II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 December 2003

on the State aid granted by France to EDF and the electricity and gas industries

(notified under document number C(2003) 4637)

(Only the French text is authentic)

(Text with EEA relevance)

(2005/145/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 the provisions cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 10 July 2001, the Commission invited the French authorities to provide information on certain measures in favour of Electricité de France (EDF) which possibly involved State aid.

(2) Between July 2001 and June 2002, many letters were exchanged between the Commission and the French authorities [2]. A technical meeting was held on 3 September 2002.

(3) By letter dated 16 October 2002, the Commission informed the French authorities that it had taken three related decisions concerning EDF [3]. First, it proposed to the French authorities, as an appropriate measure pursuant to Article 88(1) of the Treaty, that they should withdraw the unlimited State guarantee enjoyed by EDF on all its commitments by virtue of its public enterprise status, which precluded application of the legislation on the administration and compulsory liquidation of firms in difficulty. Second, the Commission initiated a formal investigation under Article 88(2) of the Treaty into the advantage resulting from the non-payment by EDF of the corporation tax due, when it restructured its balance sheet in 1997, on some of the accounting provisions created free of tax for the renewal of the high-voltage transmission network (RAG). Third, it issued an injunction requiring the French authorities to supply information it needed in order to examine that tax concession in the context of the formal investigation procedure.

(4) In the comments they submitted to the Commission by letter dated 11 December 2002, the French authorities maintained that no State aid was involved in the public enterprise status and refused to implement the proposed appropriate measure. They also denied that EDF had received a tax concession in 1997. A technical meeting was held on 12 February 2003 between the Commission and the French authorities to discuss the issue of the tax concession.

[1] OJ C 280, 16.11.2002, p. 8 and OJ C 164, 15.7.2003, p. 7.
[2] See OJ C 280, 16.11.2002, p. 8.
[3] OJ C 280, 16.11.2002, p. 8.

(5) On 2 April 2003, following the French authorities' refusal to implement the proposed appropriate measure and pursuant to Article 19(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [4], the Commission decided to initiate the formal investigation procedure provided for by Article 88(2) of the Treaty in respect of the unlimited State guarantee which EDF enjoyed on account of the fact that it could not be declared bankrupt [5]. By letter dated 12 June 2003, the French authorities sent the Commission their comments in the context of the formal investigation procedure.

(6) By letter dated 11 November 2003, supplemented by letters dated 21 November and 11 December 2003, the French authorities notified the Commission of a reform of the pension scheme for the electricity and gas industries and transmitted the text of a legislative provision converting EDF into a commercial enterprise governed by ordinary law. They stated that both reforms would be included in the same bill. By letter dated 16 December 2003, the French Government confirmed that it was to lay before Parliament the legislation converting EDF, currently a public enterprise, into an entity governed by ordinary law so that the change of legal status could enter into force by 1 January 2005.

(7) On 17 November 2003, a further technical meeting was held between the Commission, the French authorities and representatives of EDF to discuss the issue of the tax concession received by EDF. The French authorities also provided additional information on this question by letter dated 20 November 2003.

II. DESCRIPTION OF THE MEASURES AT ISSUE

(A) Unlimited State guarantee

(8) EDF produces, transmits and distributes electricity throughout France. It is one of the largest groups on the European energy market and related markets. The group is also present in China, Egypt, Argentina, Brazil, Mexico and the United States.

(9) In 2002, EDF generated turnover of EUR 48,4 billion; the group currently has 32,5 million customer premises in France and 8,9 million in the rest of Europe. Its largest European subsidiaries in the energy sector are EDF Energy (United Kingdom) and EnBW (Germany), but EDF also has stakes in many other European companies.

(10) EDF was set up by Act No 46-628 of 8 April 1946 in the form of a public enterprise. In France, legal persons governed by public law — the category into which public enterprises fall — are not subject to the ordinary law on the administration and compulsory liquidation of firms in difficulty.

(11) The inapplicability of insolvency and bankruptcy proceedings to legal persons governed by public law derives from the general principle of the unseizability of the assets of public entities, which has been recognised by French case-law since the end of the 19th Century [6].

(B) Reform of the pension scheme for the electricity and gas industries

(12) The French authorities notified the Commission of a reform of the pension scheme for the electricity and gas industries.

(13) The existing pension scheme for the electricity and gas industries is a special arrangement that is separate from the general social security scheme. It is a pay-as-you-go system funded by employees' contributions and a balancing contribution paid by enterprises in the sector, calculated in proportion to their wage bill and intended to balance each year the scheme's pension liabilities. Although the scheme covers the entire sector, it is administered by a joint department attached to EDF and Gaz de France (GDF).

(14) The reform notified by the French authorities involves the creation of a nationwide joint social security body, the National Fund for the Electricity and Gas Industries (CNIEG), which will be independent of EDF and GDF, will have legal personality as a body governed by private law and will be covered by the Social Security Code. All employees and employers in the electricity and gas industries will be required to join the Fund.

[4] OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.

[5] OJ C 164, 15.7.2003, p. 7.

[6] Tribunal des conflits, Association syndicale du canal de Gignac, 9 décembre 1899, Rec. p. 731; Cour de cassation, Civ 1ère, Bureau de recherches géologiques et minières 'BRGM Société Lloyd Continental', 21 décembre 1987, Bull. civ. I, nº 348; Cour d'appel de Paris, Sté PDG et B., 15 février 1991, nº 9021744, DA 1991, nº 184.

(15) From an economic standpoint, the reform distinguishes between two types of entitlement:

— 'basic' rights, corresponding to pension benefits that would be paid by the ordinary pension schemes (general social security scheme and compulsory supplementary schemes) in return for an ordinary contribution paid in discharge of obligations,

— specific rights under the scheme for the electricity and gas industries over and above the benefits normally paid by the general scheme and compulsory supplementary schemes. These specific rights therefore correspond to the difference between the benefits paid by the special scheme for the electricity and gas industries and the basic rights.

(a) *Basic rights*

(16) As far as basic rights [7] are concerned, the reform involves affiliation of the special scheme for the electricity and gas industries to the general scheme (the National Pension Fund for Employees — CNAV) and the compulsory supplementary schemes (General Association of Pension Institutions for Managerial Staff — AGIRC and Association of Supplementary Pension Schemes — ARRCO). These schemes will pay workers in the sector pension benefits corresponding to the basic rights in return for payment by the enterprises in the sector of an ordinary contribution in discharge of their obligations.

(17) The social security bodies are to determine the technical arrangements for such affiliation with a view to ensuring financial neutrality for the transferee schemes [8]. The affiliation may be effected among other things using the dependency indicators method or the dependency ratios method, both of which have already been used by the French social security bodies during previous affiliations [9].

(18) In their letter dated 11 December 2003, the French authorities stated:

'The French authorities undertake to ensure that the agreements concluded between the electricity and gas industries and the general schemes (transferee schemes) and any other measure taken in this context are financially neutral for all parties and for the State.'

(b) *Specific rights*

(19) As far as specific rights [10] are concerned, the reform treats past and future specific rights differently.

(20) Future specific rights, acquired by employees in the sector after the reform, will remain entirely the responsibility of the enterprises under the same conditions as before, however much they increase in line with the evolution of the wage bill.

[7] The basic rights to be financed in the electricity and gas industries currently amount to a total of […] (Business secret). The total pension liabilities to be financed correspond to the sum, discounted at the real rate of 3 %, of the rights acquired at the date of the reform. The amounts indicated correspond to the situation at 1 January 2003 and will therefore be adjusted in line with rights acquired and benefits paid up to the date when the reform is implemented.

