefits or costs for the State of the decision not to levy corporation tax on the part of the grantor rights reclassified as capital under [Law No 97-1026].

(128) It is for [the French Republic], in the event of any doubts, such as those formulated by the Commission, about the applicability of the prudent private investor in a market economy test, to 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. However, in the light of the evidence provided, the decision to make an investment by way of waiving the tax EDF should have paid must be deemed to have been taken tacitly, without a reasoned legal act that would reveal the precise content of the decision, its grounds and legal basis or by what authority and on what date it was taken. In the light of the factors set out by the Court of Justice for establishing the applicability of the prudent private investor in a market economy test, namely the need for objective and verifiable evidence, a measure that has actually been implemented or economic evaluations carried out in advance, the absence of references or material evidence must be regarded as an initial indication that the test is not applicable.

(129) In the absence of any documentary evidence tracing the supposed decision, the investment measure that the French State might have taken needs to be described. In this case, the Court of Justice found that application of the private investor test must make it possible to determine whether, in similar circumstances, a private shareholder would have subscribed FRF 5.88 billion to an undertaking in a situation comparable to that of EDF. An investment by [the French Republic] would constitute waiving the collection of this amount with a view to making a profit greater than the resources initially invested. The analysis must therefore be made with reference to the amount of corporation tax due.

(130) The absence of any specific studies, references or analyses of the profitability of the investment in the amount of the tax exemption makes it difficult to isolate the effects of the supposed investment in the information submitted by [the French Republic] or by EDF. This difficulty is not insurmountable if, for the purposes of analysing most of the factors relevant for determining the applicability and the application of the prudent private investor principle, the additional capital contribution to EDF equivalent to the amount of unpaid tax is regarded as benefiting from the rights attaching to all the capital contributions. So, if the capital

contributions were remunerated at a certain rate, this rate had to be, and indeed was, applied to the amount of unpaid tax. If, on the other hand, the marginal or incremental effect is taken into account, the information provided by [the French Republic] or EDF does not at first sight demonstrate that the amount of contributed capital was increased by the amount of unpaid tax.

(131) The non-collection of the tax had the effect of increasing the capital contribution to EDF, and thus EDF's own funds, by an additional FRF 5.88 billion, within the overall amount of FRF 14.119 billion of reclassified provisions. These provisions, which did not correspond to a prior injection of fresh capital by the State as shareholder, were reclassified as capital contributions and posted under the corresponding item in the upper part of EDF's balance sheet, together with the other equity items (paid-in capital, contributed capital, etc., see Table 2). Without the tax exemption, EDF's own funds, which were to reach FRF 79.8 billion in 1997, would have reached FRF 72.1 billion, according to the documents examined at the time (see Table 2, recital 100). Instead of FRF 50.7 billion, the State contributions to EDF's capital would have stood at FRF 44.8 billion.

Supposed investment decision: factors for analysis

(132) First, as pointed out by the French authorities, given that the amount in unpaid tax was included in the capital contribution base, and that this was remunerated at a fixed rate (3%), the absolute value of the remuneration to the State was increased by the tax exemption (or non-collection, see recital 83). However, the increase in the capital contribution by the amount of the tax exemption did not have the effect of increasing the State's remuneration in relative terms. It is common ground that the remuneration for the capital contributed to EDF by the State was laid down as from Decree No 56-1360 of 30 December 1956 (recitals 18 and 103). Different types of remuneration were therefore included in the contracts which preceded and succeeded the 1997-2000 contract for services, as set out in recitals 93 and 102. The principle of remuneration pre-dated the supposed decision and was maintained afterwards.

(133) Moreover, an examination of the facts demonstrates that the tax exemption had the effect of reducing the State's return on its investment. The report produced by the National Assembly in September 1997 unequivocally shows that the increase in the total capital contribution was the reason for the reduction in the remuneration so as not to "increase the payment burden on EDF" (recital 103). The Senate report confirms this deliberate reduction by the public authorities (recital 108).

(134) Between 1991 and 1996, EDF gave the State a higher return for a lower capital contribution base compared with what was offered between 1997 and 2000 for a higher base. The average annual remuneration in absolute terms of FRF 3.41 billion for 1991-1996, when the amount of the capital contribution came to FRF 36.6 billion, was well above the FRF 2.35 billion put in place for a base increased to FRF 50.7 billion during the 1997-2000 period (recitals 92 and 102-103, Table 3). It follows that the current marginal return on the FRF 5.88 billion increase in the amount of contributed capital expected in the 1997-2000 period by the State as shareholder was lower than in the period 1991-1996.

(135) The French authorities saw to it that the remuneration paid to the State on its capital contribution fell, in absolute and relative terms, as the contribution base increased, as unequivocally established by the National Assembly and Senate reports. It follows that, by increasing the total capital contribution with a lower return than the contribution which pre-dated [Law] No 97-1026, the decision to grant a tax exemption did not necessarily constitute an investment.

(136) Second, the way in which the remuneration on the increased capital contribution was determined is not what a prudent private investor in a market economy might have chosen.

(137) As demonstrated by the references contained in the letters from the line ministers and the parliamentary reports referred to in recitals 97, 103 and 106, in making their 1997 scrutiny of the French State's remuneration after the restructuring of EDF's balance sheet, the French authorities took account both of the return on the capital contributions due to the State as shareholder in the strict sense, and of the expected amount of tax that the State, acting as a tax-raising public authority, would collect after 1997 following several years of tax loss carry-over. As set out in recital 93, the remuneration on the capital contributions was in its turn deductible from income tax, by way of exception to the ordinary law.

(138) The concept examined and adopted by the French authorities in 1997 was therefore one of the overall amount collected from EDF, tax and shareholder remuneration combined. The overall amount of tax collected from EDF, above and beyond the contested exemption, under the State's tax-raising powers, and the remuneration paid to the State as shareholder, are mixed up together in the evidence submitted by the French authorities. Nevertheless, in their view, this evidence points to the existence of an investment decision. On the contrary, the fact that the payment of tax due by EDF to the State as revenue collector, including by the regularisation and discharge of the tax that had not been collected prior to [Law] No 97-1026, was constantly taken into account for the purposes of examining and setting the remuneration to the State as shareholder tends to indicate that the disputed tax exemption was adopted by the State acting as a public authority and not as an investor.

(139) This impression is reinforced by the nature of the objectives set for EDF by the State in 1997 in the light of the concerns and goals of a public authority, not a shareholder. These concerns are reflected in the setting of EDF's tariffs, as agreed in the 1997-2000 contract for services, under which the State as shareholder was remunerated. The State asked EDF to help boost the competitiveness of French industry and the purchasing power of French households. Not only would such concerns have been alien to a prudent private investor in a market economy, they would have run counter to the hypothetical investor's financial interests. The same goes for the objective laid down for EDF in the 1997-2000 contract for services to put in place an ambitious policy to support economic activity and employment by helping local authorities (recitals 89 and 95).

Economic evaluations to determine the profitability of the supposed investment

(140) The contract for services between EDF and the State signed on 8 April 1997 contained a prior evaluation of the financial scenario, including projections of the return for the State as shareholder on the investment in the form of contributions to EDF's capital (recital 92). The documents and analyses put forward by the French authorities relate to the expected effects of reclassifying all the provisions constituted by EDF, whether mandatory or not, whether resulting from [Law] No 97-1026 or not. The only systematic evaluation presented by the French authorities in the EDF memo of 18 February 1997 (recital 92) is general and confined to the statutory remuneration on the capital contributions, including those pre-dating the restructuring of EDF's balance sheet, but excluding, for example, remuneration on other capital or own funds.

(141) None of the documents submitted by France or by EDF demonstrate that the supposed investment decision, namely to make a bigger capital contribution to EDF by waiving tax on the reclassification, was the subject of specific scrutiny, study or analysis. However, given the amounts involved, a prudent private investor in a market economy would in all probability have conducted a financial and economic analysis of the investment before deciding whether, in view of the statutory return on the capital contributions, the amount of FRF 5.88 billion in

tax exemption was needed for the undertaking to guarantee the long-term profitability of its overall investment and for the shareholder to be sufficiently remunerated. This type of prior economic study, cited by the Court of Justice in paragraph 84 of [the judgment in Case C-124/10] as one of the conditions for the private investor test to apply, is absent.

(142) It is particularly striking that, apart from the remuneration to be paid to the State over the 1997-2000 period, no study of the remuneration or return in the longer term was carried out, although [the French Republic] claims precisely to have made a long-term investment. However, a prudent private investor in a market economy would not have neglected to conduct an analysis of the profitability of the investment for the period after the year 2000.

(143) While it is reasonable to suppose that a prudent private investor in a market economy would have taken into account the effects of the reduction in EDF's debt ratio, it must be noted that the advantage to EDF of lower-cost borrowing on account of an improved debt/equity ratio is referred to in general terms in some of the documents furnished by [the French Republic] (recitals 101 and 105) and EDF. However, none of the documents mentions the advantages and the profitability for the State as shareholder of a reduction in EDF's borrowing costs or a lower debt ratio. According to the figures produced at the time as set out in recital 101, EDF's net debt/equity ratio was to drop to 148% as a result of the new capital contribution overall, which came to FRF 50.7 billion, including the FRF 5.88 billion by way of the contested exemption. Without the tax exemption, the ratio would have been around 163%, or some three times lower than the ratio of 480% before [Law] No 97-1026. Considered separately from the other effects of the reclassification of the various provisions, the contribution of the tax exemption to the improvement in the ratio is negligible and it is very doubtful that it had a real effect in terms of reducing the cost of borrowing for EDF (recitals 170 to 172). In any event, the documents submitted by the French authorities do not mention or analyse in investment terms the return for the shareholder resulting from a ratio of 148%, still less a ratio of 163%. In this connection, there are no prior economic evaluations comparable to those which a rational private investor in a market economy would have had carried out, as referred to by the Court of Justice in paragraph 84 of [the judgment in Case C-124/10].

(144) The economic study submitted by EDF in support of its comments (recitals 69-70) does not find that [the French Republic] acted as an investor rather than a public authority. The study was produced after the supposed investment decision taken in 1997 and was not examined by the authorities responsible for taking such a decision. For this reason alone, the study is not admissible as evidence, as set out by the Court of Justice (recital 126, paragraph 104 of the judgment [in Case C-124/10]). The fact that the study used authentic basic data available at the time does not invalidate this conclusion. The study was commissioned to support the case following the extension of the investigation procedure in May 2013 and the conclusions it would reach were apparently known to EDF in July 2013, although the study dates from October 2013. Other grounds also invalidate the quantified findings of the study, and consequently undermine the conclusions that EDF draws from it in support of its comments; these grounds are:

the study uses basic data almost exclusively from the time and applies widely recognised methodological approaches for evaluating enterprise value, subject to the major reservations set out below. For all that, it constitutes a particularly complex economic evaluation, following relatively thorough data research, which took some three months to carry out and validate. This complex process comprised successive and various methodological choices, some of which are questionable. Without this process, it is quite impossible, from the basic data drawn from scattered and diverse sources, to form an overall view or make a quantified projection of the profitability that the French State could expect in 1997, as the study does. However, the Court of Justice requires the private investor test to be based on evaluations which were foreseeable at the time when the decision to make the investment was taken (paragraph 105 of the judgment [in

Case C-124/10]). Contrary to what is claimed by EDF, the very fact that, with data available in 1996-1997, the relevant authorities of the French State did not themselves carry out or commission a study on this scale and with this level of complexity indicates that the profitability of the investment for the shareholder was not the sole relevant consideration for the French authorities when they took their decision;

the study analyses the conduct of the French State in the light of the private investor principle using information and hypotheses that are very different from those outlined in recitals 87 to 108 and which, according to the French authorities, formed the basis for the supposed decision. However, it is not EDF which took the investment decision, and, according to the Court of Justice (paragraphs 82 and 83 of its judgment [in Case C-124/10]), it falls to [the French Republic] to produce evidence of the nature and context of the decision taken. Since [the French Republic] alleges that it was in the light of the information and data submitted by it that it took its decision, the study, and EDF, are *de facto* substituting themselves for the alleged investor and claiming to know better than the French State the concerns and information that supposedly underpinned the decision taken and the hypotheses used to reach it. As such, the study is based on speculation and conjecture with respect to the data, information and hypotheses that the French authorities might have taken into account (among other possible options) in 1997 and has no force as evidence in 2015 (or October 2013, when it was carried out) to explain the decision taken by the French authorities in 1997, which these authorities themselves explain with reference to different data and hypotheses;

the study's value as evidence is undermined still further by the fact that, to reach the findings outlined in recital 70, the study relies on hypotheses which are arbitrary or random, or uncorroborated by the facts, or counter to the information contained in the evidence provided by the French authorities and which, according to them, illustrates that the private investor test is applicable and does in fact apply in this case. So, first, the study conjectures that after 2000, the remuneration paid to the State as shareholder would not be regulated by decree and contained in a contract between the State and EDF but would be set by reference to the dividends which other undertakings in the sector paid in 1996-1997. However, the remuneration on the capital contributions to EDF had been regulated by decree since 1956 (recital 102) and was statutory and reflected in the multiannual contracts before and after 1997, in the light of considerations unrelated to the dividends paid by undertakings in the sector operating in markets other than France (recitals 94 and 95). Likewise, and in second place, the study, with no good reason, reintroduced into EDF's income statement provisions from EDF's company accounts worth FRF 11.6 billion (before tax) and FRF 7.3 billion (after tax), artificially increasing EDF's value by that amount without taking account of the information which was available and the developments which were foreseeable in 1997 with respect to EDF's commitments under its staff pension scheme (recitals 168-169);

thirdly, the increase in the value of EDF resulting from the increase in return and results is calculated in the study on the basis of the "market expectations" in 1997. However, the French authorities had specific and quantified projections for EDF's revenue and income for 1997 to 2000, validated as part of the process of drawing up the contract for services for the same period and stated that they relied on these projections and data to take their decision (recitals 78-79, 90, 94, 96); they also had in 1997 detailed knowledge of the undertaking and its financial prospects (recital 77). The use of "market expectations" from third parties to estimate EDF's value in these circumstances is neither reliable nor consistent with the arguments put forward by [the French Republic] to explain the decision which its authorities are supposed to have taken, all the more so since the French authorities argue that most of EDF's business in 1997 was conducted in France subject to regulated tariffs (recital 85). Moreover, these tariffs were set at a low level with a view to boosting the competitiveness of French industry and the purchasing power of French households (recitals 89 and 95). The study fails to explain, still less to justify, why the remuneration, dividends and results of listed companies which had no significant

presence in France and operated in markets subject to different competitive and regulatory constraints (such as Endesa, Gas Natural and Union Fenosa in Spain, RWE, EON and Verbund in Germany, Fluxys in Belgium, etc.) should determine the results, remuneration and dividends of EDF, which is one of the hypotheses on which the findings set out in recital 70 are based;

lastly, and in fourth place, the study postulates with no justification that increasing the capital contribution to EDF in 1997 was, at least potentially, equivalent to acquiring a liquid financial asset. However, in 1997 EDF was a public industrial and commercial establishment with no share capital (recital 19), with the French authorities and EDF affirming at the time that it would retain this status in the future (recitals 95, 105). The arbitrary nature of this postulation, on which the findings of the study none the less crucially depend, is demonstrated in more detail in recitals 179 to 181.

