II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 11 April 2000
on the measure implemented by EDF for certain firms in the paper industry

(notified under document number C(2000) 1061)

(Only the French text is authentic)

(Text with EEA relevance)

(2001/274/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions [1],

Whereas:

1. PROCEDURE

(1) By letter of 13 June 1996, registered on 14 June 1996, the Commission received a complaint concerning the preferential terms on which Electricité de France (hereinafter 'EDF') apparently supplied electricity to paper mills which agreed to purchase electrical infrared drying equipment. According to the complainant, EDF took advantage of its absolute control of the French electricity market by endeavouring to influence paper mills' choice of infrared technology by offering preferential rates for electricity, to the detriment of systems operating with other energy sources, in particular natural gas.

(2) By letters dated 10 July 1996, 24 July 1996, 4 November 1997, 4 December 1997 and 12 January 1998, the Commission asked the French authorities for more detailed information. This reached the Commission on 18 July 1996, 28 August 1996, 25 November 1997 and 22 January 1998. The Commission sent the complainant a summary of the information by letters dated 10 July 1996, 29 October 1996, 14 November 1996 and 13 November 1997. The complainant's replies reached the Commission on 31 October 1996, 21 November 1996, 10 December 1996, 25 February 1997, 22 May 1997 and 12 September 1997.

(3) On 20 May 1998 the Commission decided to initiate the procedure under Article 88(2) of the EC Treaty in respect of the measure. This decision was notified to the French Government by letter No SG(98) D/5741 of 14 July 1998 requesting the French authorities to submit their comments within one month, i.e. by 14 August 1998.

(4) By letters dated 28 July 1998, 11 September 1998, 7 October 1998, 24 December 1998 and 19 January 1999, the French authorities asked the Commission not to publish certain information contained in the decision to initiate the procedure under Article 88(2). The Commission replied by letters dated 10 August 1998, 6 October 1998, 22 October 1998, 14 December 1998, 12 January 1999 and 19 February 1999. At meetings held on 21 September and 1 December 1998 the French authorities withdrew their request not to publish information, which in any case had been partly rejected because of the public nature of the matter at issue.

(5) By letter of 2 September 1998, registered on 7 September 1998, EDF asked for access to the file. The request was rejected by letter of 17 September as all the documents requested fell within the list of exceptions under the policy on access to documents.

[1] OJ C 70, 13.3.1999, p. 10.

(6) On 31 July 1998 the French authorities asked for a one-month extension of the deadline for their reply. Their request was accepted by the Commission on 5 August 1998.

(7) By letter of 4 September 1998, registered on 7 September 1998, the French authorities submitted their comments.

(8) The Commission notice to interested parties asking them to submit their observations on the measure in question was published on 13 March 1999 in the *Official Journal of the European Communities* ([2]). By 13 April 1999, the deadline given in the notice, the interested parties had submitted two observations. By letters dated 4 June and 9 June, these were forwarded to the French authorities, which had the opportunity to comment on them. In the same letter, the Commission also asked for additional information.

(9) At a meeting held on 28 May 1999 and by letter of 28 June 1999, registered on 29 June, the French authorities supplied the information requested.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Introduction

(10) EDF, which is wholly controlled by the French State, is the dominant electricity producer in France, where it used to have a vertically integrated monopoly, both in law ([3]) and in fact. Electricity prices are fixed by EDF following approval by the Finance Ministry.

(11) For at least the last 10 years, EDF has announced considerable unutilised capacity. It had initially estimated that this overcapacity would be absorbed by the market by 1997/1998. Recently, however, it has modified its own estimates and now believes that the overcapacity will last until at least 2010, the growth in the French economy being less buoyant than expected.

(12) In order to dispose of its surplus, EDF grants its customers in certain industrial sectors commercial holdings for extra consumption resulting from 'efficient and innovatory' applications of electricity. The electrical technologies and industrial sectors enjoying these benefits are the following: reversible air conditioning; radiant panels, membrane technology; CMB, electrolysis, high-efficiency electric motors and electronic speed variation (all sectors); electrical tubing (chemicals); ohmic heating (chemicals, food and glass); induction (metal-working and chemicals), infrared and other radiation techniques (paper, textiles and food).