[8] On 1 April 2003 the National Accountancy Council adopted Recommendation No 2003-R.01 on the rules for posting and evaluating liabilities in respect of pension and comparable benefits, which spells out the evaluation methods to be used in that area. The discount rate to be applied must be determined by reference to a market rate at the closure date based on investment-grade corporate bonds with long maturities matching the duration of the liabilities or, failing that, by reference to long-term government bond rates. The use in the case in point of a real discount rate of 3 % is thus in the lower range of possible values.

[9] The methodology currently used by the CNAV scheme involves comparing, at the evaluation date, the ratio between the likely present value of the rights already acquired and the contributive capacity over a year, modulated by the average age of the contributors, for the transferor scheme and the transferee scheme. If the dependency ratio in the electricity and gas industries is higher than that of the basic scheme, an entry fee is calculated which is equal to the amount that, when deducted from the present value of the liabilities of the scheme for the electricity and gas industries, enables the dependency indicator for the CNAV scheme before the operation to be equalised with the dependency indicator for the combination of the CNAV scheme and the scheme for the electricity and gas industries after the operation.
The methodology currently used by the AGIRC and ARRCO schemes involves comparing the benefits/contributions dependency ratios projected over a 25-year period for the supplementary schemes with those for the electricity and gas industries. Rights may be taken over on a minimum or a maximum basis. Where rights are taken over on a minimum basis, if the dependency ratio of the transferor scheme is more unfavourable than that of the transferee scheme, a deduction is made from the benefits attached to the past basic rights transferred. Such a deduction automatically increases the past rights that are kept by the enterprise. The enterprises will therefore remain responsible for financing the share of benefits attached to past basic rights that are not transferred to the general schemes. Where rights are taken over on a maximum basis, even if the dependency ratio of the transferor scheme is more unfavourable than that of the transferee scheme, all the basic rights are taken over but the transferor scheme must then make a balancing cash payment in order to ensure that the affiliation is financially neutral.
In the case in point, if rights are taken over on a maximum basis, the amount of the balancing cash payment to be made to the general schemes is estimated at […].

[10] The specific rights to be financed in the electricity and gas industries currently amount to a total of […].

(21) Past specific rights already acquired at the date of the reform by employees assigned to electricity and gas transport and distribution activities will no longer be financed by the enterprises in the sector but by a tariff-based contribution. The contribution will be based, for each final consumer, on the component of the standing charge for use of the electricity or gas networks which can be directly imputed to him and which is independent of the energy actually consumed. It will be collected by the entity invoicing the electricity or gas distribution service to the final consumer and will be directly and fully allocated to the new pension fund for the electricity and gas industries.

(22) Past specific rights already acquired at the date of the reform by employees assigned to activities other than electricity and gas transport and distribution will continue to be financed by the enterprises in the sector. At the date of the reform, the financing of these specific pension rights will be definitively apportioned among all the enterprises in the sector on the basis of two criteria: the wage bill of the enterprises concerned and the length of service with them of the employees covered by the arrangements for the electricity and gas industries.

(23) As part of the notified reform, the State is also to guarantee the payment of pension benefits corresponding to all past specific rights. This guarantee of last resort will be granted to the National Fund for the Electricity and Gas Industries, not to the enterprises themselves. It could be called upon only after failure of an enterprise had been duly established and prior activation of an inter-company solidarity mechanism up to a given ceiling.

(C) **Advantage resulting from the non-payment by EDF in 1997 of corporation tax on some of the accounting provisions created free of tax for the renewal of the high-voltage transmission network**

(24) In 1987, on the ground that the high-voltage transmission network (RAG) had been entrusted to it in 1956 by a concession contract, EDF changed its accounting practice and classified the assets allocated to the RAG under the balance sheet item 'Assets under concession'. EDF therefore 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 tax-free provisions for the renewal of the RAG.

(25) Act No 97-1026 of 10 November 1997 nevertheless established that EDF was deemed to have owned the RAG since 1956. The accounting provisions created between 1987 and 1996 under the arrangements for assets under concession therefore became superfluous.

(26) In 1997, EDF had in its accounts two types of provisions created free of tax for the renewal of the RAG: provisions not yet used, amounting to FRF 38,5 billion, and grantor rights, corresponding to renewal operations already carried out, amounting to FRF 18,345 billion.

(27) Since these provisions had become superfluous, the French authorities reorganised EDF's balance sheet by means of an act and a ministerial decision.

(28) First, Act No 97-1026 of 10 November 1997 provided that 'as at 1 January 1997, the value of the assets in kind allocated under concession to the RAG appearing as liabilities on EDF's balance sheet shall be entered, net of the corresponding revaluation differences, under the item "Capital injections"'. The share of the provisions corresponding to grantor rights was therefore to be reclassified as capital injections without being subject to corporation tax.

(29) Second, Annex 1 to a letter addressed to EDF on 22 December 1997 by the Minister for Economic Affairs, Finance and Industry, the Secretary of State for the Budget and the Secretary of State for Industry (hereinafter the letter from the Minister for Economic Affairs) explained the restructuring of the upper part of EDF's balance sheet pursuant to Article 4 of Act No 97-1026 of 10 November 1997:

'— Reclassification of "Grantor rights" (FRF 18 345 563 605):

— Consolidation as capital injections of the value of assets in kind allocated under concession to the RAG, amounting to FRF 14 119 065 335.

— Amalgamation of the revaluation differences for the RAG in 1959 (FRF 2 425 million) and 1976 (non-depreciable fixed assets: FRF 97 million) with the item "Revaluation differences 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), the item thus increasing from FRF 877 million to FRF 2 581 million.

— Reclassification of the replacement provisions which have become unwarranted (FRF 38 520 943 408) as surplus carried forward, in accordance with National Accountancy Council Opinion No 97-06 of 18 June 1997 on accountancy changes.'

(30) Annex 3 to the letter from the Minister for Economic Affairs also sets out the tax implications of the reorganisation of EDF's balance sheet. A net asset variation is observed as a result of the reclassification of the unused replacement provisions amounting to FRF 38,5 billion as surplus carried forward and subjected to corporation tax at the rate of 41,66 % applicable in 1997.

(31) The unused provisions amounting to FRF 38,5 billion were thus correctly taxed by the French authorities, while the share of the provisions corresponding to grantor rights were not taxed.

(32) In accordance with Act No 97-1026 of 10 November 1997 and the letter from the Minister for Economic Affairs, the revaluation differences were transferred to the item 'Own assets' without incurring any tax since they corresponded to revaluation surpluses realised free of tax or under a tax neutrality arrangement pursuant to the 1959 and 1976 revaluation acts.

(33) In reorganising EDF's balance sheet, the French authorities followed National Accountancy Council Opinion No 97-06 of 18 June 1997 on changes to accounting methods, changes to estimates, changes to tax options and corrections to errors (hereinafter the National Accountancy Council Opinion), which States that corrections to accounting errors, which by their very nature relate to the posting of past transactions, 'should be posted in the accounts for the financial year in which they are discovered'.

(34) In its injunction of 15 October 2002, the Commission requested the French authorities to let it have all the necessary documents, information and data for assessing the compatibility of that aid measure, and in particular full copies of the confidential reports issued by the French Court of Auditors on EDF. The French authorities confined themselves to communicating extracts from those reports on the ground that only those extracts had to do with the Commission's investigation and that 'the Court of Auditors' special reports on EDF contain names of individuals and/or business secrets'.