Nature and subject matter of the measure, its context and the rules to which it is subject

(145) The Court of Justice states that the nature of the measure is one of the relevant factors to take into account when ascertaining whether the private investor principle is applicable (paragraph 86 of [the judgment in Case C-124/10]). The decision to contribute additional capital to EDF by waiving the tax on the reclassification of the irregular RAG provisions is both an accounting decision on moving amounts between different items on EDF's balance sheet (recitals 100 and 105) and a tax decision, since the authorities responsible deemed that the corporation tax should be levied before reclassification (recital 35), even though tax was paid on other reclassified accounting provisions. Contrary to what is claimed by the French authorities, it has not been established that the two accounting and tax strands are indissociable within a single measure put in place by [Law No 97-1026].

(146) Article 4(2) of the [law] provides that the value of the assets in kind allocated under concession to the RAG and appearing as liabilities on EDF's balance sheet should be entered, net of the corresponding revaluation reserves, under the item "contributed capital" (recital 28). It could be concluded that, under the [law], any revaluation reserves aside, no further accounting or tax treatment was to reduce the value entered as a capital contribution to EDF. However, in accordance with Article 34 of the … Constitution [of the French Republic], the decision to levy tax or not is not a matter regulated by law, and [Law] No 97-1026 could not therefore legitimately settle this question. Under this article, Parliament's legislative powers in tax matters are confined to setting the base, rates and collection procedures for tax of all kinds. EDF paid corporation tax on some accounting provisions and not on others following the same reclassification operation provided for in the [law].

(147) Furthermore, the preparatory documents submitted by the French authorities and referred to in recital 104 show that the Council of State took the view in 1997 that non-legislative provisions should be eliminated from the draft law; a draft amendment designed to limit the amounts that the State could collect from EDF under the [law] was also rejected. Lastly, the line ministers took the view in April 1997 that the detailed arrangements for implementing EDF's restructuring, on both the accounting and the tax fronts, should be the subject of further discussions between the supervising authorities and the undertaking (recital 98).

(148) These implementation arrangements, detailed and quantified in the [letter of 22 December 1997], following the adoption of the [law] (recital 31), suggest that the tax elements were dissociable from the provisions of [Law No 97-1026]. In their letter the ministers explain the restructuring of the upper part of EDF's balance sheet pursuant to Article 4 of [Law No 97-1026] and appear to reach a tacit decision on the tax implications of the restructuring, without there being any question of a profitable investment or of any mandatory requirements of the law.

(149) As regards the context of the measure, this being one of the factors cited by the Court of Justice for the purposes of ascertaining the applicability of the private investor test, the preparatory meetings and supporting documents dating from the period, and which resulted in the contract for services between the state and EDF signed on 8 April 1997, demonstrate that the reclassification of the provisions took place in the light of the prospect of the partial liberalisation of energy markets in the [European Union], planned as from 1996. Hence the concern for EDF's activities to become more international evident in the 1997-2000 contract and the preparatory documents, as well as the parliamentary documents. The contract itself presupposes that its implementation will require a regularising legislative measure such as that laid down in [Law] No 97 1026, thereby establishing a *de facto* link between the objectives of the contract and of the legislator. However, neither the contract concluded in April 1997 nor the preparatory documents or exchanges with EDF's line ministries take a position on the precise amount of tax.

(150) This context, outlined by the evidence cited by [the French Republic] in its comments, does not, however, establish beyond doubt that the measure could be ascribed to a shareholder making an investment. The need to correct the irregularities identified by the Court of Auditors in October 1994 is also part of the picture. While, on one side, there was a need to correct an accounting irregularity that had allowed EDF to avoid paying corporation tax for years, on the other, the French authorities stressed that the measure did not call into question EDF's monopoly (recital 105) and that the stable framework allowed by the liberalisation of the market should be maintained (recital 95). Although liberalisation opened up possibilities for expansion into the national markets of other Member States and some measures were included in the 1997-2000 contract for services so that EDF could become more international, the concern of the public authorities to place national undertakings at an advantage through financial support in the early stages of liberalisation was not confined to public undertakings; nor does it constitute typical behaviour by a prudent investor in a public undertaking

(151) Lastly, the Court of Justice states that the rules to which the disputed measure is subject are relevant for determining whether it constitutes an investment by the State as shareholder or a prerogative of a public authority. Classing the measure as one or the other may therefore take account of compliance with the rules governing it. The rules governing the investment of tax resources in undertakings like EDF must therefore be examined. Without the measure, the revenue from the uncollected corporation tax would have been paid into the general revenue of the budget of the French State in 1997. Under Article 18 of Order No 59-2 of 2 January 1959 laying down an organic law for budget laws, which was in force at the time of the facts, as all revenue is used to implement all expenditure, all revenue and all expenditure of the State are posted to a single account, called the General Budget. So, tax revenue is posted to the budget for the benefit of the State, and not for the benefit of public undertakings.

(152) The budget is subject to the constitutional principle of universality, whereby all revenue and all appropriations are posted as two separate blocks, with no specific link made, for example, between revenue from corporation tax and an allocation such as a capital contribution to a public undertaking like EDF. Of course, the pre-allocation of a tax resource to a legal person other than the State in the form of a subsidy or an investment is possible under French law, where expressly provided for. Article 18 of Order No 59-2 thus provided that, apart from in the case of loans and advances in particular, the allocation of State resources was exceptional and could take place only pursuant to a provision of a budget law, which was for the government to adopt.

(153) However, [Law No 97-1026] was not a budget law and as such could not allocate a tax resource to EDF's capital. Moreover, there do not appear to have been any specific government initiatives to adopt budget-law provisions applicable to the 1997 budget with a view to pre-allocating the revenue from the tax owed by EDF to expenditure by the French State on any investment in

EDF's capital as part of the same budget. The rule allowing the investment of a tax resource constituted for the benefit of the State in a legal entity distinct from the State, such as EDF, does not seem to have been applied here.

(154) The vast majority of the evidence described above clearly shows that [the French Republic] did not, either before or at the same time as conferring the economic advantage resulting from the non-payment of the corporation tax, take a decision to make an investment in EDF by way of the tax exemption. Accordingly, the prudent private investor in a market economy principle does not appear to be applicable to this measure. The considerations set out below on the application of the private investor test are therefore provided in the alternative.'

2. Preliminary observations

116 It must be reiterated that the Commission did not err in concluding, in essence, in recital 113 et seq. of the contested decision, that its task was to examine whether the private investor test was applicable to the measure at issue that had been clearly identified as the waiver by the French Republic of the tax that had become payable on the grantor rights, as described in the memorandum of 9 April 2002 (see paragraph 107 above).

117 It is therefore necessary immediately to dismiss the various allegations which EDF repeats in support of its second plea in law to the effect that the Commission should have examined not that waiver of a tax claim, but the measure to recapitalise EDF, with no distinction being drawn between the various provisions that were reclassified as capital contributions.

3. The first part of the second plea in law

(a) Arguments of the parties

118 In support of the first part of its second principal plea in law, EDF argues, in essence, that, disregarding its obligation to take into account all the relevant points of fact and law in its analysis of both the applicability of the private investor test and the application of that test, the Commission merely relied on the information and evidence submitted by the French Republic and ignored the information and evidence which it had itself submitted, and that the Commission had justified that approach by reference to alleged contradictions between the documents which the French State had provided and those which it had submitted.

119 EDF does acknowledge that 'the Commission has … made an incidental reference to the evidence which it [had been] sent by EDF', and it mentions in this connection recital 66 of the contested decision, which refers to 'some 40 contemporaneous documents that EDF attached to its accounts'.

120 Nevertheless, EDF still argues that 40 or so contemporaneous documents out of the 53 documents which it sent the Commission are not referred to in the contested decision and that they have therefore not been analysed, although the Commission has not explained in what way they contradict the documents submitted by the French Republic or are irrelevant.

121 Given that, it is indisputable, according to EDF, that the only evidence that the Commission has examined in this case is the evidence submitted by the French Republic, which demonstrates that it wilfully refused to examine the documents which it submitted, in breach of its duty to act diligently.

122 EDF also maintains that some of the information disclosed in some of the documents which it sent the Commission shows that, had it been taken into account, the Commission would have arrived at different conclusions from those which it reached in the contested decision. In this connection, it

mentions information contained in document No 18 (a letter from EDF to the Minister for Economic Affairs concerning EDF's fiscal and accounting system), document No 20 (a note of a meeting held on 27 October 1995 at the Ministry of Finance), document No 22 (a letter which EDF sent to the Ministry of Economic Affairs, Finance and the Budget, containing an annex entitled 'Restatement of EDF's balance sheet as at 31 December 1994'), document No 23 (a letter from EDF to the Ministry of the Budget enclosing an annex entitled 'Proposal for the restructuring of EDF's balance sheet'), document No 32 (a letter from the Minister for Economic Affairs and Finances and the Minister for Industry, Postal Services and Telecommunications) — albeit that it states that that last document was taken into consideration in the contested decision — documents Nos 50 to 56 (contemporaneous opinions of ratings agencies taken into account in the study prepared by the consulting firm Oxera in 2013) and document No 57 (a study entitled 'Pan-European Utilities'), all of which are listed in a table set out in paragraph 77 of the application.

123 EDF adds that the Commission's assertions that it took these documents into consideration are incorrect and that the only two documents cited in the contested decision and presented as documents sent to it by the company are in fact documents which the French Republic also sent the Commission.

124 EDF submits that the Commission cannot claim that its decision simply to disregard the documents which it submitted in itself amounts to evidence of an in-depth analysis.

125 EDF claims that the judgments of 16 March 2016, *Frucona Košice* v *Commission* (T-103/14, EU:T:2016:152), and of 26 May 2016, *France and IFP Énergies nouvelles* v *Commission* (T-479/11 and T-157/12, under appeal, EU:T:2016:320), lend support to its allegations that, in substance, the Commission must take all relevant evidence into consideration, even if it has not been sent to the author of the measure, that is to say, the Member State concerned.

126 In addition, EDF argues that an objective, impartial reading of the documents mentioned in paragraph 80 of the application demonstrates unequivocally that the measure at issue is indeed the decision to recapitalise the company, which is identified, for example, in document No 20, which it sent to the Commission.

127 Finally, in the observations which it submitted following the judgment in *Frucona Košice*, the applicant, supported by the French Republic, alleges that, in accordance with that judgment, since the Commission was obliged to take all relevant information into consideration, even if that meant going beyond the evidence provided by the State and ignoring the State's subjective opinion, it could not ignore the evidence which had been submitted to it by the State and by EDF itself.

128 In support of EDF's line of argument, the French Republic submits that recitals 87 to 108 of the contested decision merely describe the nine documents which were annexed to the comments that the French authorities sent to the Commission on 1 July 2013 and fail to explain the reasons for which those documents led the Commission to conclude that the private investor test was not applicable in the present case.

129 The French Republic has produced a table (Annex 10 to its statement in intervention) in which it lists and comments on the documents which it and EDF produced and which the Commission failed to take into account, even though, in its opinion, the documents contained information of crucial importance in assessing whether the test applied in this case.

130 The French Republic gives three examples.

131 First, the French Republic cites a letter of 19 February 1997 from EDF's finance director to the Head of Financing and Holdings at the Ministry of Finance, which it alleges the Commission merely mentioned in recitals 88 and 91 of the contested decision without taking it into account in its reasoning, even

though that letter shows that, when preparing the contract for services for 1997-2000 that was concluded by EDF and the State on 8 April 1997 ('the contract for services'), the State had examined, on the basis of economic and financial considerations, the remuneration which it would receive as shareholder over the period 1997 to 2000. The letter sets out the projections that were based on the assumptions contained in the contract for services (changes in tariffs, the terms of remuneration of the public shareholder, investment objectives and debt reduction).

132 Secondly, the French Republic mentions an analytical memorandum prepared by EDF on 27 July 1996 and sent, at its request, to the French Senate on 15 September 1997, which it alleges the Commission merely mentioned in recital 88 of the contested decision, even though that memorandum demonstrates that, when adopting the measure at issue, the concerns of the French State were those of a public shareholder. The memorandum examined, in particular, forecasts for the remuneration of public shareholders in light of the balance sheets of European undertakings in the electricity sector.

133 Thirdly, the French Republic cites a letter which EDF sent on 26 December 1995 to the Ministry of Economic Affairs, Finances and the Budget, which contained an annex entitled 'Restatement of EDF's balance sheet as at 31 December 1994', which the Commission failed to take into account in the contested decision, even though it contained accounting analyses which demonstrate that the restructuring of EDF's capital and the consequences thereof were being examined in detail by the French State as early as 1995.

134 The Commission disputes these arguments.

(b) Findings of the General Court

135 EDF essentially argues that, when it assessed whether the private investor test was applicable to the measure at issue, the Commission, in breach of its duty to act diligently, failed to take into consideration numerous documents which it had sent it and merely, and without further explanation, examined the documents which the French Republic had sent it, even though the information disclosed in its documents should have led the Commission to the conclusion that the test was applicable.

