Other parties to the proceedings: Électricité de France (EDF), French Republic, Iberdrola SA

Form of order sought

— Set aside the judgment of the General Court of the European Union (Third Chamber) of 15 December 2009, notified to the Commission on 16 December 2009, in Case T-156/04 EDF v Commission, in so far as the judgment:

  — annulled Articles 3 and 4 of Commission Decision C(2003) 4637 of 16 December 2003 on the State aid granted to EDF and the electricity and gas industries (C 68/2002, N 504/2003 and C 25/2003);

  — ordered the Commission to bear its own costs and to pay the costs of Électricité de France (EDF)

— refer the case back to the Court of First Instance for reconsideration;

— reserve the costs of the proceedings.

Pleas in law and main arguments

The European Commission puts forward two pleas in support of its appeal.

By its first plea, the Commission submits that the General Court misinterpreted the facts of the case. Contrary to what is stated in the judgment under appeal, the French Republic did not in fact convert a tax claim into capital, but simply granted EDF aid in the form of a corporate tax exemption. The recapitalisation of EDF, itself, was not considered in the annulled decision to be State aid; the Commission only classified its tax implications as State aid.

By its second plea, which comprises four parts, the appellant submits that the General Court committed an error of law in taking the view that the French Government acted in the present case like a prudent private investor in a market economy.

First, the appellant contests the General Court's finding that the distinction between the State as shareholder and the State wielding public power depends primarily on the objective pursued by the State — in the present case, the recapitalisation of EDF — and not on objective and verifiable elements. First, in fact, the Court has repeatedly stated that Article 87(1) EC does not distinguish between the causes and objectives of State intervention. Second, a criterion based on the intention of the State would be particularly inappropriate for assessing the existence of State aid in so far as such a criterion is, by its very nature, subjective and subject to interpretations.

Second, the Commission criticises the General Court for not having based its assessment on a comparative study of, on the one hand, the behaviour that a prudent private operator without privileges would have adopted in similar circumstances and, on the other hand, the behaviour of the French State in the present case, with its prerogatives as public authority.

Third, the appellant submits that the judgment under appeal fails to apply the principle of equal treatment between State enterprises and private undertakings, thus allowing for more favourable tax treatment of the State, including undertakings in which the State is not the only shareholder.

Finally, according to the Commission, the General Court disregarded the rules governing the apportioning of the burden of proof as regards the applicability of the principle of the prudent private investor in a market economy, while taking into account facts that occurred after the date on which the annulled decision was adopted.

Reference for a preliminary ruling from the Bundespatentgericht (Germany) lodged on 9 March 2010 — Merck & Co Inc v Deutsches Patent- und Markenamt

(Case C-125/10)

(2010/C 161/24)

Language of the case: German

Referring court

Bundespatentgericht

Parties to the main proceedings

Applicant: Merck & Co Inc

Defendant: Deutsches Patent- und Markenamt

Question referred

Can a supplementary protection certificate for medicinal products [1] be granted if the period of time between the filing of the application for the basic patent and the date of first authorisation for marketing in the Community is shorter than five years?

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[1] Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (codified version); OJ 2009 L 152, p. 1