(35) The Commission notes that the documents forwarded were heavily censored. It would stress that it is not for the Member State but for the Commission to assess the relevance of such documents in the context of its investigation. Neither does the existence of business secrets constitute a valid ground for refusing to transmit a document to the Commission, since the Commission is required to treat in confidence any information classed as a business secret. In accordance with Article 13(1) of Regulation (EC) No 659/1999, the refusal by a Member State to provide a document requested by the Commission entitles the latter to take a decision exclusively on the basis of the information available to it.

III. COMMENTS FROM AN INTERESTED PARTY

(36) By letter dated 6 January 2003, the National Association of Independent Thermal Electricity Producers (SNPIET) submitted comments to the Commission in the context of the formal investigation procedure initiated in respect of the non-payment by EDF, in 1997, of corporation tax on some of the accounting provisions created free of tax for the renewal of the RAG. The SNPIET alleged that EDF had not complied in its operations with normal practice in industrial and commercial enterprises, contrary to the provisions of Act No 46-628 of 8 April 1946.

IV. COMMENTS FROM THE FRENCH AUTHORITIES IN THE CONTEXT OF THE FORMAL INVESTIGATION PROCEDURES

(37) The French authorities submitted comments to the Commission in the context of the two formal investigation procedures.

(A) Unlimited State guarantee

(38) The French authorities submitted their comments to the Commission by letter dated 12 June 2003, in which they reiterated and supplemented the arguments set out in their letter of 11 December 2002.

(39) In their letter of 11 December 2002, the French authorities disputed the classification of the State guarantee as aid, developing their case at length on the basis of the following arguments:

(a) Under Act No 80-539 of 16 July 1980 on periodic penalty payments imposed in administrative proceedings and compliance with judgments by legal persons governed by public law, a public enterprise was responsible for settling its debts out of its own assets. If it had insufficient funds, it had to create the necessary resources either by reducing the funds allocated to other expenditures or by increasing its revenues. Where the public enterprise failed to act, the supervisory authority served formal notice for it to do so. If the public enterprise did not comply, the supervisory authority itself issued a mandatory payment order for the expenditure in question, where necessary having first released the necessary resources. According to the French authorities, the State did not therefore take the place of the public enterprise in order to pay its debts; it merely ordered the expenditure should the public enterprise fail to act.

(b) According to the Commission, it was not the public enterprise status that constituted aid, but the more favourable credit terms it enabled such enterprises to obtain. However, the Commission had not demonstrated in what way the special status enjoyed by public enterprises had actually enabled EDF to obtain real advantages linked to a particular loan or another financial obligation it had entered into.

(c) The Commission should have carried out an overall assessment of the prerogatives and constraints of public enterprises rather than confining itself to highlighting certain privileges. Public enterprises were subject to certain statutory constraints, such as the principle of specialisation and the ban on arbitration clauses, which disadvantaged them in relation to commercial enterprises. Neither did the Commission take account of the public service obligations incumbent on EDF.

(d) If it were found that there was an implicit State guarantee, it would in any event be necessary in order to ensure continuity of the public service.

(e) The Commission decision deprived Article 295 of the Treaty of its effectiveness and ran counter to the principle of equal treatment in that it treated public enterprises and commercial enterprises in the same way although they did not operate in comparable conditions.

(40) In their letter dated 12 June 2003, the French authorities added further points as set out below.

(41) As regards the use of State resources, they considered that the Commission's interpretation of Act No 80-539 of 16 July 1980 was incorrect. They stressed that no legal instrument or court decision provided for or sanctioned the existence of an automatic guarantee for the benefit either of EDF or of public enterprises in general. They reiterated that Act No 80-539 of 16 July 1980 had neither the object nor the effect of transferring the burden of a debt to the State and emphasised that, even when public entities in France had faced extremely serious financial difficulties, financial solutions had been found without State intervention. They furthermore took the view that the fact that a public supervisory authority was empowered to increase the resources of a public entity in financial difficulty did not suffice to demonstrate either the existence of a State guarantee of last resort or the use of State resources within the meaning of Article 87(1) of the Treaty.

(42) With regard to the grant of a selective advantage, the French authorities claimed that the selective nature of the aid measure under examination had not been proven. They argued that the arrangements established by Act No 80-539 of 16 July 1980 formed part of the general scheme of the system that derived from the general principle of the unseizability of the assets of public entities under French law. They also took the view that the Commission had not demonstrated that they enjoyed any discretionary power to assess the appropriateness of issuing a mandatory payment order, for a sum of money that had become due for payment following a court decision, on behalf of a public entity.

(43) The French authorities thus again disputed the Commission's claim that, by virtue of its status as a public enterprise, EDF enjoyed an unlimited State guarantee constituting aid within the meaning of Article 87(1) of the Treaty.

(B) **Non-payment by EDF of corporation tax on some of the accounting provisions created free of tax for the renewal of the high-voltage transmission network**

(44) The French authorities submitted their comments to the Commission by letter dated 11 December 2002. They disputed the classification as State aid of the non-payment in 1987 of corporation tax on some of the accounting provisions created free of tax for the renewal of the high-voltage transmission network (RAG).

(45) The French authorities first disputed the amount of the provisions for renewal of the RAG advanced by the Commission. They then argued that, even if EDF had not set aside provisions for the renewal of the RAG, it would still not have been liable for payment of corporation tax between 1987 and 1996 because of the carryover of large tax losses. Furthermore, since the State was both the owner of EDF and the grantor of the concession on the RAG, they considered that the grantor rights did not provide it with a genuinely enforceable claim. Consequently, when the balance sheet was restructured in 1997, they assigned those rights to EDF's capital and reserves in order to correct its undercapitalisation, but without subjecting them to corporation tax. The French authorities took the view that the restructuring of EDF's accounts in 1997 could be interpreted as a capital injection of an amount equivalent to the partial tax exemption.

(46) They also denied that the remuneration of the State was unduly reduced between 1987 and 1996 as a result of the creation of the provisions in question. They argued that, even if the net result had been higher, the remuneration of the State would not have been increased since, during that period, the level of that remuneration did not correspond to a predetermined percentage of EDF's net result: it was determined freely by the State in absolute terms and did not necessarily depend on EDF's financial situation; neither did the remuneration have to be deducted from the net profits for each year. In view of the foregoing and given the losses carried over by EDF, the French authorities stressed that between 1987 and 1996 the State in fact took a dividend considerably in excess of the levels allowed by the ordinary law on commercial enterprises.

(47) The French authorities also considered that even if the creation of provisions for the renewal of the RAG had resulted in an advantage, such an advantage had to be regarded as cancelled out by the increase in corporation tax paid in 1997. They claimed that, over the period 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.

(48) The French authorities also argued that if EDF were found to have benefited from an undue advantage, it would constitute existing aid and not new aid on account of the expiry of the ten-year limitation period laid down in Article 15 of Regulation (EC) No 659/1999, which began to run from the date the initial aid was granted. Since the Commission's first request for information was made on 10 July 2001, any aid granted before 1991 would be time-barred. The legislative measures adopted in 1997 did not suspend the limitation period since only action by the Commission could have that effect. The French authorities argued finally that the measure would constitute existing aid in any event since it was granted prior to the liberalisation of the electricity market.