(13) In the [...] (*) and [...] industries, these practices resulted in electricity supply contracts being concluded, in particular with [...] and [...]; these are also under examination by the Commission. In the paper industry, the commercial policy conducted by EDF took the form of some 10 'commercial holding' projects between 1990 and 1996 aimed, in particular, at encouraging the installation of infrared drying equipment. EDF granted subsidies in this way to the Condat, Cascades, Lancey, Gromelle and Sibille Stenay ('Sibille') paper mills.

2.2. Recipients and detailed description of the measures

(14) When the paper mills concerned purchase the drying equipment, EDF gives them an advance corresponding to the discount on the quantity of electricity which the dryers, according to the mills' estimates, will use during the life of the supply contract, which is usually six years. EDF thus calculates the discount in order to spread the initial holding over the presumed annual additional consumption of electricity by the dryers and over the lifetime of the supply contracts. However, the calculation does not take account of interest on the advance in question and on consumption. The discounts given below are expressed at their present (discounted) 1999 value ([4]).

(15) **Condat**: in June 1989, October 1990 and April 1995 the mill acquired three electrical infrared drying machines with an additional consumption of 9, 21 and 18 GWh a year respectively ([5]). It received from EDF a total of FRF 15,8 million (EUR 2,41 million) for additional electricity consumption over six years, of which FRF 10,5 million (EUR 1,6 million) was in the form of an advance and FRF 5,3 million (EUR 0,81 million) in the form of an operating grant paid annually to the customer. The actual discount amounts to 6,2 c/kWh (EUR 0,95/kWh) or 27 % of the average price of 22,8 c/kWh (EUR 3,48/kWh). The present value of the discount is FRF 22,6 million (EUR 3,45 million).

(16) **Cascades**: in April 1992 EDF granted FRF 250 000 (EUR 38 112) for the development of a new membrane technology aimed at the recycling of coating effluent, involving additional annual consumption of 0,75 GWh

([2]) See footnote 1.

([3]) Before Law No 2000-108 of 10 February 2000 on the modernisation and development of the public electricity service (*Official Gazette of the French Republic* of 11 February 2000, p. 2143).

(*) Business secret.

([4]) The reference rate used by the Commission in order to measure the aid element of subsidies is 4,76 % as at 1 August 1999.

([5]) On the basis of the information provided by the French authorities on 21 Januay 1998, the Commission included in its decision to initiate the procedure a commercial incentive of FRF 6,6 million (EUR 1,01 million) for the installation of a fourth drying machine. In their letter of 28 June 1999 the French authorities provided proof that the fourth machine had not been installed. The Commission therefore removed the incentive for that machine from the calculation of the discount.

over three years. The real value of the discount amounts to 11,6 c/kWh (EUR 1,77/kWh) or 59 % of the average price of 19,6 c/kWh (EUR 2,99/kWh). The present value of the discount is FRF 346 185 (EUR 52 775).

(17) **Lancey**: in March 1996 it acquired two electrical infrared drying units and an effluent treatment unit. It therefore benefited from a commercial incentive from EDF of FRF 2,25 million (EUR 0,34 million) for an annual additional consumption of 15 GWh over six years. This amounts to a real discount of 2,7 c/kWh (EUR 0,41/kWh) or 15 % of the average price of 17,8 c/kWh (EUR 2,71/kWh). The present value of the discount is FRF 2,87 million (EUR 0,44 million).

(18) **Gromelle**: in March 1993 EDF granted it a holding of FRF 130 000 (EUR 19 818) for an electric drying unit with an annual additional consumption of 0,8 GWh over six years. The real average discount is 3,0 c/kWh (EUR 0,46/kWh) or 8 % of the average price of 37,8 c/kWh (EUR 5,76/kWh). The present value of the discount is FRF 171 840 (EUR 26 196).