136 First of all, it must be borne in mind that, if a Member State relies on the private investor test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective, verifiable and contemporaneous evidence that the measure implemented falls to be ascribed to the State acting as shareholder and is based on the requisite prior economic evaluations (see, to that effect, the judgment in Case C-124/10 P, paragraphs 82, 85 and 104).

137 Secondly, it must be remembered that the duty to act diligently which is inherent in the principle of sound administration and applies generally to the actions of the EU administration in its relations with the public requires that that administration act with care and caution (judgment of 4 April 2017, *European Ombudsman* v *Staelen*, C-337/15 P, EU:C:2017:256, paragraph 34).

138 Where the EU institutions have a discretion, respect for the rights guaranteed by the EU legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case and the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court of Justice and the General Court verify whether the factual and legal elements upon which the exercise of the discretion depends were present (judgment of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14).

139 In addition, according to the settled case-law of the Court relating to the principles governing the administration of proof in the sector of State aid, the Commission is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose (see judgment of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 63 and the case-law cited).

140 Thirdly, it should also be borne in mind that the lawfulness of a decision concerning State aid falls to be assessed by the European Union judicature in the light of the information available to the Commission at the time when the decision was adopted (judgments of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 54, and of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 91).

141 Fourthly, and lastly, even though, in the context of State aid review, the Member State must, in accordance with the duty to cooperate in good faith laid down in Article 4(3) TEU, provide the Commission with the information that will allow it to take a decision on whether the measure at issue contains State aid, the Commission is under an obligation to conduct a diligent and impartial examination and to conduct a careful examination of the information which the Member State provides to it. In keeping with the intention of the formal investigation procedure, which makes the interested parties the Commission's source of information, that obligation also applies to the Commission in respect of information communicated to it by the interested parties (see the judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 112 and the case-law cited).

142 In the present case, it is common ground that the French Republic relied on the private investor test during the administrative procedure (see recital 95 of the initial decision and paragraph 31 above). Consequently, it must establish unequivocally and on the basis of objective, verifiable and contemporaneous evidence that the measure implemented falls to be ascribed to the State acting as shareholder and is based on the requisite prior economic evaluations (see, to that effect, the judgment in Case C-124/10 P, paragraphs 82, 85 and 104).

143 In the context of this first part of the second plea, the applicant, supported by the French Republic, complains that the Commission failed to take into consideration all the items of evidence submitted by it in this connection and instead merely examined all or some of the evidence put forward by the French Republic.

144 It must immediately be observed that EDF's allegations are extremely general and singularly vague in identifying the purportedly important evidence, contained in the documents which it submitted to the Commission, that the Commission supposedly failed to take into consideration.

145 Indeed, EDF confines itself to setting out, in paragraph 77 of the application, a table in which it lists 50 documents (not 53, as it claims in paragraph 78 of the application) that it sent to the Commission. It states that, in the case of 10 of these documents, the contested decision does refer to them. As regards the rest, it merely argues that they were not mentioned and, a fortiori, were not analysed by the Commission. They were consequently disregarded without justification, even though it was incumbent on the Commission to have regard to all the relevant points of fact and law.

146 Next, in paragraph 80 of the application, EDF mentions 'certain evidence that was disregarded for no reason' and which, given that it appeared in the documents appended to Annex 7 to the application, should have led the Commission to conclude that the private investor test was applicable to the measure at issue:

– 'document [No]18: "A better balance between the roles of shareholder-owner, regulator and grantor";

– document [No]20: “Capitalisation of EDF by the conversion of the State’s grantor rights and the associated provisions for renewal into capital and consolidating the capital injections, so as to establish a permanent basis for shareholder remuneration”;

– document [No]22: “Proposed changes to EDF’s balance sheet as at 31 December 1994, RAG to own funds, reclassification of grantor rights [public distribution]”;

– document [No]23: “Restructuring of own funds on the liability side of the balance sheet” (see points 1.1, 1.2 and 1.3);

– document [No]32: “An ambitious target for the remuneration of the State”;

– documents [Nos]50-56: rating agency reports commenting on the performance and prospects of the undertakings used as comparators in the study carried out by Oxera (prepared in 2013). These documents provide information about the economic context in Europe and describe the measures taken by undertakings to meet anticipated developments. This is important information which the Commission ignored without justification.

– document [No]57: “Morgan Stanley, pan-European utilities”: this very important contemporaneous document clearly sets out the methodology which a private investor would have followed and the matters it would have taken into account, but was inexplicably ignored by the Commission’.

147 EDF concludes from this that the Commission deliberately ignored documents that conflicted with its own point of view, and did so without justification.

148 First of all, the Commission was not required, as part of its duty to act with diligence, mentioned in paragraph 138 above, to mention or to express a position in the contested decision on each and every document that EDF sent to it, the relevance of which in the examination the Commission was required to carry out EDF has failed to prove.

149 The Commission cannot therefore be said to have failed in its duty to act with diligence in this regard.

150 Moreover, in so far as EDF also maintains that the Commission failed in its duty to state reasons, it must be recalled that it has consistently been held that the statement of reasons must be appropriate to the measure concerned and the context in which the measure was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the Court to carry out its review and to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded. It is not necessary for the statement of reasons to specify all the relevant matters of fact or of law, since the question whether the statement of reasons for a measure satisfies the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 et T-233/99, EU:T:2003:57, paragraphs 278 to 280).

151 It follows that the Commission was equally not required, as part of its duty to state reasons, to express a position in the contested decision on each and every document sent to it by EDF.

152 Consequently, in so far as they allege a failure to state reasons, EDF’s arguments again cannot succeed.

153 Secondly, as regards the documents which EDF mentions in paragraph 80 of the application, in connection with which it points to 'evidence' that the Commission allegedly ignored or disregarded, it must be held, first, that the scant material which it cites and on which it relies does not relate to the measure at issue as examined by the Commission. At most, it relates to the measure as EDF wrongly conceives it to be, that is to say, the recapitalisation of EDF. Secondly, even if the documents mentioned are read in their entirety, none of them makes so much as an incidental reference to the measure at issue. EDF's argument is therefore factually incorrect.

154 It must also be noted that EDF has offered not the least explanation of how the 'evidence' to which it refers in paragraph 80 of the application might have radically altered, as it claims, or even affected the analysis of the applicability of the private investor test which the Commission carried out.

155 Thirdly, it must be pointed out that, as the Commission argues, even though it did not expressly refer to all of the documents mentioned by EDF, the fact remains that the evidence adduced by EDF that was allegedly disregarded was indeed taken into consideration in the contested decision.

156 Indeed, the clarification of the different roles of the French State as shareholder, grantor and regulator (Annex A-7-18 to the application) and the 'ambitious' target for the remuneration of the State (Annex A-7-32 to the application) were alluded to in recital 89 and the third indent of recital 95 and of the contested decision.

157 The operation to recapitalise EDF, and the associated establishment of a basis for remunerating the public shareholder (Annex A-7-20 to the application), the proposed changes to EDF's balance sheet (Annex A-7-22 to the application) and the restructuring of EDF's own funds (Annex A-7-23 to the application) are described in the details given in recitals 25 to 30 and 100 to 103 of the contested decision of the operation decided upon by the French Republic.

158 The work which EDF engaged in with the supervisory authorities and the meetings it had with them, from 1995 onwards, which gave rise to the documents which EDF mentions in paragraph 80 of the application, are referred to in recitals 28, 89 and 90 of the contested decision, in which the Commission focused on outcomes rather than processes, for which it cannot be criticised.

159 Moreover, as regards the rating agency reports that were considered by Oxera while it was preparing its study (Annex A-7-50 to A-7-56 to the application), these are admittedly contemporaneous, unlike the Oxera study which dates from 2013, but they do not relate specifically to EDF, still less to the measure at issue.

160 The first of these reports, which is from a rating agency, is entitled 'Rating methodology — European electric utilities'. It contains a general analysis of the sector, which underwent change in 1999. It does not contain any analysis of EDF's fiscal and accounting position resulting from the structure of its balance sheet and the renewal provisions. It does not even mention the company's recapitalisation or the restructuring of its balance sheet. A single sheet, page No 875 in the annexes to the application, gives an overview of some general information concerning the company's rating.

161 Annexes A-7-51 to A-7-55 to the application comprise five analyses carried out by a rating agency. These all relate to undertakings other than EDF.

162 These various reports do not, therefore, help to explain the reasons which led to the measure at issue, as properly identified, or the measure itself. At most, they constitute some of the contextual material on which Oxera's study was based.

163 As regards the Oxera study itself, which was prepared in 2013, it is described and evaluated in recital 144 of the contested decision. It was, therefore, taken into consideration by the Commission.

164 Finally, as regards a bank report on the entire European energy sector, as opposed to EDF in particular (Annex A-7-57 to the application), the Commission explained, in the third indent of recital 144 of the contested decision, the reasons for which it considered that the dividends paid by undertakings other than EDF had not served as a reference for the remuneration paid to the French State in respect of the capital contributions to EDF. According to the French Republic itself, other considerations were examined and provided the basis for its decision. (The Commission also refers, in this connection, to recital 87, the third indent of recital 102, the eighth indent of recital 107 and recital 161 of the contested decision).

165 It must also be held that the three documents which the French Republic mentions in its statement in intervention were also taken into consideration by the Commission.

166 First of all, the content of the letter of 19 February 1997 from EDF's finance director, which sets out 'the principal assumptions in the financial scenario associated with the contract for services', is set out in recitals 90 and 91 of the contested decision. At no point does that letter refer to the measure at issue, and the information it does contain does not support the conclusion that the private investor test was applicable, as the Commission indeed explained in recital 132 et seq. of the contested decision.

167 Secondly, as regards the analytical memorandum prepared by EDF on 27 July 1996, that merely discusses in general fashion the conduct of the regulators and the remuneration of shareholders in the electricity sector in other countries. It draws no conclusions of an operational nature in so far as EDF is concerned.

168 Thirdly, and lastly, as regards EDF's letter of 26 December 1995 and in particular the annex entitled 'Restatement of EDF's balance sheet as at 31 December 1994', the following should be noted.

169 Several documents are annexed to EDF's letter of 26 December 1995. First, there are several diagrams which represent the balance sheet positions before and after the reclassification of 'public distribution concessions' (also referred to as local authority concessions), which are distinct from the RAG concession, as is attested to by Annexes A-7-23 and A-7-24 to the application, and these clearly show the different treatment of the two types of concession, which are also briefly referred to in Report No 204 (corrected) prepared by Mr Migaud, Rapporteur General, for the National Assembly's Committee on Finances ('the Migaud report') (Annex I-8 to the statement in intervention). Secondly, with regard to the same concessions, there is a 'comparison of the current accounting system and the proposed new system'. Thirdly, there is a document addressing the 'grantor and concessionaire financing that served as the basis for the obsolescence calculations and the determination of the respective shares of depreciation borne by the two parties', which again deals with the same concessions. Fourthly, there is an annex entitled 'Restatement of the balance sheet as at 31 December 1994'. That annex is divided into three subsections: first, a 'detailed balance sheet recast according to EDF's most recent proposals regarding concessions and the restructuring of the balance sheet', which identifies 'F. H.' concessions and the public distribution concessions (the table illustrating this first part of the annex admittedly shows the proposed changes to the liabilities side of the balance sheet following the change to the status of the RAG, which are similar to those which were made in 1997, but the tax implications of the reclassification of the used provisions are not mentioned); secondly, 'the same balance sheet, but presented differently to highlight the treatment of the [public distribution] concessions'; thirdly, 'a third table showing in isolation the balance sheet items relating to the [public distribution] concessions (highlighted in the previous table) so as to explain the logic of the treatment of the [public distribution] concessions in EDF's balance sheet'. The fifth document sets out the 'long-term changes in the [public distribution] concession accounts in the balance sheet, with certain outline projections up to 2015.

170 First of all, it must be held that the measure at issue is in no way referred to in EDF's letter of 26 December 1995 or its annexes.

171 Next, it must be observed that the Commission did touch upon the few relevant pieces of information in EDF's letter of 26 December 1995 in recitals 25 to 30 and 100 to 103 of the contested decision, and also mentions, in recitals 26, 89 and 90, the work which EDF engaged in with the French State and the meetings that took place, from 1995 onwards. Those recitals give a detailed description of the fiscal and accounting aspects of the measure at issue, which, moreover, is not even alleged to be incorrect.

172 Lastly, the Commission cannot be criticised for focusing in the contested decision on the outcomes of the preparatory work undertaken by EDF and the French State in relation to Law No 97-1026 rather than on how that work proceeded, especially since there is no indication that consideration was given to the measure at issue or its alleged effects in investment terms.

173 As to the remainder, the table set out in Annex 10 to the statement in intervention sets out annotated extracts from documents that are alleged not to have been taken into account. Without it being necessary to rule on the admissibility of the French Republic's reference to a table set out in an annex to its statement in intervention, it may be observed that none of the passages cited and none of the comments refers to the measure at issue.

174 At most, the extracts referred to in paragraph 173 above give some background to the adoption of the measure at issue, but it is not alleged that the Commission failed to take that background into consideration.

175 In conclusion, EDF has not proven that the Commission failed in its duty to act with diligence in that it omitted to examine or to take into consideration the documents which EDF sent it. Neither has it demonstrated that the Commission failed in its duty to state reasons.

176 Consequently, the first part of the second principal plea in law must be dismissed as partly factually incorrect and, moreover, completely unfounded.

4. The second part of the second plea in law

(a) Arguments of the parties

177 In support of the second part of its second plea, which alleges confusion between matters relating to the applicability of the private investor test and matters relevant to the application of that test, EDF points out that the Commission took the view that the private investor test was not applicable in the present case because the French Republic 'did not, either before or at the same time as conferring the economic advantage resulting from the non-payment of the corporation tax, take a decision to make an investment in EDF by way of the tax exemption'.