(49) In their letter dated 20 November 2003, the French authorities reiterated their arguments concerning the revaluation differences included in the amount of the grantor rights appearing in the accounts and concerning application of the limitation rule. They also claimed that the rate of corporation tax that should have been applied when EDF's balance sheet was restructured was the 1996 rate (36,67 %) not the 1997 rate (41,66 %), since the restructuring was carried out on the basis of a tax return lodged on 23 December 1997, after closure of the accounts for 1996 but before the 1997 accounts were finalised.

(50) The French authorities thus disputed the Commission's claim that EDF benefited from an advantage in 1997 on account of the non-payment of corporation tax on some of the provisions created free of tax for the renewal of the high-voltage transmission network.

(C) **Observations by the French authorities on the comments from an interested party**

(51) The SNPIET's comments were forwarded to the French authorities by letter dated 21 January 2003. By letter dated 21 February 2003, the French authorities reacted to those comments by stating, first, that most of the points made by the SNPIET should be declared inadmissible because they did not concern the formal investigation procedure that had been initiated and, second, that the SNPIET had not brought any new fact concerning the procedure to the Commission's attention: they consequently did not have any observations to make in response to the SNPIET's comments.

V. **ASSESSMENT OF THE EXISTENCE OF STATE AID**

(52) Article 87(1) of the Treaty [11] provides that '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 shall, insofar as it affects trade between Member States, be incompatible with the common market'. In determining whether a measure constitutes State aid within the meaning of Article 87(1) of the Treaty, the Commission has to apply the following criteria: the measure must be imputed to the State and use State resources, it must confer an advantage on certain undertakings or certain sectors which distorts competition and it must affect trade between Member States.

(53) The Commission reiterates here the points already made in the decisions to propose appropriate measures and open formal investigations [12].

(54) This Decision is without prejudice to the application of and compliance with the rules of the Treaty establishing the European Atomic Energy Community.

1. **Unlimited State guarantee**

(a) *State resources*

(55) EDF has had public enterprise status since it was set up by Act No 46-628 of 8 April 1946 on the nationalisation of electricity and gas. Like all public entities, EDF is not subject to the ordinary law on collective proceedings.

[11] The reference to Article 87(1) of the Treaty should be understood as also referring to Article 61 of the Agreement on the European Economic Area.

[12] See footnote 1.

(56) Point 2.1.3 of the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([13]) (hereinafter the notice on State aid in the form of guarantees) States that 'the Commission (…) regards as aid in the form of a guarantee, the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency proceedings or provides an explicit State guarantee or coverage of losses by the State'. The existence of State aid is therefore established in either of the above instances.

(57) The Commission takes the view that the fact that EDF cannot be subject to administration or compulsory liquidation proceedings, and therefore cannot be declared bankrupt, is equivalent to a general guarantee covering all its liabilities. Such a guarantee cannot be the subject of any remuneration according to the rules of the market. Such a guarantee, which is unlimited in scope, time and amount, constitutes State aid.

(58) In accordance with the notice on State aid in the form of guarantees, State aid exists within the meaning of Article 87(1) of the Treaty even if no payments are made by the State under the guarantee. The aid is granted at the moment when the guarantee is given, and this took place in the case in point when EDF was set up as a public enterprise, thereby rendering it exempt from insolvency and bankruptcy proceedings. The unlimited State guarantee granted to EDF was thus conferred by an act.

(59) In its decision to propose appropriate measures and its decision to open a formal investigation, the Commission already classed the unlimited guarantee enjoyed by EDF as existing aid. Under Article 1 of Regulation (EC) No 659/1999, all aid which existed prior to the entry into force of the Treaty in the respective Member State constitutes existing aid. The general principle of the unseizability of the assets of public entities was established by French case-law in the late 19th Century, and EDF's status dates back to 1946.

(60) Contrary to what the French authorities have claimed, the special procedure for the recovery of claims established by Act No 80-539 of 16 July 1980 ([14]) is not comparable to Act No 85-98 of 25 January 1985 on the administration and compulsory liquidation of enterprises. Under Act No 85-98, where a commercial enterprise is no longer able to honour its debts and cannot be the subject of an administration measure, it must be put into compulsory liquidation. Its assets are then seized and sold and the proceeds of their sale normally serve to pay off all the creditors. However, since in practice the assets are often worth much less than the liabilities, the proceeds of the sale are seldom sufficient to repay all the claims. The creditors of a commercial enterprise under the ordinary rules are therefore exposed to two risks: not only can the enterprise be put into compulsory liquidation should it suspend payments, but also the procedure does not guarantee that the creditors will recover their claims.

(61) Public enterprises, on the other hand, cannot be put into compulsory liquidation and their assets are unseizable: they cannot therefore be sold in order to repay creditors. The debts of public entities are paid in accordance with a special procedure established by Act No 80-539 of 16 July 1980, whereby they must, if they have insufficient funds, create the necessary resources. Should the public enterprise fail to act, the supervisory authority serves formal notice for it to do so. If the public enterprise does not comply, the supervisory authority itself issues a mandatory payment order for the expenditure in question. Act No 80-539 and its Implementing Decree do not rule out a State guarantee of last resort, since the latter provides that the supervisory authority 'shall, where appropriate, release the necessary resources either by reducing the funds allocated to other expenditures and so far unused or by increasing resources' ([15]). This instrument does not rule out the possibility of such an increase in resources, following the State intervention, coming from outside the enterprise, at least if there is no other possible solution involving the enterprise's own resources.

(62) The creditors of a public enterprise are therefore not exposed to any risk of their claims failing to be paid: not only can the enterprise not be declared bankrupt, but also the law guarantees the payment of their claims through special administrative procedures. The special procedure applicable to public enterprises cannot therefore be compared with the compulsory liquidation procedure applicable to commercial enterprises under the ordinary rules. On the contrary, Act No 80-539 of 16 July 1980 strengthens the effect of the unlimited State guarantee enjoyed by EDF on account of the fact that it cannot be declared bankrupt.

([13]) OJ C 71, 11.3.2000, p. 14.
([14]) Article 1.II.
([15]) Fourth subparagraph of Article 3-1 of Implementing Decree No 81-501 of 12 May 1981.

(63) French legal theorists consider that public entities under French law do enjoy a State guarantee of last resort. Where such public entities carry on a strategic activity that is essential to the national economy or national solidarity, the State could not disregard their fate if they were faced with a difficult financial situation. The involvement of the State would be all the more certain where it had exercised decisive control over the activity of the enterprise, for example by setting the prices for its products ([16]).

(64) Likewise, in an unpublished opinion, the French Council of State held 'that the State guarantee [enjoyed by a public enterprise] will derive, in the absence of an explicit legislative provision, from its very nature as a public enterprise' ([17]).

(65) In other words, if the inapplicability of bankruptcy or insolvency proceedings to public entities is a corollary of the principle of the unseizability of their assets, then the obligation on the State to answer for their debts in the event of default derives from the same principle.

(66) Contrary to what the French authorities have claimed, Act No 80-539 of 16 July 1980 is selective in that it applies only to commercial enterprises with the status of a public entity. It does not therefore constitute a general measure.

(b) *Selective advantage and distortion of competition*

(67) A measure constitutes State aid if it confers an advantage on certain specific beneficiaries. All measures that are liable directly or indirectly to favour certain sectors, enterprises or products fall within the concept of economic advantage. State interventions in favour of public enterprises may also involve State aid where they are carried out under abnormal circumstances and confer an advantage on the enterprise in question.