(19) **Sibille**: for installing an electric dryer, EDF granted it (i) in July 1992 the sum of FRF 1,35 million (EUR 0,21 million) for an annual additional consumption of 7 GWh, (ii) in April 1996 the sum of FRF 283 000 (EUR 43 143) for reconditioning and (iii) again in April 1996 a further commercial incentive of FRF 230 000 ([6]) (EUR 35 063) for further additional consumption of 1,2 GWh over a period of six years. The real average discount amounts to 4,6 c/kWh (EUR 0,70/kWh) or 19 % of the average price of 24,2 c/kWh (EUR 3,69/kWh) for an annual additional consumption of 8,2 GWh. The present value of the discount is FRF 2,72 million (EUR 0,41 million).

(20) **IRS**: in order to help finance the development of infrared drying technology, EDF granted InfraRouge-System ('IRS') a loan of FRF 3 million (EUR 0,46 million) in 1996. The loan was apparently to be repaid over five years depending on the firm's turnover in France and abroad. The present value of the loan is FRF 3,45 million (EUR 0,53 million).

(21) The present value of the discounts and the loan is FRF 32,2 million (EUR 4,9 million).

3. PRINCIPAL REASONS WHICH LED TO THE DECISION TO INITIATE THE PROCEDURE

(22) The Commission decision to initiate the procedure under Article 88(2) was based on (a) suspected aid with regard to preferential tariffs granted to certain paper mills and (b) the commercial logic of the loan granted by EDF to IRS.

3.1. Preferential tariffs for certain paper mills

(23) The Commission considers that preferential tariffs are caught by the ban in Artic1e 87(1) of the EC Treaty if they meet the following three conditions: (a) they are granted by the State or through State resources; (b) they favour certain firms or the production of certain goods; and (c) they distort competition between the favoured firms and similar firms and/or products in other Member States, the products concerned being traded between Member States.

(24) As to the second condition, there was doubt whether the fact that certain paper mills benefited from a preferential electricity tariff was tantamount to granting them an advantage.

(25) At first sight, EDF did not appear to cover the marginal cost and at least a proportion of its fixed costs. Where long-term electricity supply contracts are concerned, a generator must take account of a significant proportion of its fixed costs even if it has surplus capacity.

(26) What is more, it did not appear that EDF had any need to grant price discounts in order to compete, as there are no competitors at present on the French electricity market, or to keep customers it might lose without offering such discounts ([7]).

(27) Lastly, the preferential prices granted to the paper mills concerned appeared to discriminate against other electricity consumers in a comparable situation.

3.2. Loan granted by EDF to IRS

(28) Without more detailed information and in view of the difficult financial position of IRS, there is some doubt as to the commercial logic of the loan granted by EDF.

4. OBSERVATIONS BY THE INTERESTED PARTIES

(29) Following publication of its decision to initiate the procedure under Article 88(2) of the EC Treaty in respect of the aid in question, the Commission received observations from two interested parties, namely an aid recipient (Cascades) and EDF.

([6]) In their letter of 4 September 1998 the French authorities stated that EDF had demanded reimbursement of the sums for the paper machine and the infrared equipment generating additional consumption of 1,2 GWh which had been out of use since the end of 1997. Since they acknowledge in their letter of 28 June 1999 that the incentive has not been paid back, the Commission is including the sum of FRF 230 000 (EUR 35 063) in the calculation.

([7]) Joined Cases 67, 68, and 70/85 *Van der Kooy* [1988] ECR 219.

4.1. **Observations by Cascades**

(30) Cascades states that it is equipped solely with gas infrared systems by the firm Solaronics and has no electrical infrared equipment; EDF therefore did not influence its choice. However, EDF did grant the sum of FRF 250 000 for the development of a new membrane technology aimed at the recycling of coating effluent. The discount in question was not spread over three years. Lastly, electricity consumption corresponded to the motor of the pump feeding the installation, which, according to Cascades, could not be powered in any other way, and so this in no way penalised or discriminated against either another equipment provider or another energy provider.

4.2. **Observations by EDF**

(31) EDF considers that neither the discount granted to the paper mills nor the contract with IRS contains elements of State aid and that the interpretation of Articles 87 and 88, as proposed by the Commission in this case, may discriminate against public electricity companies in favour of private electricity companies by denying the former the commercial freedom which all companies may enjoy under the Treaty.

(32) Firstly, EDF maintains that the discount covers all variable costs and a very substantial proportion of the company's fixed costs. According to a study carried out by the consultant Hagler-Bailly, the prices offered by EDF for additional consumption by paper mills linked to new equipment cover all variable costs and, on average, 57 % of fixed costs.