178 According to EDF, the Commission's line of argument rests on certain inaccuracies in its analysis of the relevant points of fact and law and fails to take into account the conclusions to be drawn from the judgments in Cases T-156/04 and C-124/10 P.

179 EDF submits that the Court held that the question of the applicability of the private investor test depended on the capacity in which the State was acting, that it to say, whether it acted as a shareholder or as a public authority.

180 In addition, inasmuch as the measure at issue was a measure recapitalising an undertaking in which the State is a shareholder, the General Court took the view that that measure, by nature, tended to demonstrate that the State was pursuing an investment objective comparable to that of a private investor.

181 The contested decision therefore fails to draw from the judgment in Case T-156/04 the necessary conclusions concerning the argument relating to the 'tax gift' and almost systematically confuses the requirements pertaining to the applicability of the private investor test with those relating to its application.

182 EDF argues in this connection that recitals 132 to 135 of the contested decision, which discuss the increase in the State's remuneration, address the application of the test, not its applicability, and that that is also the case with recitals 140 to 144 of the contested decision, which discuss the profitability of the investment in question.

183 Lastly, EDF adds that the Commission misconstrues paragraphs 82 and 84 of the judgment in Case C-124/10 P, which link the applicability of the private investor test with the capacity in which the State has acted, and that the profitability of the investment decision is a separate matter from the capacity in which the State has acted and falls to be addressed in the application of the test. Therefore, by pretending the opposite, the Commission has disregarded the judgment in Case C-124/10 P.

184 For its part, the French Republic submits that the Commission should have first examined, in isolation, whether the decision to recapitalise EDF was a decision taken by the State in its capacity as public shareholder or as public authority and should have then examined the question of profitability, which it in its view falls to be addressed solely in the application of the test.

185 The Commission submits that these arguments are unfounded.

(b) Findings of the General Court

186 EDF, supported by the French Republic, argues in substance that the Commission systematically confused the analysis it was required to carry out in relation to the applicability of the private investor test with that relating to the application of that test.

187 EDF's arguments on this point are as follows.

188 First, EDF submits that the Court of Justice held that the question of the applicability of the private investor test depended on whether the State acted in its capacity as shareholder or as public authority. It argues that, since the measure at issue was a measure recapitalising an undertaking in which the State is a shareholder, the General Court held, in paragraph 259 of the judgment in Case T-156/04, that that measure, by nature, tended to demonstrate that the State was pursuing an investment objective comparable to that of a private investor.

189 That line of argument cannot succeed.

190 Indeed, contrary to EDF's claim, the measure at issue was not a measure recapitalising the company, but the waiver of tax on the grantor rights (see paragraphs 106 and 107 above). This line of argument is therefore based on a misreading of the judgments in Cases T-156/04 and C-124/10 P.

191 It must also be observed that this line of argument in reality amounts to insisting that it is clear from the judgments in Cases T-156/04 and C-124/10 P that, since the measure was a recapitalisation measure, the State was acting in its capacity as shareholder and as such was pursuing an investment objective by nature comparable to that of a private investor, and that that should have led the Commission to find that the test was applicable.

192 However, it must be remembered that the judgments in Cases T-156/04 and C-124/10 P did not pre-judge the applicability of the private investor test.

193 On the contrary, in its judgment in Case C-124/10 P, the Court held that:

> '82. … if a Member State relies on that test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as shareholder.
>
> 83. That evidence must show clearly that, before or at the same time as conferring the economic advantage …, the Member State concerned took the decision to make an investment, by means of the measure actually implemented, in the public undertaking.'

194 In other words, it is not sufficient for the State merely to allege that it decided to make an investment and that it took the relevant measure in its capacity as shareholder. It must establish that fact unequivocally and on the basis of objective, verifiable and contemporaneous evidence.

195 The present line of argument is consequently based on a misreading of the judgments in Cases T-156/04 and C-124/10 P.

196 Secondly, EDF, supported by the French Republic, argues, in essence, that, when considering the applicability of the test, the Commission made the mistake of assessing the increase in the remuneration payable to the French State and the profitability of the measure (which it wrongly described as an 'investment'), since those criteria come into play when the test is applied.

197 However, the Court held in its judgment in Case C-124/10 P that:

> '84. In that regard, it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability.
>
> 85. By contrast, for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen (see, to that effect, *France* v *Commission*, paragraphs 71 and 72).'

198 The Commission cannot, therefore, be criticised for focusing on the profitability of the alleged investment when it assessed whether the private investor test was applicable.

199 The second part of the second principal plea in law must therefore be dismissed in its entirety.

5. The third part of the second plea in law

(a) Arguments of the parties

200 EDF, supported by the French Republic, submits, in support of the third part of its second principal plea in law, that the Commission erred in concluding that the private investor test did not apply in this case because the French Republic had acted in its capacity both as public authority and investor, that is to say, because it had adopted the measure at issue on the basis of both considerations concerning it as a shareholder and considerations concerning it as a public authority, which EDF alleges the Commission found to be demonstrated by the overlapping, in the documents submitted by the French authorities, of considerations relating to the remuneration of the State with considerations relating to the amount of tax due following the restructuring of EDF's balance sheet.

201 EDF submits that that position is based on both factual errors resulting from a selective and biased reading of the documents and an error of law relating to the very nature of the private investor test.

202 As regards the factual errors, EDF submits that numerous documents — and it refers in particular to documents Nos 23 to 25 annexed to the comments which it sent to the Commission in July 2013 (Annexes A-7-23 to A-7-25 to the application) — show that the effects on its tax liability of the proposed restructuring of its balance sheet were examined in parallel with, but separately from the consequences of that restructuring for the remuneration of the public shareholder, but do not reveal any overlapping of the fiscal considerations and investment considerations by which the State was guided.

203 As regards the error of law, EDF argues that, in recitals 137 to 139 of the contested decision, what the French Republic is actually criticised for is its having examined the effects of the restructuring of its balance sheet on EDF's fiscal position, and thus on such future tax charges as could be anticipated at the time, despite the fact that, while it did, admittedly, carry out such an assessment, it did so in parallel with, and separately from its examination of the consequences for the remuneration of the public shareholder. The French Republic adds that the approach it took was consistent with the case-law of the General Court (judgment of 24 September 2008, *Kahla/Thüringen Porzellan* v *Commission*, T-20/03, EU:T:2008:395).

204 According to EDF, the Commission's line of argument thus reveals a misunderstanding of the nature of the private investor test and amounts to a breach of the principle of equal treatment between States and investors. The very purpose of the test is to distinguish between decisions which a State may adopt as an investor and decisions which it may adopt as a public authority, but the test cannot be held to be inapplicable on the ground that the former may coexist with the latter. Such reasoning on the Commission's part is further evidence of the excessive formalism for which it earned the General Court's criticism.

205 The private investor test may be ruled out only if the State has acted solely in its capacity as a public authority. However, where it has taken several factors into account in its investment decision, the test is not merely applicable, it is indispensable, in order to distinguish between factors of an economic nature, which will be relevant to the application of the rules on State aid, and other factors, and this point is illustrated by the Commission Notice on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1).

206 According to EDF, the only question the Commission should have examined is whether a private investor in a position as close as possible to that of the State would have made the investment in the light of its expected profitability, with no account being taken of the fiscal considerations which the State might have examined separately. In other words, isolating the factors relating to the definition of the measure and to the capacity of the author of that measure (a recapitalisation measure decided upon by the State as shareholder) and the factors relating to the profitability of that measure, was the test applicable and was it correctly applied.

207 EDF adds that the coexistence of public authority considerations and investor considerations did not prevent the Commission from applying the private investor test in its decision on alleged aid to Altrad (C(2015) 4569 final, of 7 July 2015), in which it did not conclude that the test was inapplicable as a matter of principle, but instead checked that it had been properly applied. EDF alleges that, according to the case-law, the applicability of the test indeed depends on the capacity in which the State has adopted the measure in question, but the State is not precluded from carrying out in parallel a separate analysis of all the consequences that flow from it.

208 According to EDF, in the light of paragraph 52 of the judgment of 24 October 2013, *Land Burgenland and Others* v *Commission* (C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682), it is appropriate that no account be taken, when applying the private investor test, of considerations relating to the

State's capacity as a public authority. However, it would be contrary to the principle of equal treatment to infer from that that the test is inapplicable merely because such considerations exist alongside economic considerations. The discounting of such considerations when applying the test does not mean that their existence must be negated at the stage when the applicability of the test is being considered.

209 EDF also submits that the Commission's statement that the non-economic considerations cannot be separated out from the measure enacted by Law No 97-1026 begs the question and is contradicted by the facts, inasmuch as the recapitalisation was brought about by that law, while the other considerations (reduced tariffs, sustained employment) figure in the contract for services.

210 Lastly, in the observations which it submitted following the judgment in *Frucona Košice*, EDF, supported by the French Republic, alleges that the Court of Justice has confirmed that the notion of State aid is an objective concept and has held that the subjective perception which the State may have of the measure it implements is irrelevant. It follows, according to the applicant, that, even if the French Republic did not draw a clear distinction between fiscal considerations and investment considerations, *quod non*, that would not in any event be relevant to the analysis which was required to be carried out in this case.

211 In addition, the French Republic argues that it is clear from a number of the documents which it sent the Commission that, when it adopted the measure at issue, it did so primarily on the basis of shareholder considerations.

212 The French Republic refers, first of all, to the contract for services which, in the section headed 'The equitable funding of the public service remits', identifies how those remits are to be funded, which, it alleges, demonstrates the French State's intention to separate public authority considerations from shareholder considerations.

213 Secondly, the French Republic mentions the Migaud report on draft law No 201, presented by Mr Migaud, a Member of the National Assembly, on 12 September 1997. That report addresses the public authority considerations separately from the shareholder considerations. It illustrates the effect of the restructuring of EDF's balance sheet on the gross debt/equity and net debt/equity ratios, then compares those ratios, with and without the restructuring, with those of EDF's main European competitors, revealing the disproportionately high level of EDF's indebtedness by comparison with those of its European competitors. The report thus attests to the fact that the French State attached primary importance to shareholder considerations.

214 Next, the French Republic cites the letter of 4 April 1995 sent to EDF by the Private Secretaries of the Ministers for Economic Affairs, Industry, Postal Services and Telecommunications, Foreign Trade and the Budget concerning a programme of work relating to the concessions (Annex A-7-17 to the application, 'the letter of 4 April 1995'). That letter was not taken into account by the Commission, but it shows that one of the French State's concerns when adopting the measure at issue was whether it was in line with the interests of the public shareholder. According to the French Republic, the purpose of the letter was to identify 'what changes, if any, need to be made to the mechanisms in place in order to best protect the interests of the public shareholder if the monopolies are broken up'. It states that, in view of that prospect, it asked EDF to provide it with economic analyses.

215 Lastly, the French Republic refers to EDF's letter of 31 October 1995 (Annex A-7-23 to the application, 'the letter of 31 October 1995') to the Minister for the Budget, which enclosed an annex entitled 'Proposal for the restructuring of EDF's balance sheet', which demonstrates that the French State's primary concern was that EDF should become truly profitable and that the company's financial image should improve.

216 The Commission disputes these allegations.

(b) Findings of the General Court

217 In substance, EDF maintains that, by concluding that the private investor test did not apply because the French Republic had adopted the measure at issue on the basis of both considerations concerning it as a shareholder and considerations concerning it as a public authority, the Commission both made and error of law and misconstrued the facts and the various documents that had been submitted to it.

(1) The alleged error of law

218 EDF argues that, although the French Republic admittedly examined the effects of the restructuring of its balance sheet on future tax charges, it carried out that assessment in parallel with, and separately from its examination of the consequences of that operation in terms of the remuneration of the French State. Next, it submits that the Commission should have confined itself to considering whether a private investor would have made a similar investment, having regard to its profitability, without taking into account any fiscal considerations that the State might have examined separately, isolating the factors relating to the definition of the measure and to the capacity of the author of that measure, in this case a recapitalisation measure decided upon by the State as shareholder. The test exists in fact to distinguish between decisions which a State may adopt as an investor and decisions which it may adopt as a public authority, but it cannot be held to be inapplicable on the ground that the former may coexist with the latter. Moreover, according to EDF, it follows from the case-law that the subjective perception which the State may have of the measure it implements is irrelevant and consequently, even if the French Republic did not draw a clear distinction between fiscal considerations and investment considerations, *quod non*, that would not in any event be relevant to the analysis which was required to be carried out in this case.

219 It must immediately be reiterated that the measure at issue is the decision of the French Republic not to subject the grantor rights — the provisions for renewal that EDF had used — to tax when they were reclassified as capital.

220 The French Republic claimed, during the course of the administrative procedure, that the tax which it had waived could be regarded as an additional capital injection, that it had therefore acted as a shareholder in EDF and that the private investor test should consequently have been applied.

221 First of all, having regard to paragraphs 80 and 81 of the judgment in Case C-124/10 P, set out in paragraph 50 above, a distinction must be drawn between the State as shareholder and the State as a public authority, the applicability of the private investor test depending on the Member State's having conferred the economic advantage on the undertaking in its capacity as shareholder and not in its capacity as a public authority.

222 Thus, in accordance with paragraphs 82 and 83 of the judgment in Case C-124/10 P, since the French Republic relied in the administrative procedure on the private investor test, it was incumbent on it to establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented fell to be ascribed to it in its capacity as shareholder, that evidence having to show clearly that, before or at the same time as conferring the advantage (the waiver of tax on the reclassification of the grantor rights as a capital injection), it took the decision to make an investment, by means of the measure actually implemented, in EDF.

223 In addition, to that end, in accordance with paragraph 84 of the judgment in Case C-124/10 P, in order to establish the economic nature of the action it took, the French Republic could have produced to the Commission evidence showing that the decision was based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a position as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability.

224 That evidence must be contemporaneous with the measure in question. Indeed, in accordance with paragraph 85 of the judgment in Case C-124/10 P, 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.

225 Furthermore, in accordance with paragraph 86 of the judgment in Case C-124/10 P, if the Member State concerned provides the Commission with the requisite evidence, it is for the Commission to carry out a global assessment, taking into account - in addition to the evidence provided by that Member State - all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority. In particular, the nature and subject matter of that measure are relevant in this regard, as is its context, the objective pursued and the rules to which the measure is subject.