(68) Since by virtue of its status EDF cannot be declared bankrupt, its liabilities do not give rise to any risk of insolvency. EDF can therefore borrow at lower rates than those normally offered to commercial enterprises that are governed by the ordinary rules and can be the subject of administration and compulsory liquidation proceedings. The credit terms obtained by an enterprise vary according to its risk of insolvency: the higher that risk, the more costly the credit terms it is offered. Enterprises which, like EDF, raise funds by issuing bonds request independent rating agencies regularly to assess their creditworthiness. The ratings assigned in this way to an enterprise determine the amount of the remuneration required by an investor to subscribe to its bond issues. Where an enterprise's rating falls as a result of an increased risk of insolvency, investors will demand greater remuneration and the bond issue will cost it more. On the other hand, an enterprise that is not subject to the ordinary law on bankruptcy and therefore enjoys an unlimited State guarantee does not present any risk of insolvency, which enables it to borrow on more favourable terms.

(69) The main rating agencies all regard the unlimited State guarantee as a decisive factor in assessing EDF's creditworthiness. Since June 2001, Fitch Ratings has thus assigned EDF a long-term debt rating of AAA and a short-term debt rating of F1+. In a press release, it stressed that those ratings reflected the implicit State guarantee covering EDF's debt and its current legal status and added that, in the absence of such a guarantee, EDF's long-term debt rating would be AA+ ([18]). In May 2002, Fitch Ratings confirmed those long-term and short-term debt ratings, but gave the group an intrinsic creditworthiness rating of AA ([19]). The unlimited State guarantee thus enables EDF to obtain a better assessment of its risk of insolvency than would result from a simple analysis of its intrinsic creditworthiness. For its part, in January 2002 Moody's downgraded the outlook for EDF's long-term debt rating of Aaa from 'stable' to 'negative'. In a press release, the agency explained its revision of the rating by the increasing likelihood of EDF's status and control structure having to change in the medium term and stated that if EDF were to lose its current status, which exempted it from the ordinary law on bankruptcy, its long-term debt rating could be lowered by one or two notches ([20]). The unlimited State guarantee does therefore enable EDF to obtain more favourable credit terms than those available to a commercial enterprise without a State guarantee.

(70) Insofar as EDF is the only enterprise active on the electricity market that enjoys an unlimited State guarantee by virtue of its status, the advantage is selective.

([16]) See, for example J. Rivero, *Encyclopédie Juridique Dalloz, Droit administratif, Régime des entreprises nationalisées*, 1959: '§ 78. (…) One last peculiarity, which is not enshrined in the texts but derives from practice: where necessary, the enterprise can rely, as an ultimate resource, on advances from the State, which cannot disregard key parts of the national economy and public assets; such advances are normally repayable. (…) § 81. The texts have not envisaged the eventuality of a deficit. But it is certain, a priori, that a deficit could not lead to the enterprise being declared bankrupt: it is inevitable that an exception would be made to the ordinary rules; in practice, the State, which is often responsible for the deficit insofar as it retains control of prices and wages, is prompted, as we have seen, to cover it by means of advances'.

([17]) See the Council of State's annual report for 1995, p. 219.

([18]) Source: Reuters News Service, Reuters French Language News, 22.6.2001.

([19]) Source: Reuters News Service, Reuters French Language News, 27.5.2002.

([20]) Sources: Moody's Investors Service Press Release, 30.1.2002; Reuters News Service, Reuters French Language News, 30.1.2002.

(71) EDF is in competition with other Community operators in the markets for the production and distribution of electricity and energy services and with other operators active on energy markets that compete with electricity. The Court of Justice of the European Communities has consistently held [21] that any State aid which strengthens the position of an enterprise in relation to other enterprises competing in intra-Community trade distorts competition.

(72) The unlimited State guarantee thus confers on EDF an advantage that necessarily strengthens its position in relation to its competitors. It therefore distorts competition within the meaning of Article 87(1) of the Treaty.

2. **Reform of the pension scheme for the electricity and gas industries**

(a) *Selective advantage and distortion of competition*

(73) The affiliation of the pension scheme for the electricity and gas industries to the general schemes does not constitute an advantage insofar as such affiliation is an option open to any special pension scheme that wishes to do so and the financial arrangements, valuation methods and timetable for the affiliation are financially neutral for the transferee schemes and the State.

(74) In the case in point, the technical arrangements for the affiliation are still to be determined as part of ongoing negotiations between the electricity and gas industries and the transferee schemes. The French authorities have nevertheless formally undertaken by letter dated 11 December 2003 'to ensure that the agreements concluded between the electricity and gas industries and the general schemes (transferee schemes) and any other measure taken in this context are financially neutral for all parties and for the State'.

(75) The Commission takes the view that, provided the above undertaking is fulfilled in practice, the affiliation of the pension scheme for the electricity and gas industries to the general schemes will not constitute an advantage. Otherwise, the operation would of course have to be re-examined. The Commission stresses that the French authorities would have to notify it formally of the operation if the definitive arrangements for the affiliation were not in line with the principle of financial neutrality.

(76) In the light of the undertaking given by the French authorities, the Commission considers that the affiliation of the pension scheme for the electricity and gas industries to the general schemes will not involve any State aid provided that such affiliation is financially neutral for the enterprises, the transferee schemes and the State.

(77) On the other hand, the notified reform relieves enterprises in the electricity and gas industries of the payment of some of the pension liabilities corresponding to rights already acquired at the date of the reform by employees assigned to electricity and gas transport and distribution. Those rights will be financed by the above-mentioned tariff-based contribution. Enterprises in the electricity and gas industries are thus relieved of the payment of some of the pension benefits acquired in the past, something which constitutes an advantage for those industries.

(78) An advantage is thus conferred on the electricity and gas industries which has not been granted to any other area of the French economy, and in particular to the industries in direct competition (such as the oil and coal industries). It is consequently a selective sectoral advantage.

(79) The French electricity and gas industries are in competition with the same industries in other Member States. Any State aid that strengthens the position of one industry in relation to other industries competing with it in intra-Community trade distorts competition. The non-payment by enterprises in the electricity and gas industries of some of their past pension liabilities constitutes an advantage for the French electricity and gas industries that necessarily strengthens their position in relation to enterprises in competing industries in the other Member States. The advantage therefore distorts competition within the meaning of Article 87(1) of the Treaty.

(80) The State guarantee granted to the National Fund for the Electricity and Gas Industries, covering the payment of pensions corresponding to all specific rights acquired in the past, constitutes a guarantee of last resort afforded to the pension scheme for the electricity and gas industries, not to the enterprises themselves. The State guarantee consequently benefits a social security institution that operates on a pay-as-you-go basis and is financed by compulsory contributions. The Court of Justice has consistently held [22] that institutions of that nature are not engaged in an economic activity within the meaning of the Treaty. Any guarantees granted to such institutions do not therefore constitute an advantage caught by Article 87(1) of the Treaty.

(b) *State resources*

(81) The reform of the pension scheme for the electricity and gas industries notified by the French authorities involves State resources.

[21] Cases 730/79 *Philip Morris* [1980] ECR 2671 and 259/85 *France* v *Commission* [1987] ECR 4393.

[22] Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

(82) The cost of the liabilities corresponding to the specific pension rights already acquired at the date of the reform by employees assigned to electricity or gas transport and distribution will be transferred to the National Fund for the Electricity and Gas Industries and will be financed by the tariff-based contribution introduced by the French authorities. The chargeable event for the contribution will be the existence of a connection to an electricity or gas transport or distribution network.