(33) Furthermore, in order to gauge the real impact of the discount on competition and intra-Community trade, EDF considers that it should be calculated in relation to the average price paid by a paper mill for the total energy consumption of its site. According to EDF, the discount for Condat, Lancey and Sibille, expressed as a percentage of total site consumption (in 1996), amounted to 0,8 %, 3,4 % and 1,3 % respectively. Given that the effect of the cost of electricity on the cost of paper ranges from 5 % to 10 % depending on the quality of the paper, the 'advantage' which the discount represents in terms of electricity costs is, according to EDF, between 0,04 % and 0,08 % for Condat, between 0,17 % and 0,34 % for Lancey and between 0,065 % and 0,13 % for Sibille.

(34) Furthermore, EDF states that the agreement concluded in 1996 with IRS does not constitute a simple loan but a particular kind of partnership. Under the terms of the agreement, IRS undertook to develop electrical infrared applications. In exchange, EDF made available to IRS the sum of FRF 500 000 to contribute to the development of commercial communication and the sum of FRF 2,5 million to be repaid over five years on the basis of IRS's annual turnover.

(35) Under the contract, IRS must each year repay 4 % of its turnover generated by the sale of electrical infrared equipment. However, following a downturn in its business, it did not keep to this commitment. At the request of EDF, the Paris commercial court issued an interim order against IRS on 11 February 1999. IRS has three months in which to pay off its debt by making an interim payment of FRF 870 769,39. If it fails to do so, the entire debt will be immediately payable.

(36) Finally, EDF points out that the Commission interprets Articles 87 and 88 of the Treaty in a way which restricts the commercial freedom of public electricity companies in favour of private companies. If EDF were a private company, the market behaviour which is being challenged would be perfectly permissible.

5. **COMMENTS BY FRANCE**

(37) The French authorities replied to the Commission decision to initiate the Article 88(2) procedure by two letters, dated 4 September 1998 and 29 June 1999, which are summarised below.

5.1. **Letter of 4 September 1998**

(38) In their reply of 4 September 1998 concerning the initiation of the procedure, the French authorities observed that the discount granted to the firms concerned in the paper industry did not constitute State aid within the meaning of Article 87(1) of the Treaty, for the following reasons:

(39) According to them, the commercial strategy at issue stemmed from a decision taken by the company itself and was not dictated by any measure, decision or incentive originating from them. The fact that EDF is wholly owned by the French State does not *ipso facto* make the State responsible for commercial measures of limited scope such as the one in question.

(40) The French authorities state that, like any other electricity company, public or private, EDF has a legitimate commercial interest in encouraging the development of technologies and equipment likely to stimulate the demand for electricity and create new outlets for the company's product. The discount for additional consumption could not be called a preferential tariff. According to the French authorities, it constituted established, legitimate commercial practice based on objective, non-discriminatory criteria.

(41) Furthermore, the French authorities point out that the prices charged for overall consumption of the industrial sites concerned are calculated so as to cover, and to cover effectively, all the costs of the contracts in question. The Commission simply calculates the effect of the discount on additional consumption alone. According to the French authorities, this approach does not appear to be in line with the principle of the market economy operator. They consider that the Commission cannot establish that an operator in a market economy, put in EDF's position, would make sure of the profitability of each of the elements of a given commercial relationship with an industrial consumer. In any case, since the prices at issue relate to additional consumption, the French authorities maintain that the discount was calculated so as to arrive at a price which covers not only all the variable costs but also around 50 % of fixed costs.

(42) Furthermore, the French authorities consider that, although the commercial practice set in place normally lasts for six years, the beneficial effects it has on electricity consumption last well beyond the incentive period, in fact throughout the life of the equipment, i. e. between 12 and 15 years. This means that the extra electricity consumption and the revenue it generates may be calculated over a much longer period than the period for which the discount is granted.

(43) With regard to its overcapacity, the French authorities confirm that EDF has a surplus of energy from nuclear sources. They claim that the NERA study shows that EDF did not knowingly arrange this overcapacity and that its commercial policy towards customers allowing it to absorb the surplus is carried on under pricing conditions which cover all variable costs and a large proportion of fixed costs.