226 In the present case, the French Republic and EDF sent the Commission various pieces of evidence in order to establish that the measure implemented fell to be ascribed to the French State in its capacity as shareholder.

227 In essence, the Commission took the view that the evidence submitted to it by the French Republic and EDF did not unequivocally establish that a decision to make an investment had been made by the French State by way of waiving the tax when the grantor rights were reclassified as a capital injection (see, in particular, recitals 128 to 131, 138 and 139 of the contested decision).

228 Indeed, the Commission assessed all the evidence at its disposal, taking into account - in addition to the evidence provided by the French Republic - the relevant evidence submitted by EDF, in order to determine whether the French State had taken the measure at issue in its capacity as shareholder or as a public authority. In particular, it examined the nature and subject matter of that measure, its context, the objective pursued and the rules to which the measure was subject (see recital 145 et seq. of the contested decision), once it had examined the other evidence that had been submitted to it.

229 The Commission did not, therefore, err in law in its application of the conditions governing the applicability of the private investor test.

230 The argument maintained by EDF and the French Republic to the effect that the Commission should have confined itself to considering whether a private investor would have made a similar investment, having regard to its profitability, without taking into account any fiscal considerations that the State might allegedly have examined 'separately', isolating the factors relating to the definition of the measure and to the capacity of the author of that measure, in this case a recapitalisation measure decided upon by the State as shareholder, is based on a misreading of paragraphs 80 to 86 of the judgment in Case C-124/10 P.

231 Indeed, the Commission cannot ignore evidence which reveals the existence of public authority considerations and examine only the evidence which supports the argument of a possible investment. To take such an approach would be to disregard the need to evaluate all the relevant evidence in order to determine whether the measure in question falls to be ascribed to the Member State in its capacity as shareholder or in its capacity as a public authority, which will include, in particular, the context and the nature of the contested measure.

232 Admittedly, it cannot be ruled out that, in some cases, public authority considerations will exist alongside shareholder considerations. However, they cannot alter the assessment of whether the same measure would have been adopted under normal market conditions by a private investor in a position

as similar as possible to that of the State in question. Indeed, 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 (judgment in Case C-124/10 P, paragraph 79).

233 In the present case, neither the French Republic nor EDF has established that, before or at the same time as granting funding equivalent to the tax that was waived when the grantor rights were reclassified as a capital injection, the French State took the decision to make an investment, by means of the measure actually implemented, or that that decision was based on prior economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability (see, to that effect, judgment in Case C-124/10 P, paragraphs 83, 84 and 104).

234 If it appears that such shareholder considerations are absent, the Commission must decide that the private investor test is inapplicable.

235 That conclusion is not called into question by the argument which EDF puts forward concerning the judgment of 24 October 2013, *Land Burgenland and Others* v *Commission* (C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682), which is in fact irrelevant, inasmuch as the dicta of the Court in paragraph 52 of that judgment concern specifically the application, not the applicability of the private investor test and cannot, therefore, support the argument that only shareholder considerations are to be taken into account when assessing the applicability of the test.

236 Nor is that conclusion called into question by the arguments which EDF bases on the Commission's decision on alleged aid to Altrad (C(2015) 4569 final, of 7 July 2015).

237 First of all, in that case, the Commission did not take issue either with the measure which gave rise to its decision, which was a direct subscription to Altrad's capital stock by the Fonds stratégique d'investissement coupled with an option for an additional injection, or with the fact that the operation in question was an investment.

238 Secondly, even if the two operations were comparable, the fact remains that the concept of State aid must be applied to an objective situation, which means that, in order to be classified as aid, a measure must be capable of affecting trade between the Member States and distorting or threatening to distort competition, matters which fall to be appraised on the date on which the Commission takes its decision, the sole test being whether a State measure confers an advantage on one or more particular undertakings. Accordingly, the Commission's decision-making practice in the area, with which the parties moreover disagree, cannot be a decisive factor (see judgment of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, EU:T:2009:50, paragraph 145 and the case-law cited; see also, to that effect, judgment of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 21).

239 Nor is that conclusion called into question by the points which EDF put forward following the judgment in *Frucona Košice*, that is to say, that the French Republic's 'subjective perception' of the measure is irrelevant and that, as a result, the possible absence of a clear distinction between fiscal considerations and investment considerations at the time when the measure at issue was adopted is of no consequence.

240 Indeed, in so far as concerns the consequences of the judgment in *Frucona Košice*, it must be remembered that, according to that judgment, the private creditor test, or the private investor test, is not an exception which applies only if a Member State so requests, when all the constituent elements of State aid incompatible with the common market, as laid down in Article 107(1) TFEU, exist. In fact,

that test, where applicable, is among the factors which the Commission is required to take into account for the purposes of establishing whether such aid exists (judgment in *Frucona Košice*, paragraph 23 and the judgment in Case C-124/10 P, paragraph 103).

241 Consequently, where it appears that the private creditor test might be applicable, it is incumbent on the Commission to examine that possibility, irrespective of any request to that effect from the Member State concerned; and, accordingly, nothing prevents the recipient of the aid from arguing the applicability of the test (see, to that effect, the judgment in *Frucona Košice*, paragraphs 25 and 26).

242 Finally, the Court clarified that, in either of the latter two cases where the Member State does not invoke the private investor test, it is necessary, in order to determine whether the test is applicable, to take as a starting point the economic nature of the Member State's action, not how that Member State, subjectively speaking, thought it was acting or which alternative courses of action it considered before adopting the measure in question (see, to that effect, the judgment in *Frucona Košice*, paragraphs 12 and 27).

243 On the other hand, the Court has held that, if a Member State 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 having to 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 (see, to that effect, the judgment in Case C-124/10 P, paragraphs 82 and 83).

244 However, for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen (see, to that effect, the judgment in Case C-124/10 P, paragraphs 85 and 104).

245 Moreover, as was pointed out in paragraph 232 above, in order to assess whether the same measure would have been adopted under normal market conditions by a private investor in a situation as similar as possible to that of the State in question, 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 (judgment in Case C-124/10 P, paragraph 79).

246 It was therefore incumbent on the Commission, in order to determine whether the private investor test was actually applicable in the present case, to examine whether the French Republic had established unequivocally and on the basis of objective, verifiable and contemporaneous evidence that the measure implemented fell to be ascribed to the State acting as shareholder and whether it had adduced evidence that clearly showed that, before or at the same time as conferring the economic advantage and on the basis of the requisite prior economic profitability assessment, it had taken the decision to make an investment, by means of the measure actually implemented, in EDF.

247 It must be observed that that is the examination which the Commission carried out in recitals 126 to 154 of the contested decision.

248 EDF's argument, supported by the French Republic, cannot therefore be upheld.

249 Finally, EDF's allegation that the Commission relied on the mere 'overlapping' of shareholder considerations and public authority considerations in order to declare the private investor test inapplicable is not supported by the facts.

250 Indeed, it was after completing a global assessment and after considering each of the pieces of possibly relevant evidence that the Commission concluded that the measure at issue was not an investment on the part of the French Republic, shareholder considerations established on the basis of objective, verifiable and contemporaneous evidence, as held to be necessary by the Court in paragraphs 82 to 85 of its judgment in Case C-124/10 P, notably lacking.

251 The arguments by which EDF and the French Republic allege that the Commission made an error of law must consequently be rejected.

(2) The alleged errors of fact

252 EDF argues that numerous documents, in particular documents Nos 23 to 25 annexed to the comments which it sent the Commission in July 2013 (Annexes A-7-23 to A-7-25 to the application), show that the effects on its tax liability of the proposed restructuring of its balance sheet were examined in parallel with, but separately from the consequences of that restructuring for the remuneration of the public shareholder, and that those documents do not reveal any overlapping of the fiscal considerations and investment considerations by which the French State was guided. The French Republic also argues that it is clear from a number of the documents which it sent the Commission that, when it adopted the measure at issue, it did so primarily on the basis of shareholder considerations.

253 It must be emphasised at the outside that, among the documents to which EDF and the French Republic refer, there are none predating the French Republic's reply to the Commission in 2002 that mention that tax had become due on the grantor rights (the provisions which EDF had used) when they were reclassified as a capital injection or, a fortiori, that state that the decision not to collect tax was to be regarded as an additional investment in EDF's capital, as the Commission notes in recitals 128 and 129 of the contested decision.

254 As for the documents EDF mentions which purportedly show that there was no overlapping of considerations relating to the tax and considerations relating to the remuneration of the State, the following points should be noted.

255 Annex A-7-23 to the application is the letter of 31 October 1995, which was sent to the Ministry of the Budget a little more than two years before Law No 97-1026 was adopted. It had two annexes, namely a three-page document entitled 'Proposal for the restructuring of EDF's balance sheet' and a table headed 'Proposed developments in EDF's balance sheet'.

256 The three-page document annexed to the letter of 31 October 1995 contains three sections which deal with the 'restructuring of own capital on the liabilities side of the balance sheet' and, more specifically, with the reclassification of the grantor rights as capital, the 'adjustment of the "local authority" grantor rights of the [public distribution] concessions' and the 'clearing of the accumulated tax deficit' respectively.

257 Section 1.1 of the document concerns the 'reclassification of the "State" grantor rights and the associated renewal provisions as capital'. It refers to the proposal to 'capitalise EDF … by converting the RAG grantor rights and the corresponding renewal provision into capital', an 'operation which [would] reinstate the pre-1987 accounting analysis'.

258 Section 1.2 of the document, headed 'Consolidation of the capital contributions with EDF's capital', states that '[the consolidation of the capital contributions] would reinforce the "shareholder investment" aspect of those contributions' inasmuch as they were in the nature of an 'increase in capital, even though the 1956 decree treated them as an interest-bearing loan'.

259 Section 1.3 of the document concerns the 'consequences of the two measures' and states that they offer 'the following two benefits:

– 'the State could seek real profitability from EDF in the form of a dividend on the company's capital, that is to say, on the sums treated as shareholder investments. As for the consolidation into the capital, that would put an end to the controversy which followed the 1982 tax inspection regarding whether the remuneration was a "dividend" or "interest"';

– 'EDF's financial image would improve as a result of presenting capital of approximately FRF 85 billion (as opposed to FRF 2.6 billion currently) and a net position of FRF 80 billion (as opposed to FRF 19.9 billion currently), before incorporation of the measures to reduce the losses carried forward. The reclassifications also answer the criticisms made by the Cour des comptes, which regards the State concessions as not being real concessions'.

260 First of all, it must be pointed out that the issue of the capital contribution referred to in the letter of 31 October 1995 does not cover the waiver of the tax payable on the grantor rights, which is not discussed in the letter at all.

261 Secondly, it must be observed that the accounting, fiscal and shareholder considerations are closely inter-related in the three-page document annexed to the letter of 31 October 1995, which, moreover, contains no evaluation or even assessment of the profitability of the reclassification of the grantor rights as capital.

262 Annex A-7-24 to the application is a two-page internal EDF memorandum dated 7 December 1995 and headed 'Origin, content and consequences of the proposals for the restructuring of EDF's balance sheet' ('the internal memorandum of 7 December 1995').

263 The first part of the internal memorandum of 7 December 1995 outlines the reviews carried out by the French Cour des comptes and their implications for the renewal provisions and the inspection carried out by the tax authorities in 1994. The second part deals, in three points, with the aims of the proposals for the restructuring of the liabilities side of the balance sheet put to the Ministry. The memorandum mentions two steps which EDF proposes: first, the restructuring of the upper part of its balance sheet, which is to result, in particular, in clarifying the 'financial relationship between EDF and the [French] State', which would allow the State henceforth to seek real profitability from EDF in the form of a dividend on the company's capital; secondly, 'clarification of the accounting presentation of the public distribution concessions'.

264 Once again, it must be observed that the profitability derived from reclassifying the grantor rights as capital is no more than mentioned in the internal memorandum of 7 December 1995 and is in no way evaluated and that, in any event, there is no mention at all of the waiver of tax on the grantor rights.

265 Even assuming that the internal memorandum of 7 December 1995 could be regarded as a separate, 'parallel' analysis of the effects of the recapitalisation of EDF, it is not relevant to the examination of the measure at issue. At most, it is evidence of the context in which that measure was adopted.

266 For the rest, it must be observed that the internal memorandum of 7 December 1995, the content of which is ultimately quite similar to that of the letter of 31 October 1995, is as incapable as that letter of evidencing any detailed analysis of the shareholder considerations or the considerations relating to remuneration or profitability that may have been carried out by or on behalf of the State in view of the recapitalisation of EDF.

267 Lastly, Annex A-7-25 to the application is a letter which EDF sent on 10 April 1997 to one of the heads of division at the Ministry of Finance ('the letter of 10 April 1997') and which enclosed a one-page annex containing a diagram headed 'provisional estimates of payments to the State in 1997 and 1998'.

268 Although the letter of 10 April 1997 may constitute evidence of some, minimal presentation of the possible remuneration that the French State was to receive, it must nevertheless be observed that that presentation was based simultaneously and entirely on the fiscal implications of the payments that were to be made to the State.

269 Consequently, other than by skipping every other line, it is impossible to regard the letter of 10 April 1997 as a separate, 'parallel' analysis of the remuneration of the public shareholder, as EDF claims.

270 The documents to which EDF refers do not, therefore, provide evidence of any separate, independent analysis of the considerations pertaining to the French State in its capacity as shareholder with regard to the measure at issue. Equally, and contrary to EDF's claim, they do not show that there was no overlapping of considerations relating to tax and considerations relating to the remuneration of the State.

271 Next, as regards the evidence adduced by the French Republic, it refers, first of all, to a table set out in Annex 11 to its statement in intervention that reproduces almost identically the references and comments that may be found in the table set out in Annex 10 to its statement in intervention (which it produced in support of the arguments it put forward in support of the first part of the second principal plea in law and which sets out extracts from various documents). Secondly, it refers in its statement in intervention to several documents which it mentions 'by way of example'.