(83) Payment of the contribution will be compulsory. It will be introduced by an act which will determine the chargeable event, the arrangements for collection and the allocation of the proceeds. The different rates of the contribution will be set by joint order issued by the ministers responsible for the budget and for energy, after consulting the Energy Regulatory Board. In the case in point, although the State is not directly involved in managing the contribution, since it is collected by the entities invoicing the electricity or gas distribution service and paid direct to the new pension fund for the industries, the State nevertheless determines the conditions in which it is collected and the way in which the proceeds are used. Accordingly, the resources collected by way of the tariff-based contribution do constitute State resources.

3. **Non-payment by EDF in 1997 of corporation tax on some of the accounting provisions created free of tax for the renewal of the high-voltage transmission network**

(a) *Selective advantage and distortion of competition*

(84) Since Act No 97-1026 of 10 November 1997 established that EDF was deemed to have been the owner of the high-voltage transmission network (RAG) since 1956, it has to be ascertained whether the Act did not involve a transfer of ownership of the RAG.

(85) According to the information provided by the French authorities, EDF can reasonably be regarded as the owner of the RAG since the initial contractual conditions dating from 1956. That conclusion is based on the following evidence: the features of the different types of concession contract under French law; the special features of the original concession granted to EDF, which did not include an explicit retrocession clause; the procedure for the acquisition of the assets concerned, for which EDF had to pay a fee similar to compensation under a compulsory purchase procedure; and the conditions for the financing, maintenance and extension of the RAG at EDF's expense. The Commission consequently takes the view that the 'clarification' of ownership of the RAG brought about by Act No 97-1026 of 10 November 1997 does not in itself involve any State aid.

(86) It now has to be examined whether Act No 97-1026 addressed all the tax implications of such 'clarification' and, if not, whether a tax concession was thus granted to EDF.

(87) During the period between 1987 and 1996, EDF created tax-free provisions for the renewal of the RAG. Following the 1997 Act declaring that EDF was deemed to have been the owner of the RAG since 1956, those provisions became superfluous and therefore had to be reallocated to other items in the balance sheet.

(88) The letter from the Minister for Economic Affairs 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 Act No 97-1026 of 10 November 1997, 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. The French authorities themselves acknowledge that the transaction was illegal. In a memorandum dated 9 April 2002 addressed by the Directorate-General for Taxation to the Commission, the French authorities Stated 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 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 under Article 38(2)' of the General Tax Code. They noted that 'the tax concession thus obtained [by EDF in 1997] can be estimated at FRF 5,88 billion (14,119 × 41,66 %)', equivalent to EUR 888,89 million ([23]).

(90) The Commission points out, on the one hand, that, in line with the National Accountancy Council Opinion, corrections to accounting errors should be posted in the accounts for the financial year in which they are discovered. On the other hand, since the unused provisions amounting to FRF 38,5 billion that had been created free of tax were subjected to corporation tax at the rate of 41,66 % in 1997, the Commission can see no objective reason why the rest of the provisions created free of tax should not have been taxed at the same rate.

([23]) Conversion made on the basis of the exchange rate between the French franc and the euro on 22 December 1997.

(91) The Commission takes 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. 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.

(92) The Commission considers that the aid was indeed paid in 1997, since the FRF 14,119 billion was at that time a debt to the State, entered under the balance sheet item of grantor rights, which the State waived by means of Act No 97-1026 of 10 November 1997.

(93) The French authorities claim that, even if EDF had not set aside provisions for the renewal of the RAG, it would still not have been liable for payment of corporation tax between 1987 and 1996 because of the carryover of large tax losses. The Commission dismisses this argument as irrelevant, since the tax concession dated from 1997 and not previous years. It also notes that, if the provisions had not been set aside, the tax losses carried over would have been gradually absorbed between 1987 and 1996 and the amount of tax payable by EDF in 1997 would have been significantly higher.

(94) The French authorities also take the view that, even if the creation of provisions for the renewal of the RAG resulted in an advantage, that advantage should be regarded as cancelled out by the increase in corporation tax paid in 1997. The Commission cannot but dismiss this argument. As it has demonstrated above and as the French authorities themselves acknowledge in their memorandum dated 9 April 2002, although the unused replacement provisions were correctly taxed, the grantor rights were reclassified as capital injections without being subjected to corporation tax. The tax paid by EDF in 1997 is therefore lower than the tax normally due.

(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. 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.

(98) The French authorities claim that the rate of corporation tax that should have been applied when EDF's balance sheet was restructured was the 1996 rate and not the 1997 rate. As Stated earlier, the Commission would first point out that the National Accountancy Council considers that corrections to accounting errors should be posted in the accounts for the financial year in which they are discovered. Since the provisions for renewal of the RAG became superfluous following Act No 97-1026 of 10 November 1997, they should have been reclassified in the accounts for the 1997 financial year and therefore taxed at the rate of corporation tax applicable to that year. The Commission also notes that the French authorities themselves applied the 1997 rate of corporation tax to the share of the provisions that was taxed.

(99) The non-payment by EDF, in 1997, of EUR 888,89 million in tax therefore constitutes an advantage for the group. EDF was able to use the amount of the unpaid tax to increase its capital and reserves without having to raise outside finance. The advantage is necessarily 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 a transaction. The fact that the advantage was granted to EDF by a specific legislative instrument, Act No 97-1026 of 10 November 1997, is proof that it is unique and overrides the rules of ordinary law.

(100) Like EDF's unlimited State guarantee, this advantage it enjoys necessarily strengthens its position in relation to its competitors. It therefore distorts competition within the meaning of Article 87(1) of the Treaty.

(b) *State resources*

(101) The concept of aid embraces not only positive benefits, such as subsidies, but also interventions by the public authorities which mitigate the charges that are normally included in the budget of an undertaking and which have the same effect as subsidies ([24]). The Court has consistently held ([25]) that the non-collection by the State of a tax which should normally have been collected is equivalent to the consumption of State resources.

(102) The non-collection of the full amount of corporation tax due in respect of the 1997 financial year derived directly from a measure adopted by the State, namely Act No 97-1026 of 10 November 1997.

(103) Consequently, in 1997 EDF received State aid amounting to EUR 888,89 million in the form of a tax concession.

4. **Effect on trade between Member States**

(104) From its creation in 1946 until the entry into force of 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 ([26]), EDF enjoyed a monopoly on the French market, with exclusive rights in respect of the transport, distribution, import and export of electricity. It was, however, already in competition with electricity producers in other Member States even before Directive 96/92/EC entered into force, and free competition also existed on related markets where EDF had already diversified its activities beyond its exclusive rights (in both geographic and sectoral terms). Effects on trade did therefore exist well before the liberalisation provided for by Directive 96/92/EC.

(105) Electricity was the subject of significant, growing trade between Member States in which EDF was actively engaged. This trade, which was given a further boost by the adoption of Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids ([27]), took place on the basis of commercial agreements between the different operators of the high-voltage transmission networks in the Member States. In the European OECD member countries, electricity imports grew at an average annual rate of over 7 % between 1980 and 1990. Between 1981 and 1989, EDF multiplied the surplus on its balance of trade in electricity by nine, achieving net exports of 42 TWh, representing 10 % of its total production. In 1985, EDF already exported 19 TWh to other Member States.

(106) In its annual report for 1997, EDF stated that it ranked 'among the world's leading operators in the electricity industry, with, outside France, more than FRF 13 billion invested, a total installed production capacity equal to nearly 11 % of the figure for France and over 8 million customers'. The report also stressed that in 1997 EDF had 'increased the number and size of its investments in Europe by extending its presence to Austria and Poland' and had 'exported over 70 TWh in Europe'.

