

European Commission v Électricité de France: The Private Investor Test and State Aid

Article By:

Antitrust & Competition Practice

The **European Court of Justice (ECJ)** upheld on 5 June an earlier ruling of the General Court that annulled a decision made by the **European Commission** that a modification of accounting rules made by France in favour of energy company **Électricité de France (EDF)** constituted State aid.

The 5 June judgment clarifies the conditions under which an EU Member State, in its capacity as shareholder, may invest in public undertakings through legislative and fiscal support.

The Private Investor Test

Article 107(1) of the **Treaty on the Functioning of the European Union (TFEU)** prohibits State aid granted by Member States or through State resources for the benefit of certain undertakings, or for the production of certain goods, if there is a possibility the aid may distort competition or have an adverse effect on intra-Community trade. Article 107(1) TFEU does not distinguish between State intervention in public undertakings or in private undertakings.

In some cases, however, financial advantages granted by Member States are not prohibited. If the same measure would have been adopted under normal market conditions by a private investor in a situation similar to the State's, the undertaking concerned does not benefit from an economic advantage and is therefore not considered to have received State aid.

The application of this "private investor test" depends ultimately on the State having conferred the economic advantage in its capacity as shareholder and not in its capacity as public authority. It follows that the roles of the State as shareholder of an undertaking and of the State acting as public authority must be distinguished.

The Private Investor Test and Instruments of State Power

In *European Commission v EDF* C-124/10 P, the ECJ examined whether the private investor test is applicable when a Member State confers an advantage to an undertaking by using measures that are not available to a private investor because they are instruments of public authority. The Commission had argued that the State acts as a public authority, not a shareholder, when it uses measures that only a public authority can use, such as legislative or tax measures.

The ECJ came to the conclusion that the sovereign nature of the measure does not preclude the applicability of the private investor test. However, the Member State must show unequivocally and on the basis of objective and verifiable evidence that it acted in its capacity as shareholder when making the investment in a public undertaking. 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 in the public undertaking by means of the measure actually implemented. The evidence must show that the decision was based on economic evaluations comparable with those a rational private investor would have had carried out, before making the investment, in order to determine its future profitability.

In other words, the Member State must prove that, *ex ante*, it considered the measure as an investment on market terms, and not as financial support by a public authority. The Member State cannot just argue *ex post* that the measure has effects comparable with a hypothetical action of a private shareholder.

Financial Situation of the Recipient

Once the applicability of the private investor test is established, it then needs to be determined whether or not the substantive criteria of the test are fulfilled, *i.e.*, whether or not the measure would have been adopted under normal market conditions by a private investor in a situation as close as possible to that of the State's.

The financial situation of the recipient public undertaking does not depend on the means used to grant the advantage, but on the amount received. Consequently, the analysis should not focus on the fiscal nature of the means employed by the Member States, but on the improvement in the beneficiary's financial situation and on the effects of the measure on competition.

Practical Application

The *EDF* judgment clarifies the applicability of the private investor test to State measures that are beyond the means of a private investor, when applied to a public undertaking. By allowing a Member State to rely on the private investor test when acting in its capacity as shareholder, regardless of the measures used to place the public undertaking at an advantage, the ECJ has extended the possibility of justifying financial investments by the State in public undertakings.

Public authorities should be aware, however, that it is incumbent upon the Member State to provide the Commission with evidence that the measure implemented is consistent with the State acting as shareholder and considering the measure *ex ante* and on market terms. In this regard, it is not sufficient to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member States was actually profitable, or on subsequent justifications of the course of action.

The judgment does not have implications for the applicability of the private investor test to measures granted by the State that are also available to private investors, such as direct grants.

An alternative reading of the judgment suggests, however, that the ECJ has introduced the additional criterion of an *ex ante* business plan for situations in which the Member State does not use instruments of State power. If this alternative reading were correct, this would restrict considerably the opportunity for Member States to rely on the market terms investor principle.

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