272 First and foremost among the documents which it mentions by way of example is the contract for services.

273 It must be observed that, in the contract for services, the public authority considerations not only run closely in parallel with the shareholder considerations, they clearly predominate them.

274 The public authority considerations set out in the contract for services — which relate to the implementation of the State's energy policy, the need to ensure security of supply while protecting the environment and limiting costs, providing consumers with a high-quality supply wherever they are located, helping with employment and economic activity, services offering solidarity with the least well off and regional planning — are set out under Title I of the contract, which is headed 'Reaffirming the fundamental remits of the public undertaking'. The three sections under Title I are headed 'Five new and improved public service remits', 'Participating in regional planning and solidarity' and 'Towards a new legislative framework for the energy sector'.

275 Title II of the contract for services deals with 'Preparing the company's future today', by ensuring its development in France (by improving performance and preferentially allocating gains in productivity to the reduction of prices, by lowering tariffs and adjusting the tariff structure, through the relationships between EDF and independent producers and by the development of services, including in particular measures to increase customer loyalty and better positioning on the electricity and associated markets using appropriate commercial tools, namely 'marketing support' to the value of FRF 2.8 billion), by capturing new foreign markets (in respect of which it is merely stated that 'the return on investment capital' must be taken into consideration, without any further details being given), by contributing to innovation and technological progress (research and development, partnerships with French undertakings) and by 'involving the whole undertaking in this development' (a section which addresses human resource issues, including the management of human resources, training, improving work organisation, safety and security, staff remuneration policy, social cohesion, and so on).

276 The public authority considerations set out in Title II of the contract for services run closely in parallel with very general considerations which relate to the company's future but which cannot be described as shareholder considerations relating to the evaluation of the profitability of an investment, still less of the particular investment made by way of the implementation of the measure at issue.

277 Lastly, Title III of the contract for services is headed 'A new financial and institutional framework for the company'. Over three pages, it addresses the following objectives: 'Stabilising the relationship with the public shareholder', 'Equitable funding of the public service remits', 'Preparing the mechanisms needed to address changes in legislation', 'Generating resources to prepare for the future' and 'Tracking objectives and commitments'.

278 In those three pages, only two paragraphs address the restructuring of EDF's balance sheet, one of which vaguely mentions the remuneration of the French State.

279 The first of these two paragraphs, which offers no enlightenment, appears in the introduction of Title III of the contract for services. It reads as follows:

'EDF's balance sheet will be restructured, with the dual aim of strengthening the company's net assets and stabilising the financial relationship between the State and the company, on a basis closer to ordinary law.'

280 The second paragraph, which appears under the subheading 'Stabilising the relationship with the public shareholder', reads as follows:

'Remuneration for the State will comprise two components:

– remuneration on capital contributions at an interest rate of 3%;

– additional remuneration at 40% of the company's net income'.

281 It must be observed that, in the limited information on the remuneration of the State that is given in these two paragraphs, there is no mention of any additional investment in the sum of the tax debt owed to the French State or of the profitability of such an investment.

282 The contract for services therefore appears to be of no relevance in demonstrating that the remuneration of the French State and the shareholder considerations, not to mention any considerations relating to the measure at issue, were analysed separately and independently from the public authority considerations.

283 The second document to which the French Republic refers is an extract from the Migaud report to the National Assembly, delivered in view of the adoption of Law No 97-1026.

284 The first part of the Migaud report describes the historical circumstances surrounding the ownership of the assets placed under concession (the placing of the assets under concession, the accounting consequences thereof and the position taken by the Cour des comptes) which had led to the presentation of the draft law.

285 The second part of the Migaud report describes the 'tax treatment' that was necessitated by the opinion delivered by the French Cour des comptes and which entailed 'altering the financial relationship between the State and EDF'.

286 The first subsection of the Migaud report sets out the accounting consequences to be drawn from the recognition of ownership of the RAG along with the resulting alteration of the structure of EDF's own funds: 'the value of the assets in kind allocated under concession relating to the RAG concession recorded in own funds under the heading "Other own funds" is moved up to "Own capital" in order to reflect the ownership of the structures.'

287 Next, the Migaud report describes the accounting movements, in the strict sense, that the measure at issue necessitated (which are described in recital 28 et seq. of the contested decision).

288 However, there is no mention on this occasion of any waiver of the tax on the grantor rights.

289 The second subsection of the Migaud report addresses the changes in the financial relationship between the French State and EDF and describes how the State is to be remunerated following the impending accounting changes:

'This remuneration comprises two components.

First, remuneration on the capital contributions at a rate of interest set annually by interministerial decree. The decree limits the rate to 8%. Since 1989, it has been set at 5%.

Secondly, additional remuneration is to be paid (the "dividend") out of the company's post-tax profits and fixed interest.

The rate is set by decree on the basis of the expected profits as stated in the forecast accounts.

…

Since the capital contributions form the base for the fixed interest, increasing them as a result of this article would increase the payment burden on EDF. An amendment to the terms of remuneration is therefore included in the contract between the State and EDF for 1997-2000, signed on 8 April 1997.

The fixed interest rate is brought down to 3% in order to offset the effect of the base. The annual amount of fixed interest will thus decrease from FRF 1 816 million to FRF 1 522 million.

The additional remuneration payable to the State is set at 40% of the company's net income.

The combined amount of the two components is limited to 6% of the capital contributions (giving an upper limit of FRF 3 044 million in respect of the contributions as resulting from this article).'

290 The Migaud report then goes on to describe the tax implications of the changes made.

291 In particular, the Migaud report states the following:

'Moving up the provisions relating to the RAG concession to retained income will result in wiping out in one go the accumulated tax and accounting deficit.

Directly moving up FRF 38.5 billion will result in retained income in the accounts of FRF 18.3 billion, resulting in an increase in net assets which is itself subject to [corporation tax]. Article 38-2 of the [General Tax Code] in fact provides that net profits consist in the difference between the values for net assets at the beginning and at the end of the financial year. Inasmuch as "net assets are the excess of the value of assets over the total liabilities comprising debts to third parties, amortisation and justified provisions", the moving up of the renewal provisions will automatically result in an increase in net profits.

Moreover, in order to take account of the comments of the Cour des comptes regarding the "Hydraulic force" and "Public distribution" concessions, EDF will make accounting adjustments which will have the effect of reducing its fiscal carry forward by FRF 14 billion.

In total, that item should therefore become positive, standing at FRF 3.4 billion.

According to the information provided to me by the Ministry of Economic Affairs, Finances and Industry, the corporation tax which the public establishment will have to pay [following] these reforms will be FRF 3 billion in 1997 and FRF 2.5 billion in 1998.'

292 It must be observed that, as in the section dealing with accounting adjustments, there is, in the section dealing with tax implications, no mention in the Migaud report of the waiver of the tax on the grantor rights when they were reclassified as a capital contribution, even though, according to the reply which the French Republic gave the Commission in its memorandum of 9 April 2002, that credit too was the result of a variation in net assets.

293 Furthermore, while the Migaud report admittedly contains some information about the remuneration which the State anticipated from the recapitalisation of EDF (and which, following the recapitalisation operation, was nominally reduced), it is absolutely clear from reading that document that that information represents a very small part of the considerations — public authority considerations, essentially — which led to the adoption of Law No 97-1026.

294 Lastly, it may be observed that the content of the Migaud report provides the framework for recital 23 et seq. of the contested decision, and the facts and matters which it sets out were therefore properly taken into consideration by the Commission.

295 The third document which the French Republic mentions is the letter of 4 April 1995. Including its annex, this is a four-page document that was sent to EDF by the Private Secretaries of the Ministers for Economic Affairs, Industry, Postal Services and Telecommunications, Foreign Trade and the Budget, so that a 'programme of work' could be commenced in view of the presentation and adoption of the measures concerning the EDF concessions called for by the French Cour des comptes.

296 The public shareholder is mentioned in the letter of 4 April 1995 on only two occasions and then only very briefly:

– page 1 of the annex to the letter states, with reference to the aims of the work programme, 'is [the current system] … consistent with the interests of the public shareholder?'

– page 3 of the annex, which sets out topics for further reflection, mentions 'the asset problem', with regard to which it was necessary to 'identify what changes, if any, need to be made to the mechanisms in place in order to best protect the interests of the public shareholder if the monopolies are broken up'.

297 The other concerns addressed in the letter of 4 April 1995 (which, moreover, merely concerns a work programme, and not its conclusions) are, in reality, essentially public authority considerations, and it must be observed that the letter offers no evidence of any separate, independent analysis of any shareholder considerations.

298 Finally, the last document referred to by the French Republic is the letter of 31 October 1995. In so far as analysis of that document is concerned, reference is made to paragraph 168 et seq. above.

299 In addition, without it being necessary to rule on the admissibility of a simple reference to a table set out in an annex to the statement in intervention, which sets out extracts from documents, some of them annotated, that are not mentioned in the statement in intervention, it must be observed that none of the passages cited and none of the comments refers to the measure at issue.

300 At most, the extracts referred to in paragraph 299 above give some background to the adoption of the measure at issue. However, it is not even alleged that that background was not taken into consideration by the Commission, which, in order to describe it, placed reliance on the documents in question.

301 In addition, like the Commission, the Court must conclude upon reading the extracts referred to in paragraph 299 above and set out in the table in question that the shareholder considerations are very much secondary to the public authority considerations.

302 Finally, the extracts in question contain no detailed discussion at all of shareholder considerations relating to the evaluation of the profitability of an investment, still less of the particular investment made by way of the implementation of the measure at issue.

303 The documents to which the French Republic refers do not, therefore, provide any more evidence than EDF's documents of any 'separate, independent' analysis of the considerations pertaining to the State in its capacity as shareholder. Equally, they do not show that there was no overlapping of considerations relating to tax and considerations relating to the remuneration of the State.

304 In conclusion, the third part of the second principal plea in law must be dismissed.

6. The fourth part of the second plea in law

(a) Arguments of the parties

305 EDF, supported by the French Republic, argues that the Commission erred in concluding that the investment decision was not the subject of any specific studies, references or analyses or of a business plan concerning the profitability of the investment in the sum of the tax exemption, making it difficult to isolate the effects of the investment in the information submitted by France or by EDF (recital 130 of the contested decision).

306 According to EDF, the Commission's analysis is based on the premiss that the measure at issue is the tax exemption alone, which, as it argued in the context of the first plea in law, is not the measure that should have been examined.

307 Moreover, the Commission's point relating, essentially, to the absence of any formal business plan is unfounded in law, inasmuch as, first of all, a business plan is not held to be a requirement in the case-law of the Court of Justice or the General Court. Secondly, no business plan was necessary in any event, since the French State was the sole shareholder and knew the company perfectly well and since a private investor in a similar situation would not have had recourse to a business plan either.

308 Furthermore, the Commission's point relating, essentially, to the absence of any formal business plan is also inconsistent with the facts, inasmuch as several documents, drawn up *in tempore non suspecto* and provided along with the comments sent to the Commission in 2013, constitute the substance of such forward planning. Indeed, they indicate unambiguously that the aim of the French State was to make an investment in the company and that it carried out numerous prospective analyses and evaluations.

309 For its part, the French Republic refers to Table 3, set out in Annex 12 to its statement in intervention, which contains various references to documents, sometimes accompanied by comments. In its statement in intervention, it cites three of these documents, 'by way of example'.

310 The French Republic first mentions the letter of 10 April 1997 and the memorandum appended to that letter headed 'Provisional estimates of payments to the State in 1997 and 1998'. It alleges that that document demonstrates that it requested EDF to provide an analysis of how the State's remuneration would develop and that the economic assessments of the proposed restructuring were being refined and further specified in view of the adoption of the measure at issue.

311 Secondly, the French Republic mentions the letter of 9 February 1996 from EDF's finance and legal director to EDF's Board which included an annex headed 'The restructuring of EDF's balance sheet' (Annex A-7-30 to the application, 'the letter of 9 February 1996'), which contains an economic appraisal of the restructuring of EDF's balance sheet.

312 Thirdly and lastly, the French Republic cites the strategic plan for 1996-1998 (Annex A-7-34 to the application, 'the strategic plan') which the State took into account when adopting the measure at issue, alleging that such a plan is generally taken into account when the private investor test is applied.

313 The Commission disputes these allegations.

(b) Findings of the General Court

314 EDF, supported by the French Republic, maintains essentially, first, that the Commission's analysis in recital 130 of the contested decision is based on a mistaken premiss, inasmuch as the measure at issue is not merely the waiver of tax on the renewal provisions used by EDF, secondly, that the Commission was wrong to require a formal business plan in this case and, thirdly, that the Commission's conclusions regarding the absence of a formal business plan are inconsistent with the facts, inasmuch as various contemporaneous documents constitute the substance of a formal business plan. The French Republic mentions in this connection four documents which it alleges demonstrate the existence of prospective analyses and evaluations of the investment.

315 The Court must immediately reject the first argument put forward by EDF, since the measure at issue is indeed the waiver of tax due on the reclassification of the grantor rights as a capital contribution.

316 The Court must also reject EDF's argument that the Commission erred in requiring a formal business plan in the present case, which is based on a misreading of the contested decision.

317 Indeed, in the contested decision, the Commission notes that there is not a single contemporaneous document that gives any evaluation of the profitability of the supposed investment consisting in the waiver of tax on the grantor rights.

318 There are, admittedly, documents which estimate, rather succinctly, the remuneration to be paid to the French State following the recapitalisation of EDF and, consequently, the profitability of that operation, but nothing more.

319 While the recapitalisation of EDF is certainly the context in which the measure at issue must be assessed, the fact remains that, according to the judgment in Case C-124/10 P, it was for the French Republic to submit 'evidence showing that the decision [was] based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability', albeit that, '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' (paragraphs 84 and 85 of that judgment).

320 The Commission did not therefore err in concluding, in recital 130 of the contested decision, that 'the absence of any specific studies, references or analyses of the profitability of the investment in the amount of the tax exemption makes it difficult to isolate the effects of the supposed investment in the information submitted by [the French Republic] or by EDF'.