(107) The 1997-2000 management contract, signed on 8 April 1997 between the French State and EDF, stipulates that EDF is to allocate some FRF 14 billion to its international investments, assigning priority to regions in Europe. Between 2000 and 2002, EDF acquired one third of the capital of the German company EnBW, increased the production and distribution capacities of its United Kingdom subsidiary London Electricity, took direct control of the Italian enterprise Fenice and set up a partnership with Fiat for the purchase of Montedison (now Edison). EDF thus plays a major role in electricity trading between the Member States. In 2001, EDF's electricity exports grew to a record level of 83,9 TWh, contributing EUR 2 300 million to its annual turnover.

(108) The French electricity market is currently 34,5 % open, with the threshold for eligible customers set at 7 GWh. The market open to competition consists of some 3 100 premises representing demand of over 150 TWh. According to the latest estimates, the market share of EDF's competitors on that market is 18,5 %. 31 European suppliers are present on the French market, and electricity imports into France totalled some 26 TWh in 2001. As regards electricity production in France, EDF is furthermore now in competition with Compagnie Nationale du Rhône, a subsidiary of Electrabel, and Société Nationale d'Electricité et de Thermique, some of whose capital is held by the Spanish company Endesa. EDF is therefore now in competition with other operators on the French market.

([24]) Judgments of the Court in Cases 30/59 *Gezamenlijke Steenkolenmijnen* v *High Authority* [1961] ECR 3, C-387/92 *Banco de Crédito Industrial* [1994] ECR I-877, C-39/94 *SFEI* [1996] ECR I-3547, C-241/94 *France* v *Commission* [1996] ECR I-4551 and T-106/95 *FFSA* v *Commission* [1997] ECR I-911.

([25]) See in particular Case T-67/94 *Ladbroke* v *Commission* [1998] ECR II-1, paragraph 109.

([26]) OJ L 27, 30.1.1997, p. 20.

([27]) OJ L 313, 13.11.1990, p. 30.

(109) Even before Directive 96/92/EC entered into force in February 1999, certain Member States acted unilaterally to open up their electricity market. In particular, the United Kingdom opened up its market completely for large industrial customers in 1990. Sweden opened up its market completely in 1996, Finland began the process in 1995 and reached 100 % market opening in 1997, Germany completely opened up its market in 1998 and the Netherlands opened up its market completely for industrial customers in 1998. In those circumstances, even before the deadline set by the Directive for opening up the market to competition, State aid granted to enterprises enjoying a monopoly in a Member State that took an active part in intra-Community trade, as in the case of EDF, distorted competition on the electricity market within the meaning of Article 87(1) of the Treaty.

(110) EDF competed and continues to compete both in France and in other Member States in areas outside its core business of electricity production and distribution, since it has diversified its activities on the markets in services related to energy, which have been entirely liberalised. In 1997, SDS, a wholly owned subsidiary of EDF, brought together its activities associated with the provision of services to individual customers, businesses and local authorities. SDS was active in waste treatment, street lighting and other energy-related services and generated turnover equivalent of EUR 685 million in 1998 as against EUR 650 million in 1997. In 2000, EDF established a partnership with Veolia Environnement via the company Dalkia, the European leader in energy services to businesses and local authorities. It offers energy engineering and maintenance services, manages heating plants and technical services to do with the operation of buildings and operates district heating networks, combined heat and power schemes, and energy production and industrial fluid systems.

(111) EDF has also developed its activities on the market in renewable energy sources. In 1997, the holding company Chart, a wholly owned EDF subsidiary, brought together its activities in the renewables sector, e.g. geothermal energy and wind power. Its contribution to consolidated turnover that year was EUR 70 million.

(112) Lastly, as an electricity producer and distributor, EDF was and still is in competition with suppliers of other substitute energy sources such as coal, oil and gas, both on its domestic market and on international markets. In France, for example, EDF has launched a successful campaign to promote the use of electricity for heating. It has thus increased its market share in comparison with its competitors who supply substitute energy sources such as oil or gas. In the steel industry, electric furnaces are in competition with gas and oil-fired furnaces.

(113) As far as the effect on trade in gas between Member States is concerned, it should be noted that as France has only small gas reserves it has always imported most of its supplies. The gas market has also been the subject of a liberalisation directive: Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, which was to be transposed by all the Member States by August 2000. The Member States had to specify the eligible customers who could choose their supplier. The definition of eligible customers was to result in an opening of the market equal to at least 20 % of annual national gas consumption immediately and then 28 % in 2003.

(114) A French parliamentary report [28] found that, according to government figures, the consumption of eligible customers who had changed suppliers accounted in early 2002 for around 25 % of the total consumption of eligible customers and 5 % of the total market, and that four new operators had entered the French market.

(115) It is therefore clear that, in 1997, EDF was already well established on certain markets in other Member States and that the aid resulting from the non-payment by EDF of corporation tax on some of the accounting provisions created free of tax for the renewal of the RAG inevitably affected trade between Member States.

(116) The unlimited State guarantee has also conferred on EDF an advantage which necessarily strengthens its position in relation to its competitors. In the light of the foregoing considerations, it necessarily affects trade between Member States within the meaning of Article 87(1) of the EC Treaty.

(117) The reform of the pension scheme for the electricity and gas industries reduces the costs borne by enterprises in those industries and therefore constitutes an advantage for the sector. Since European markets in electricity and gas exist, the grant of an advantage to enterprises in those industries in France necessarily affects trade between Member States.

(118) Consequently, since they fulfil the four criteria laid down in Article 87(1) of the Treaty, the unlimited State guarantee enjoyed by EDF, the non-payment by enterprises in the electricity and gas industries of some of the pension benefits corresponding to rights acquired in the past, and the non-payment by EDF of corporation tax on some of the accounting provisions created free of tax for the renewal of the RAG constitute State aid. The compatibility of these measures in the light of the Treaty rules now has to be assessed.

[28] Report by Mr Poniatowski on the energy markets bill, drafted in 2002 at the request of the Senate Committee on Economic Affairs.

5. **Assessment of the compatibility of the State aid at issue in the light of the Treaty**

(a) *Unlimited State guarantee*

(119) The unlimited State guarantee enjoyed by EDF constitutes State aid which enables the group to borrow on more favourable terms on the international financial markets.

(120) Article 87(1) of the Treaty provides that aid fulfilling the criteria laid down therein is in principle incompatible with the common market. The exceptions to that rule, laid down in Article 87(2), are not applicable in the case in point because of the nature of the aid, which is not intended to achieve any of the objectives listed in that paragraph.

(121) Neither does the aid measure in question qualify for the exceptions allowed by Article 87(3)(a) or (c), for aid to promote the economic development of certain regions, particularly since it corresponds to operating aid: it is not conditional on investments or on job creation as required by the guidelines on national regional aid ([29]).

(122) Article 87(3)(c) of the Treaty also allows an exception to be made for aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The aid measure under examination does not qualify for this exception.

(123) As regards the exceptions allowed by Article 87(3)(b) and (d) of the Treaty, the aid measure under examination is not intended to promote the execution of a project of common interest, remedy a serious disturbance in the French economy or promote culture and heritage conservation.

(124) The compatibility criteria set out in Article 87(2) and (3) of the Treaty are therefore not met.