(44) They go on to stress that the discount is not applied in a discriminatory manner. They point out that the tariff conditions for [...] and [...] have a fundamentally different background from the case in question, linked mainly to the electricity-intensive nature of the industrial activities concerned, which exceeds 50 %. Given that energy costs account for only 5 % to 10 % of the total cost of paper manufacture, the paper industry is not an electricity-intensive sector.

(45) The French authorities believe that the Commission overestimates the importance of the discount for the competitive position of EDF's industrial customers. In their view, the effect of the discount on the average price charged by the paper firms is minimal. In the same way, they emphasise that it would be wrong to maintain that EDF's practice of giving commercial incentives has 'diverted' the market from its natural course of using gas, since electrical equipment is a more attractive option.

(46) Lastly, the French authorities end their letter by explaining that, at the time of the negotiations for the EDF/IRS contract in 1996, EDF could, on the contrary, expect an increase in electricity consumption as a result of the introduction of infrared technology in many industrial sectors in which IRS is active. Sales of electrical infrared equipment by IRS in 1996 and 1997 realised FRF 18 million. According to the French authorities, such prospects should lead to additional income.

(47) According to the French authorities, EDF estimates that infrared equipment with a total power of 300 MW was installed in industry in France in 1996. According to EDF, annual electricity consumption generated by such equipment is over 720 GWh, representing estimated annual income of FRF 200 million. In the paper industry alone, infrared technology generates consumption of 120 GWh. In view of the number of machines not yet equipped with this technology, EDF estimates that the pool of consumption still accessible is 125 GWh, representing estimated potential annual income of FRF 30 million.

5.2. **Letter of 29 June 1999**

(48) By letter of 4 June 1999, the Commission asked the French authorities to reply to the questions in its decision to initiate the procedure which still remained unanswered and to a number of other questions arising from the observations made by third parties.

(49) In response to this request, the French authorities supplied calculation sheets concerning the rate of coverage of fixed costs for additional consumption resulting from the installation of electrical infrared drying equipment. According to them, these calculations were made and endorsed by the independent consultant Hagler-Bailly. They indicate that, for additional consumption generated by the infrared installations, the commercial terms cover all variable costs and, on average, 57 % of fixed costs.

(50) They point out in this connection that the commercial incentives introduced for new consumption do not lead to lower tariffs but, through increased sales, make it possible to cover more of the fixed costs of EDF's generation system, thereby directly benefiting all of its customers.

(51) As regards the comparison between the tariff terms in the case in question and those of [...] and [...], the French authorities state that the two situations are not in fact comparable. For [...] and [...] electricity accounts for over 50 % of the cost of manufacturing the final product, while in the paper industry it accounts for less than 5 %. According to a statistical study by VDEW based on data supplied by the German Statistisches Bundesamt, DIW

and Unipede, electricity accounts for 2,4 % of the cost of paper production. Similarly, a study of the 1997 report by SESSI (statistics department of the French Economics Ministry) gives a figure of 4,3 %. The real percentages of electricity intensity for paper manufacture are ten times lower than the figures put forward by the complainant in this case.

(52) As regards real additional consumption linked to the operation of drying machinery, the authorities explain that this was not measured specifically. The discount was therefore calculated and granted on the basis of the additional consumption generated by this equipment and provided for in the relevant agreements.

(53) In their letter, the French authorities also confirm that the additional commercial incentive of FRF 230 000 for Sibille has not been repaid.

(54) With regard to the loan to IRS, the French authorities maintain that the agreement concluded between EDF and IRS on 29 March 1996 is in fact a contract for the provision of services and not a loan agreement. According to them, at the time the contract was signed, IRS was indeed the only manufacturer capable of offering innovatory electrical infrared drying equipment. On the basis of EDF's marketing platform, IRS was therefore chosen since it could provide the services which EDF wanted in the market segment of electrical infrared drying.

(55) With regard to Condat, one of the recipients of the aid, the French authorities confirm that only three electrical infrared machines were installed by the company and that the fourth, planned at one time, had not been installed since in the end the firm chose a gas-powered infrared machine.