321 The Court must also reject the argument which EDF bases on the parallel which it attempts to draw with the judgment of 25 June 2015, *SACE and Sace BT* v *Commission* (T-305/13, EU:T:2015:435), since, in that case, the absence of a detailed business plan occurred in a context of economic crisis. Admittedly, the General Court held that, in such a situation, account must be taken of the inability to make reliable, detailed forecasts of developments in the economic situation and the performance of different operators, but it also held that 'the inability to make detailed, full projections cannot relieve a public investor of its task of carrying out an appropriate prior evaluation of the profitability of its investment, comparable to that which a private investor would have had carried out in a similar situation, having regard to the available and foreseeable information'.

322 Next, it is appropriate to examine the documents which the French Republic alleges constitute or contain economic evaluations comparable to those which a private investor would have had carried out before implementing the measure at issue in order to determine its future profitability.

323 First of all, the French Republic mentions the letter of 10 April 1997 and the memorandum appended to it, headed 'Provisional estimates of payments to the State in 1997 and 1998' (Annex A-7-25 to the application).

324 The letter of 10 April 1997, which comprises three lines, merely sends the annex to the head of division at the Ministry of Finance. As regards the annex, which is a one-page table, it presents the estimates for the payments to the French State over five lines with a figure at the end of each for the year under consideration: pre-tax accounting profit and additional remuneration, taxable profits, remuneration of capital contributions, corporation tax and tax on additional remuneration.

325 Nothing is said in the letter of 10 April 1997 about the remuneration pertaining specifically to the grantor rights, nor about the tax — theoretically transformed into an investment — that the French State waived.

326 It must therefore be held that the letter of 10 April 1997 is entirely irrelevant and neither constitutes nor contains economic evaluations comparable to those which a private investor would have had carried out before implementing the measure at issue in order to determine its future profitability.

327 Next, the French Republic mentions the letter of 9 February 1996, which includes an annex headed 'The restructuring of EDF's balance sheet' (Annex A-7-30 to the application), which contains an economic appraisal of the restructuring of EDF's balance sheet.

328 The letter of 9 February 1996, which was sent by EDF's finance and legal director, merely communicated to the Chairman of EDF's Board of Directors a one-page 'summary sheet' which gave an 'update on the negotiations with the State'.

329 The ‘summary sheet’ sent under cover of the letter of 9 February 1996 states, under the heading ‘Strengthening the top part of EDF’s balance sheet’, the following:

‘The current restructuring involves three steps:

– incorporating the capital contributions made by the State into capital in the strict sense;

– incorporating into the capital the contributions made by (or on behalf of) the State in the context of the RAG concession and the provisions established in connection with that concession. This operation will eliminate the quite subtle distinction between the State’s capital contributions and its contributions by way of concession;

– the wiping out of the accumulated accounting deficit which is currently jeopardising EDF’s net asset position.

These measures should bolster the company’s financial position, bringing the capital up from FRF 2.6 billion to FRF 85 billion and the net asset position up from FRF 20 billion to FRF 90 billion, which is more in line with its assets, and thus present an image comparable to that of the other European electricity companies.

…

Presenting own capital of close to a hundred billion French Francs and with clearer descriptions of its concessions, EDF will then have a balance sheet that better reflects the company’s financial position.’

330 The letter of 9 February 1996 mentions neither the grantor rights nor the waiver of the tax payable on their incorporation into the capital.

331 It must therefore be held that the letter of 9 February 1996 is entirely irrelevant and neither constitutes nor contains economic evaluations comparable to those which a private investor would have had carried out before implementing the measure at issue in order to determine its future profitability.

332 Lastly, the French Republic mentions the strategic plan which it allegedly took into account when it adopted the measure at issue. In its view, such a plan is generally taken into account when the private investor test is applied.

333 The strategic plan is a document of 36 pages which presents, to the entire staff of the company it appears, the company’s future direction and the steps to be carried out up to 1998.

334 The strategic plan makes no mention of either the French State’s waiver of the tax due on the grantor rights, or the grantor rights, or the provisions relating to the RAG concession, or the ownership of the RAG, its accounting and fiscal position, or even the recapitalisation of EDF which was the subject of Law No 97-1026.

335 The strategic plan therefore appears to be entirely irrelevant and neither constitutes nor contains economic evaluations comparable to those which a private investor would have had carried out before implementing the measure at issue in order to determine its future profitability.

336 In addition, without it being necessary to rule on the admissibility of a simple reference to a table set out in an annex to the statement in intervention, which sets out extracts from documents, some of them annotated, that are not mentioned in the statement in intervention, it must be observed that none of the passages cited and none of the comments appearing in the table set out in Annex 12 to the statement in intervention refers to the measure at issue.

337 Consequently, the fourth part of the second principal plea in law must be dismissed in its entirety.

7. The fifth part of the second principal plea in law

(a) Arguments of the parties

338 EDF, supported by the French Republic, asserts, essentially and conclusively, that, as is demonstrated by the arguments which it put forward in support of its first two principal pleas in law, the Commission was wrong to conclude that the private investor test was not applicable in this case. Indeed, an objective, unbiased analysis of the nature and subject matter of the measure, its context and the objective which it pursued, and the rules to which it is subject should have led the Commission to conclude that the test was applicable to the measure at issue.

339 As regards the nature and subject matter of the measure at issue, it was a measure for the recapitalisation of EDF by the French Republic, which was sole shareholder.

340 As regards the context in which the measure was adopted, this was clearly described in paragraphs 9 to 36 of the judgment in Case T-156/04. In 1997, it was characterised by the impending opening up to competition of the European electricity market. In that context, EDF's ability to react to this liberalisation and to take advantage of international investment opportunities was restricted by the state of its balance sheet.

341 As regards the objective pursued, the purpose of Law No 97-1026 was 'to restructure EDF's balance sheet and to increase its own funds' and it pursued the 'objective of recapitalising EDF', according to the judgment in Case T-156/04 (paragraphs 243 and 247).

342 Lastly, as regards the rules applicable to the measure, given that it was a recapitalisation of EDF, whose capital was defined by legislation, it could only have been implemented by legislation, as the General Court acknowledged in paragraph 252 of its judgment in Case T-156/04.

343 EDF concludes that, by adopting Law No 97-1026, the purpose of which was to recapitalise the company, the French Republic conducted itself as a shareholder would have done, as is demonstrated, it alleges, by the contemporaneous documents that were sent to the Commission, and the Commission should have recognised that the private investor test was applicable.

344 The Commission disputes these arguments.

(b) Findings of the General Court

345 EDF, supported by the French Republic, asserts, essentially and conclusively, that, as is demonstrated by the arguments which it put forward in support of its first principal plea in law and the first four parts of its second principal plea in law, the Commission was wrong to conclude that the private investor test was not applicable in this case. An objective, unbiased analysis of the nature and subject matter of the measure, its context and the objective which it pursued, and the rules to which it is subject should have led the Commission to conclude that the test was applicable to the measure at issue.

346 The arguments put forward by EDF and the French Republic in reality seek to establish the applicability of the test merely on the basis of factors relating to the nature and subject matter of the measure, its context and the objective which it pursued, and the rules to which it is subject.

347 However, for the reasons set out in relation to the first four parts of the second principal plea in law, those matters are not sufficient to demonstrate the applicability of the private investor test. Indeed, EDF and the French Republic have adduced no evidence that establishes unequivocally that, before or at the same time as conferring the advantage (the waiver of tax on the reclassification of the grantor rights as a capital contribution), the French Republic had taken the decision to make an investment, by means of that measure, in EDF and that, when it adopted that decision, the French Republic had evaluated, as a private investor would have done, the profitability of the investment consisting in the grant to EDF of that advantage.

348 Consequently, the fifth part of the second principal plea in law must also be dismissed.

8. Conclusion regarding the second principal plea in law

349 The present plea must consequently be dismissed in its entirety.

C. The third plea in law

350 The third principal plea in law alleges infringement of Article 107 TFEU as a result of various errors which the Commission allegedly made when examining the conditions for the application of the private investor test.

351 However, it must be remembered that, in the contested decision, the Commission concluded that the private investor test was not applicable in the present case and that it was only in the alternative that it went on to analyse the conditions for the application of the test.

352 Since EDF has not demonstrated that the Commission was wrong to conclude that the private investor test was inapplicable, on account of which the second plea must be dismissed, the third plea in law must be dismissed as ineffective.

D. The fourth plea in law

1. Arguments of the parties

353 EDF argues that, the Commission having failed in its duty to take into consideration all the relevant evidence for the purposes of its analysis of the advantage, a matter which it demonstrated with its first three pleas in law, the Commission also failed in its duty to state reasons. EDF takes issue with the Commission for having disregarded, without explanation, evidence which demonstrated that the measure at issue was not any supposed decision not to tax the grantor rights, as well as evidence casting light on the method that should have been used in applying the private investor test.

354 The Commission disputes this line of argument.

2. Findings of the General Court

355 It has been consistently held that the statement of reasons must be appropriate to the measure concerned and the context in which the measure was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the Court to carry out its review and to enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded. It is not necessary for the statement of reasons to specify all the relevant

matters of fact or of law, since the question whether the statement of reasons for a measure satisfies the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraphs 278 to 280).

356 EDF takes issue with the Commission for having disregarded, in breach of its duty to state reasons, evidence which demonstrated that the measure at issue was not a decision not to tax the grantor rights.

357 Nevertheless, it must be observed that, in recitals 23 to 35, 74 and 112 to 123 of the contested decision, the Commission explained the reasons for which it had concluded, on the basis of the evidence communicated by the French Republic, and in particular the memorandum of 9 April 2002 (see recital 35 of the decision), that the waiver of tax on the reclassification of the grantor rights as a capital contribution constituted an advantage conferred on EDF. The contested decision is therefore not vitiated by any breach of the duty to state reasons in this regard.

358 EDF also takes issue with the Commission for having disregarded, in breach of its duty to state reasons, evidence casting light on the method that should have been used in applying the private investor test.

359 Since the Commission examined the conditions for applying the private investor test only in the alternative, and since it did not err in concluding that the test was not applicable in the present case, EDF's arguments on this point must be declared ineffective.

360 Consequently, the fourth principal plea in law must be dismissed as partly unfounded and as partly ineffective.

E. The first plea in law put forward in the alternative

361 The first plea in law put forward in the alternative alleges that certain aid should have been classified as existing aid and alleges infringement of Article 1(b)(v) and of Article 15(1) of Regulation No 659/1999.

1. The contested decision Recital 215 of the contested decision states the following:

'The Commission also considers that, contrary to what is claimed by the French authorities, the rule on limitation periods does not apply in the case in point. Admittedly, EDF created the accounting provisions free of tax between 1987 and 1996. However, it should be pointed out, firstly, that corrections to accounting errors, which by their very nature relate to the posting of past transactions, should according to the National Accountancy Council be posted in the accounts for the financial year in which they are discovered and, secondly, that the [law] providing that the grantor rights were to be reclassified as capital contributions 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 because the first Commission instrument concerning this measure dates from 10 July 2001. Furthermore, under Article 15 of Regulation … No 659/1999, legal proceedings suspend the period of limitation.'

2. The first part of the plea, alleging infringement of Article 1(b)(v) of Regulation No 659/1999

(a) Arguments of the parties

362 EDF considers that the measure at issue, if it is to be classified as aid, should nevertheless be classified as existing aid.

363 EDF maintains that, in accordance with Article 1(b)(v) of Regulation No 659/1999, aid that has been implemented in a sector that was originally closed to competition is existing aid, which description ceases to apply only on the date fixed for the liberalisation of the sector.

364 EDF considers that the solution adopted by the General Court in paragraph 143 of its judgment of 15 June 2000, *Alzetta and Others* v *Commission* (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, EU:T:2000:151), may be applied in the present case. Indeed, the electricity sector was liberalised 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), which entered into force on 19 February 1997 and provided for a transposition period ending on 19 February 1999. The directive was not, however, transposed by the French Republic until 10 February 2000.

365 EDF maintains that, accordingly, any measure adopted or implemented before that date, supposing it qualifies as State aid, must necessarily be regarded as existing aid and cannot therefore be made the subject of a recovery order. That, EDF alleges, applies to Law No 97-1026, which was adopted 15 months before the expiry of the transposition period laid down in the directive, no national measure to transpose the directive having been adopted before that law.

366 The Commission disputes this line of argument.

(b) Findings of the General Court

367 It is important to remember that, as is stated in recital 4 of Regulation No 659/1999, 'in order to ensure legal certainty, it is appropriate to define the circumstances under which aid is to be considered as existing aid; … the completion and enhancement of the internal market is a gradual process, reflected in the permanent development of State aid policy; … following these developments, certain measures, which at the moment they were put into effect did not constitute State aid, may since have become aid'.

368 Article 1(b)(v) of Regulation No 659/1999 provides that existing aid includes 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 and that, where certain measures become aid following the liberalisation of an activity by Community law, such measures are not to be considered as existing aid after the date fixed for liberalisation.

369 In accordance with Article 1(b)(v) of Regulation No 659/1999, the date on which an activity is liberalised by Community law must therefore be taken into consideration for the sole purpose of ensuring that, after that date, a measure which did not constitute aid before the liberalisation by Community law should not be classified, subsequently, as existing aid. However, the fact that a date for liberalisation has been fixed in a directive such as that in issue in this case is not sufficient to prevent a measure from being classified as new aid if, by reference to market developments, it can be proven that the measure was adopted on a market that was already open, wholly or partly, to

competition before the date set for the liberalisation of the activity in question by Community law (see, to that effect, judgment of 4 April 2001, *Regione Autonoma Friuli-Venezia Giulia* v *Commission*, T-288/97, EU:T:2001:115, paragraph 95).

370 In recitals 196 to 204 of the contested decision, the Commission explained — and this is not disputed by EDF, which had put forward a plea on the point in the action which gave rise to the judgment in Case T-156/04, a plea which was dismissed by the General Court in paragraphs 134 to 155 of that judgment — that the aid had been granted in a sector which was being progressively opened up to competition and in which, even before 1997, EDF had been exporting electricity to other Member States, had been operating through subsidiaries on markets for services that were open to competition, had been in actual or potential competition with other operators on the European Union electricity market in other Member States and had competed in France with suppliers of other energy sources, such as gas.