(56) Lastly, the French authorities explain that the difference between the Commission's and EDF's calculations is due to the fact that the NERA study greatly overestimates the variable cost of a nuclear unit in EDF's generation system. For French nuclear power stations, as in almost all other countries, operating and maintenance costs are fixed costs. This means that the variable cost of nuclear power is basically the cost of the fuel, evaluated for France in the OECD report at USD 0,0083 and 0,0092/kWh as at 1 July 1991, i. e. around FRF 0,05 to 0,06 per kWh in the mid-1990s.

(57) According to the French authorities, this difference between the variable cost calculated by the NERA study [...] and the real variable cost of French nuclear power stations as evaluated in the OECD's 1992 report [...] suffices to demonstrate, given the structure of the French generation system, that the short-term marginal cost of supply is [...].

6. **ASSESSMENT OF THE MEASURE**

6.1. **Preferential tariffs for certain paper mills**

6.1.1. *De minimis rule*

(58) The French authorities initially argued that the discounts granted to the Cascades and Gromelle paper mills in 1992 and 1993 respectively were covered by the *de minimis* rule.

(59) It should be pointed out here that the ceiling applicable in this case is given in the Community guidelines on State aid for small and medium-sized enterprises of 1992 ([8]) (hereinafter 'the guidelines'), i. e. ECU 50 000, this being the only rule which France could rely on in 1992 and 1993.

(60) The guidelines state that the *de minimis* rule applies to 'aid up to a certain absolute amount, below which Article 92(1) can be said not to apply' and that one-off payments of aid of up to ECU 50 000, in respect of a given type of expenditure ard schemes under which the amount of aid a given firm may receive in respect of a given type of expenditure over a three year period is limited to that figure, will no longer be considered notifiable under Article 93(3), provided that it is an express condition of the award or scheme that any further aid the same firm may receive in respect of the same type of expenditure from other sources or under other schemes does not take the total aid the firm receives above the ECU 50 000 limit.

(61) The value of the discount granted to Cascades in April 1992 was, at the time, FRF 250 000 (ECU 36 000), while that of the discount granted to Gromelle in March 1993 was FRF 130 000 (ECU 18 700). The French authorities have confirmed that Cascades and Gromelle did not receive, under the *de minimis* rule, any other aid and that the ceiling was not therefore exceeded. Consequently, leaving aside the question of whether or not they qualify as aid, the discounts do not exceed the *de minimis* threshold. Article 87(1) does not therefore apply.

6.1.2. *State aid within the meaning of Article 87(1) of the EC Treaty*

(62) The question is whether the discounts granted to Condat, Lancey and Sibille constitute preferential tariffs caught by the ban in Article 87(1) of the EC Treaty.

([8]) OJ C 213, 19.8.1992, p. 2.

(63) Under that Article, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market.

(64) Thus, preferential tariffs are caught by the ban in Article 87(1) of the EC Treaty if they meet the following three conditions:

1. they are granted by the State or through State resources;

2. they favour certain firms or the production of certain goods;

3. they distort competition between the favoured firms and similar firms and/or products in other Member States, the products concerned being traded between Member States.

6.1.2.1. Granted by the State or through State resources

(65) As regards the first point, i. e. aid granted through State resources, the French State wholly owns EDF. Electricity prices are fixed by EDF after approval by the Finance Ministry. Although the company has some freedom as regards its discount policy, it must nevertheless be concluded that the State, through EDF, has the final say as to the advantages enjoyed by the paper mills concerned.

(66) The French authorities' claim that the commercial measures are 'limited in scope' ([9]) must be refuted. They in fact themselves confirm that such measures are part of 'a commercial policy which aims to encourage industrial consumers to develop and use technologies which ensure innovatory, effective and rational use of electricity' ([10]). Being part of a 'commercial policy', these commercial measures can hardly be said to be 'limited in scope'.

(67) Therefore, since they are granted by EDF and thus indirectly by the French State, the preferential tariffs for certain paper mills constitute a State measure, with the result that the first condition under Article 87(1) is met.

([9]) Letter of 4 September 1998, p. 3.
([10]) See footnote 9.