371 That being so, the measure at issue cannot be regarded as a pre-existing measure that did not constitute aid when it was implemented and only became aid following market developments toward the end of the period for the transposition of Directive 96/92.

372 The first part of the first plea put forward in the alternative must therefore be dismissed as unfounded.

3. The second part of the plea, alleging infringement of Article 15(1) of Regulation No 659/1999

(a) Arguments of the parties

373 EDF points out, first of all, that the complexity and uncertainty which had beset the question of the ownership of the RAG were resolved by Article 4(1) of Law No 97-1026, which states that the structures of the RAG are to be deemed to have been owned by EDF from the time it was granted the concession for that network.

374 EDF submits that it must therefore be concluded, as the Commission concluded in the opening decision (paragraphs 45, 49 and 52), that, by the establishment of renewal provisions from 1987 to 1996, it had in reality benefited from an undue tax advantage each year from 1987 to 1996, one that was only partly cancelled out by the accounting adjustments and reclassifications carried out in 1997.

375 The Commission's first step in the preliminary investigation was taken on 10 July 2001 and consequently no provision established before 10 July 1991 may be taken into account in the calculation of the measure from which EDF benefited, given the limitation period laid down in Article 15(1) of Regulation No 659/1999.

376 In such case, the value of grantor rights established after 10 July 1991 that could be classified as new aid amounts to only FRF 7.976 billion out of a total of FRF 14.119 billion.

377 EDF also claims that, between the opening decision and the contested decision, the Commission altered its analysis of the measure at issue so as to circumvent the limitation period. In its view, it is clear from the opening decision that the aid was put in place each year from 1987 onwards. In the contested decision, the Commission referred to the concept of consolidation of the aid, taking the view that the non-taxation of the provisions previously established constituted aid on the date of that non-taxation, that is to say, in 1997.

378 EDF argues that, in the opening decision, which provided the basis for the contested decision (see recital 52 thereof), it was in fact assumed that a selective advantage had been conferred on the company over the period 1987 to 1996 and it was stated that the value of that advantage was the

'difference between the capitalised value of the unpaid corporation tax on the provisions during the same period and the amount of corporation tax paid by EDF in 1997, following the entry into force of Article 4 of [Law] No 97-1026'.

379 However, the calculation method finally adopted in the contested decision is not based on the difference between the capitalised value of the unpaid corporation tax on the provisions during the same period and the amount of corporation tax paid by EDF in 1997. In recital 220 of the decision, the Commission instead referred to the sum 'paid in the form of exemption from corporation tax in the amount of FRF 5 882 849 762 relating to the reclassification of part of the provisions to the tune of FRF 14 119 065 335 as capital'.

380 Moreover, in this way the Commission disregarded the concept of existing aid, classifying as new aid a measure that only partly cancelled out the advantages conferred previously (paragraph 49 of the letter appended to the opening decision).

381 Finally, EDF argues, in essence, that the Commission cannot rely on a national accounting rule in order to contest its line of argument regarding the existence of new aid.

382 The Commission disputes these allegations.

(b) Findings of the General Court

383 EDF maintains, in substance, that a large part of the aid falls outside the limitation period, inasmuch as, in the opening decision (paragraphs 45, 49 and 52), the Commission took the view that, by the establishment of renewal provisions from 1987 to 1996, EDF had in reality benefited from an undue tax advantage each year from 1987 to 1996, one that was only partly cancelled out by the accounting adjustments and reclassifications carried out in 1997, whereas, in the contested decision, the Commission deliberately altered its analysis and took the view that the advantage had been consolidated by Law No 97-1026.

384 First of all, it must be remembered that, in the reorganisation of EDF's balance sheet, the French authorities had followed the opinion of the National Accountancy Council, which stated that corrections to accounting errors, which by their very nature relate to the posting of past transactions, 'are to be posted in the profit and loss account for the financial year in which they are discovered'. That much is not disputed by the French Republic.

385 It must also be observed that it is clear from the letter of 22 December 1997 (see paragraph 23 above) that, as regards the 'renewal provisions which have become unwarranted (FRF 38 520 943 408) [that is to say, the unused provisions, these were reclassified] as retained income, in accordance with [the National Accountancy Council Opinion]'.

386 Finally, it must be borne in mind that, in the memorandum of 9 April 2002 (Annex D.2 to the rejoinder), the French authorities stated that 'the grantor rights [corresponding to used renewal provisions] in respect of the RAG [represented] an unowed debt [from EDF to the State, as it was shown in the balance sheet] which was unjustifiably exempted from tax by being incorporated into the capital'. The memorandum went on to state that, '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 "Grantor rights" [constituted] not actual liabilities, but a non-tax-exempt reserve' and that '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 … The tax

advantage thus obtained [could] be assessed at [FRF] 5.88 [billion] (14.119 x 41.67%).' Those figures are further clarified in a footnote: 'Normal rate of corporation tax (31.33%) increased by the additional contributions in force for the financial years ending between 1 January 1997 and 1 January 1999'.

387 There is consequently no doubt that the reclassification of the grantor rights as capital, which took place on 1 January 1997, was the taxable event.

388 That being so, the limitation period had not expired, since the Commission's first step in the preliminary investigation was taken on 10 July 2001.

389 Secondly, for the sake of completeness, it must be recalled that, in accordance with Article 4 of Regulation No 659/1999, the Commission must initiate a formal investigation procedure, and inform interested parties thereof, if, on completion of a preliminary examination, it has doubts about the compatibility of the financial measure in question with the internal market. It follows that, in its notice of intention to initiate that procedure, the Commission cannot be required to present a complete analysis of 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 (see the judgment in Case T-156/04, paragraph 108 and the case-law cited).

390 It should also be remembered that, in accordance with 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 internal market (see the judgment in Case T-156/04, paragraph 109 and the case-law cited).

391 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 internal market (see the judgment in Case T-156/04, paragraph 110 and the case-law cited).

392 It follows that the analysis of a measure given in an opening decision is a provisional analysis, one that may be refined or corrected by the Commission in its final decision.

393 The analysis of the measure at issue given in the opening decision in the present case was therefore not final and the Commission was entitled to refine and correct that analysis in the contested decision.

394 It must also be pointed out that, in paragraph 71 of the letter appended to the opening decision, the Commission had in any event already expressed the view that 'the reclassifications and accounting adjustments which [had] consolidated part of the advantage EDF had gained by the improper creation of provisions for the renewal of the high-voltage RAG [had been] recorded in 1997, following the adoption by the French Parliament of Article 4 of Law No 97-1026 of 10 November 1997', that 'the aid element, consisting in the capitalised value of the advantage not cancelled out by these reclassifications and adjustments [had] therefore [been] consolidated with the approval of the French authorities in the course of the ten-year limitation period laid down in Article 15(3) of Regulation No 659/1999 and in breach of Article 88(3) of the Treaty' and that 'that aid element therefore [constituted] new aid'.

395 Thirdly and lastly, the argument concerning the question whether the aid was new aid put forward in support of this part of the present plea is confused, as to the remainder, with the argument which EDF put forward in support of the first part of the plea, and it must consequently be dismissed, having regard to paragraphs 367 to 372 above.

396 The second part of the first plea put forward in the alternative must therefore be dismissed.

F. The second plea in law put forward in the alternative

1. Arguments of the parties

397 In support of the first part of the plea, EDF maintains that the Commission arrived at the figure of FRF 56 886 million by adding together the total value of the unused renewal provisions in the 31 December 1996 balance sheet (FRF 38 520 million) and the sums reclassified as own capital (FRF 18 345 million). However, in its view, the total value of the renewal provisions established during the period 1987 to 1996 was FRF 47 943 million, allocated as follows: FRF 9 423 million to grantor rights on the occasion of the renewal works carried out on the RAG structures between 1987 and 1996 and the balance of FRF 38 520 million to a reserve account, without flowing through the profit and loss account when the balance sheet was restructured.

398 EDF states that the difference between the total reclassified as own capital (FRF 18 345 million) and the use of the renewal provisions allocated to grantor rights (FRF 9 423 million) is attributable to revaluation differences (FRF 4 226 million) and the funding by the grantor of certain RAG structures (FRF 4 696 million) during the period 1987 to 1996.

399 In support of the second part of the plea, EDF argues that the rate of corporation tax that should have been applied in order to calculate the reimbursement is the 1996 rate, not the 1997 rate. Article 1 of Law No 97-1026 introduced a new contribution additional to corporation tax equal to 15% of that tax for the financial years ending between 1 January 1997 and 31 December 1998, which therefore had not existed previously. Only the additional contribution of 10% of the corporation tax was in force.

400 EDF alleges that the corrections that were made when the balance sheet was restructured were assessed to corporation tax at the rate for 1997, that is to say 33.33%, increased by the two additional contributions of 10% and 15% (Article 235b ZA and ZB of the General Tax Code), thus at an overall rate of 41.67%.

401 However, the corrections should have been made for the 1996 financial year at the overall rate of 36.67%. Indeed, Article 4 of Law No 97-1026 expressly provides that the electrical energy structures of the RAG are to be deemed to have been owned by EDF from the time it was granted the concession for that network.

402 According to EDF, it is therefore necessary to reason as if it had always had ownership of the RAG, that is to say, as if it had never established provisions for the renewal of those assets. Accordingly, if it had not established the renewal provisions it would have become liable to tax in respect of the 1996 financial year, its pre-tax profits after imputation of previous carry-overs would have been positive on 31 December 1996, if account were also taken of other corrections connected with its accounting reform. EDF claims that it is therefore the rate in force for the 1996 financial year that should be applied to the correction exercise and, a fortiori, to assess globally any possible shortfall in tax paid.

403 Lastly, it should be noted that the balance sheet that served as a basis for the restructuring was that of 31 December 1996, that the tax paid in 1997 in respect of that restructuring was calculated without taking into account the profit or loss for the 1997 financial year and that the tax credits available on 31 December 1996 were imputed to that tax.

404 In conclusion, EDF submits that the value of grantor rights that could be classified as new aid, following this reasoning, is FRF 7 655 million, to which the corporation tax rate for 1996, 36.67%, should be applied. From that sum it is necessary to deduct the overtaxation on the sum of FRF

38 520 million resulting from taxation at the rate of 41.67% instead of 36.67%, which is FRF 1 926 million. Thus, the value of the aid would be: [7 976 x 36.67%] — [38 520 x (41.67% — 36.67%)] = FRF 998.80 million, or EUR 151 million.

405 The Commission disputes these arguments.

2. Findings of the General Court

406 In support of the first part of the second plea in law put forward in the alternative, EDF argues that calculation errors were made in the determination of the value of the renewal provisions.

407 In support of the second part of the plea, EDF also argues, essentially, that it was a mistake to use the 1997 taxation rate in order to calculate the tax advantage from which it had benefited and that the rate applicable in 1996, which was more favourable, should have been used instead.

408 First of all, it must be remembered that the letter of 22 December 1997 (see paragraph 23 above), stated, with regard to the grantor rights: 'consolidation as capital contributions of the value of the assets in kind comprising the RAG under concession at FRF 14 119 065 335'.

409 Secondly, in the memorandum of 9 April 2002 (Annex D.2 to the rejoinder), the French authorities had stated the following:

'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 "Grantor rights" in the amount of [FRF] 14.119 [billion] rather than [FRF] 18.345 [billion], and the reclassification of the still-unused provisions amounting to [FRF] 38.5 [billion].

The grantor rights [corresponding to used renewal provisions] in respect of the RAG represent an unowed debt [from EDF to the State, as it was shown in the balance sheet] which was unjustifiably exempted from tax by being incorporated into the capital.

… 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 "Grantor 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 … The tax advantage thus obtained may be assessed at [FRF] 5.88 [billion] (14.119 x 41.67%).'

410 Those figures are further clarified in a footnote to the memorandum of 9 April 2002: 'Normal rate of corporation tax (31.33%) increased by the additional contributions in force for the financial years ending between 1 January 1997 and 1 January 1999'.

411 Thirdly, it must be remembered that, in the reorganisation of EDF's balance sheet, the French authorities had followed the opinion of the National Accountancy Council, which stated that corrections to accounting errors, which by their very nature relate to the posting of past transactions, 'are to be posted in the profit and loss account for the financial year in which they are discovered' (see Annex I-8 to the statement in intervention).

412 The letter of 22 December 1997 (see paragraph 23 above) states, in this regard, that the 'renewal provisions which have become unwarranted (FRF 38 520 943 408) [were reclassified] as retained income, in accordance with [the National Accountancy Council Opinion]'. It is also clear from

Annex 3 to that letter that that reclassification entailed a variation in net worth that was subject to corporation tax at the rate of 41.66%, which, the parties are agreed, was the applicable rate of taxation in 1997.

413 Consequently, the Commission cannot be criticised from relying on the information concerning the value of the renewal provisions and the applicable rate of taxation that had been provided to it by the French Republic during the administrative procedure in order to calculate the amount of aid at issue (see, to that effect, judgment of 30 November 2009, *France and France Télécom* v *Commission*, T-427/04 and T-17/05, EU:T:2009:474, paragraphs 302 and 303, confirmed on appeal by the judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraphs 102 to 104).

414 Therefore, both parts of the second plea put forward in the alternative, and thus that plea in its entirety, must be dismissed.

IV. Costs

415 Under Article 134(1) 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. In addition, under Article 134(2) of those rules, where there is more than one unsuccessful party the Court is to decide how the costs are to be shared. Furthermore, Article 138(1) of the rules provides that Member States and institutions which intervene in proceedings are to bear their own costs.

416 Since EDF and the French Republic have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission, in accordance with the latter's pleadings.

On those ground,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Électricité de France (EDF) to bear its own costs and to pay those incurred by the European Commission, with the exception of the costs which the latter has incurred as a result of the intervention of the French Republic;**

3. **Orders the French Republic to bear its own costs and those incurred by the Commission as a result of its intervention.**

Frimodt Nielsen Kreuschitz Półtorak

Delivered in open court in Luxembourg on 16 January 2018.

[Signatures]

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