6.1.2.2. Advantage to certain paper mills

(68) As regards the second point, i.e. the favouring of certain firms or goods, the fact that certain paper mills benefit from a preferential electricity tariff is tantamount to granting them an advantage. In the present case, the advantage consists in the following real average prices for electricity and discounts: **Condat**: 16,6 c/kWh (EUR 2,5/kWh) or FRF 22,6 million (EUR 3,45 million); **Lancey**: 15,1 c/kWh (EUR 2,3/kWh) or FRF 2,87 million (EUR 0,44 million); and **Sibille**: 19,6 c/kWh (EUR 3,0/kWh) or FRF 2,72 million (EUR 0,41 million). The total value of advantages in the form of discounts is FRF 28,2 million (EUR 4,3 million).

(69) In principle, a private or public enterprise can charge different prices according to the use made of the products it sells; however, such differences must be justified on commercial grounds, i.e. they must cover the marginal cost and at least a proportion of the fixed costs.

(70) Experts given the task by the Commission of analysing EDF's surplus capacity and its pricing system ([11]) estimate the marginal cost to EDF of producing an additional unit of nuclear-generated electricity would be about [...], whereas that produced from fossil fuels (coal and oil) would range from [...]. Where long-term electricity supply contracts are concerned, a generator must take account of a significant proportion of its fixed costs, even if it has a surplus. This would bring the price charged to major industrial consumers to an average of some [...], which would appear to correspond to that invoiced by EDF to its largest customers on the basis of the tariff in force.

(71) By referring to the OECD's 1992 report, which assesses the variable cost of nuclear energy for EDF at 5 to 6 c/kWh (EUR 1/kWh), the French authorities have shown that the NERA study overestimated the variable cost of a unit of nuclear-generated electricity by EDF's generation system. On the basis of this information, they confirm that the short-term marginal cost of supply is [...].

(72) On the basis of a short-term marginal cost of [...], the French authorities have established that the price offered by EDF for this additional consumption covered its variable cost and at least 35 % and, on average, 57 % of its fixed costs. The average rate of cover of fixed costs is 50 % for Condat, 66 % for Lancey and 62 % for Sibille.

([11]) Study IV/96/1178/ETD/01 'Tariffs and cost consequences of the EDF monopoly', carried out by National Economic Research Associates (NERA), February 1997.

(73) The French authorities confirm that EDF has a surplus of energy from nuclear sources ([12]). It should be pointed out that this overcapacity was created in a lawful monopoly situation, well before the current ongoing liberalisation of the electricity market. The Commission's analysis therefore focuses on the particular circumstances of the present case. Consequently, this decision in no way prejudges the conclusions which, against the background of the opening up of the market, the Commission could reach when it examines the problems posed by the creation of such overcapacity by EDF in the past.

(74) Commercial logic dictates that, where there is overcapacity, an operator in a market economy would naturally have been led by the need to maximise profits to sell an additional quantity of his product without covering all the costs for that additional quantity. If he did not, the corresponding quantities which were produced and could not be stored would remain unsold. Furthermore, there is nothing in the case file to show that EDF would have been able to obtain a better price elsewhere. However, the alternative would have been for the paper mills to install gas-powered drying equipment. In this context, obtaining for the additional consumption resulting from the choice of an additional electrical drying machine a price which covers variable costs and at least 35 % and, on average, 57 % of fixed costs must be regarded as a commercially acceptable practice.

(75) Therefore, in view of the particular circumstances in this case, the preferential electricity tariffs granted by EDF to Condat, Lancey and Sibille must be regarded as being justified on commercial grounds.

6.1.2.3. Distorting competition and affecting trade between Member States

(76) Given that a measure cannot be regarded as aid within the meaning of Article 87(1) of the EC Treaty unless all three conditions are met, and given that the second condition (aid favouring certain firms or the production of certain goods) is not met, there is no need to examine the third condition.

(77) In conclusion, the preferential electricity tariffs granted by EDF to the Condat, Lancey and Sibille paper mills do not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

6.2. **Loan granted by EDF to IRS**

(78) The Commission examined the loan granted by EDF to IRS in the light of Article 87(1) of the EC Treaty. Under that Article, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods constitutes aid within the meaning of the Article in so far as it affects trade.

(79) As demonstrated in recitals 58 to 77 regarding preferential tariffs, the loan granted by EDF to IRS is caught by the ban in Article 87(1) of the EC Treaty only if it favours certain undertakings and if the advantage it confers is not justified on commercial grounds, provided that the other conditions are met.

(80) The Commission would point out that, according to the principle of the private investor acting in a market economy, as set out in the Commission communication to the Member States on application of Articles 92 and 93 (now Articles 87 and 88) of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector ([13]) (hereinafter 'the communication'), 'only projects where the Commission considers that there were no objective or bona fide grounds to reasonably expect an adequate return in a comparable private undertaking at the moment the investment/financing decision is made can be treated as State aid' (point 28).

(81) In the case in point, with regard to the decision taken by EDF in 1996 to invest in IRS, the rate of return can be calculated in two ways.

(82) Firstly, there is the repayment of the investment at a rate of 4 % per year of IRS's turnover generated by the sale of electrical infrared equipment. According to EDF, IRS's turnover was FRF 18 million in 1996. Given that IRS was experiencing financial difficulties at the time the investment decision was taken, only a high rate of return would have attracted a private investor. In line with its standard practice, the Commission applies an interest rate of 12 % for high-risk projects. The present value of 4 % of FRF 18 million over five years — the turnover having been adjusted for the inflation rate in France in 1996, i. e. 2 % — is FRF 3 012 024.

(83) Furthermore, EDF estimates that the development of electrical infrared technology and its application in industry could, in the paper industry alone, generate consumption of 125 GWh, i. e. an estimated potential annual income of FRF 30 million.

(84) Given that, when EDF decided to invest in IRS, it reckoned not only to recover the sum invested, with 12 % interest, but also to establish infrared technology in the paper industry, representing potential annual income of FRF 30 million, it may be supposed that it reasoned in the same way as a private investor and that the loan is therefore not to be regarded as State aid.

([12]) See recital 43.

([13]) OJ C 307, 13.11.1993, p. 3.

(85) Finally, with regard to the rate of return actually obtained, the communication states that, 'there is no question of the Commission using the benefit of hindsight to state that the provision of public funds constituted State aid on the sole basis that the out-turn rate of return was not adequate' (point 28).

(86) Accordingly, the fact that IRS sufered a downturn in business and did not fulfil its commitment does not alter the nature of the investment at the time of the decision in 1996. In fact, it transpires from information available that in 1996, at the time EDF granted the loan, there was nothing which would have enabled an 'informed' analyst to predict that IRS was likely to suffer a business downturn such that the prospects would be any other than those expected.

(87) Furthermore, like a private investor concerned to protect his investment, EDF took legal action against IRS, with the result that on 11 February 1999 the Paris commercial court issued an interim order against IRS. The latter has three months in which to pay off its debt by making an interim payment of FRF 870 769,39. If it fails to do so, the entire debt will be immediately payable.

(88) In conclusion, the loan granted by EDF to IRS does not constitute aid within the meaning of Article 87(1) of the EC Treaty.

7. **CONCLUSIONS**

(89) In the light of the above and given that:

1. the preferential electricity tariffs granted to the Cascades and Gromelle paper mills fall within the scope of the *de minimis* rule,

2. in view of the surplus of energy from nuclear sources at EDF and since for additional consumption EDF is covering its variable costs and, on average, 57 % of its fixed costs, the preferential electricity tariffs granted to the Condat, Lancey and Sibille are justified on commercial grounds, and

3. at the time EDF took the investment decision, the loan granted by EDF to IRS was justified on commercial grounds,

the Commission finds that neither the preferential electricity tariffs granted to the Cascades, Gromelle, Condat, Lancey and Sibille paper mills nor the loan to IRS constitute aid within the meaning of Article 87(1) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The preferential electricity tariffs granted by EDF, and thus indirectly by France, to the Condat, Cascades, Lancey, Gromelle and Sibille paper mills and the loan granted by EDF to IRS, with a present value of FRF 32,2 million (EUR 4,9 million), do not constitute aid within the meaning of Article 87(1) of the EC Treaty.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 11 April 2000.

For the Commission

Mario MONTI

Member of the Commission