(125) The French authorities consider that, in its assessment, the Commission has not taken account of EDF's status and the constraints attached thereto, such as the principle of specialisation and the ban on arbitration clauses. These are provisions of French administrative law that have nothing to do with the issue of State aid. It is the French authorities that decided to confer such status on EDF. The status derives from an act passed by the French Parliament, which can therefore be amended at any time by the same procedure. The Commission notes, however, that the principle of specialisation has not prevented some diversification of EDF's activities.

(126) Under Article 86(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the rules of the Treaty, and in particular the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

(127) The Commission does not dispute the fact that EDF has to fulfil public service obligations. On that account and pursuant to Article 86 of the Treaty, EDF could receive financial compensation or enjoy certain prerogatives derogating from the generally applicable rules of law. However, such financial measures or prerogatives must be proportionate to what is necessary in order to compensate for the additional costs incurred by EDF as a result of those public service obligations. The State guarantee enjoyed by EDF, insofar as it covers all EDF's activities and is unlimited in time, is disproportionate. The Commission consequently takes the view that it creates an undue distortion of competition.

(128) The French authorities have not relied on Article 86(2) of the Treaty, but they have stressed the fact that EDF performs public service tasks. They have not, however, indicated in detail EDF's specific public service obligations or their cost. There is therefore no way of checking whether or not the scope of the State's commitment towards EDF corresponds to the cost of its public service tasks. The Commission stresses in this connection the difficulty of correctly estimating the value of a general guarantee that is unspecified in amount and unlimited in time.

(129) In the light of the information at its disposal, the Commission considers it impossible to examine whether the conditions formulated by the Court of Justice in *Altmark* ([30]) and the criteria for the application of Article 86(2) of the Treaty are fulfilled in the case in point.

([29]) OJ C 74, 10.3.1998, p. 9 (amended by OJ C 258, 9.9.2000, p. 5).

([30]) Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH and Others*, not yet reported.

(130) The French authorities argue that the Commission's action deprives Article 295 of the Treaty of its effectiveness. In support of their argument, they cite the Advocate General's Opinion in Cases C-367/98, C-483/99 and C-503/99 concerning golden shares. However, in its judgments the Court of Justice did not follow that interpretation of Article 295 of the Treaty ([31]). In accordance with Article 295, the Community is neutral with regard to the system of property ownership in the Member States. No provision of the Treaty is an impediment to complete or partial State ownership of enterprises. But, at the same time, the competition rules must apply in the same way to private and public enterprises. The Court of Justice has consistently held that Article 295 does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty ([32]).

(131) That case-law was upheld by the judgment delivered by the Court of First Instance of the European Communities on 6 March 2003 in *West LB* ([33]). According to that judgment, Article 295 of the Treaty cannot be held to restrict the scope of the concept of State aid within the meaning of Article 87(1) of the Treaty. The application of the competition rules to undertakings, irrespective of the property systems to which they are subject, does not have the effect of restricting the protection under Article 295 of the Treaty and of leaving the Member States hardly any latitude in the management of public undertakings, in the retention of shareholdings which they have in those undertakings, or in recourse to considerations other than purely profit-making criteria. Where the interests to which that line of argument relates might conflict with the application of the competition rules, they are taken into account by Article 86(2) of the Treaty since it provides that undertakings entrusted with the operation of services of general economic interest may escape the application of the competition rules if those rules obstruct the performance, in law or in fact, of the particular tasks assigned to those undertakings.

(132) In the present case, the fact that EDF's capital is owned by the State is not called into question in the slightest: the unlimited State guarantee is linked not to the system of ownership of EDF but to its legal status. If that status has intrinsic features that distort competition, then the status itself must be examined in the light of the State aid rules. The Member States are free to choose the legal status of undertakings but must, in their choice, observe the rules of the Treaty. In this respect, the Commission's action is in line with the principle of equal treatment.

([31]) Cases C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, C-483/99 *Commission* v *France* [2002] ECR I-4781 and C-503/99 *Commission* v *Belgium* [2002] ECR I-4809.

([32]) Judgment of the Court in Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 44. See also the Court's judgments in Cases 182/83 *Fearon* [1984] ECR 3677, C-305/89 *Italy* v *Commission* [1991] ECR I-1603 and C-302/97 *Konle* [1999] ECR I-3099.

([33]) Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, not yet reported.

(133) The Commission has no objection whatsoever to the public ownership of EDF's capital or the public enterprise status itself. It merely examines the effect of the exemption from administration and compulsory liquidation proceedings and the role of the State as the guarantor of last resort of all EDF's debts, including those associated with activities not covered by its public service obligations.

(134) The unlimited State guarantee enjoyed by EDF thus constitutes State aid that is incompatible with the Treaty rules. In the decision to propose appropriate measures which it adopted in October 2002, the Commission already requested the French authorities to withdraw it.

(135) In their letter dated 11 November 2003, the French authorities notified the following draft legislative provision to the Commission: 'The public enterprises Electricité de France and Gaz de France are hereby converted (…) into limited companies governed (…) by the rules applicable to commercial enterprises'. They explain that the effect of converting EDF into a limited company will be to make it subject to the ordinary rules applicable to companies under administration or compulsory liquidation. The Commission considers that making EDF subject to the ordinary law on bankruptcy will have the effect of withdrawing the unlimited State guarantee which it enjoyed.

(136) In a letter dated 16 December 2003, the French Government confirmed its intention to 'table before Parliament the measures for converting the legal form of EDF, currently a public enterprise, into a legal form governed by the ordinary rules so that those measures can be put into effect by 1 January 2005'. On the basis of that information, the Commission takes the view that the unlimited State guarantee enjoyed by EDF must be effectively withdrawn by 1 January 2005. Such a deadline is sufficient and reasonable given the legislative and regulatory changes that have to be made.

(b) *Reform of the pension scheme for the electricity and gas industries*

(137) The Commission notes that the current pension scheme for the electricity and gas industries in fact constitutes a barrier to entry into the French electricity and gas markets. Firstly, according to the rules of the scheme which are currently applicable to any new entrant, enterprises do not pay a contribution in discharge of their obligations but participate each year in the payment of pensions for the entire sector in proportion to their wage bill. The level of a new entrant's contribution therefore does not depend on a pre-established fixed rate but is determined each year on the basis of the amounts needed to keep the pension scheme in balance. That balance depends on parameters, such as the total wage bill of the sector and its demographic structure, that are established prior to the firm's market entry and are in no way related to its own pension liabilities.

(138) Secondly, since the electricity and gas industries are highly capital-intensive, it is likely that any new market entrant would be listed on a stock exchange or would have recourse to issuing securities. Once the IAS accounting standards enter into force, such enterprises will have to set aside provisions in their accounts to finance the pension liabilities of the sector that have accumulated prior to their market entry but are chargeable to them in proportion to their current wage bill. This provisioning for past pension liabilities constitutes an additional expense in comparison with those incurred by enterprises subject to the ordinary social security rules, which finance pension schemes by way of contributions in discharge of their obligations and do not therefore have to set aside provisions for such liabilities. Entering a highly capital-intensive market, with large fixed costs, represents such a heavy investment that any additional expense can be seen as a major barrier.

(139) Lastly, withdrawing the unlimited State guarantee enjoyed by EDF and GDF and therefore making them subject to the ordinary law on bankruptcy, without a concomitant reform of the pension scheme for the electricity and gas industries, would place all the enterprises in the sector, including new entrants, under the obligation to take over the pension liabilities of the two incumbents if they were declared bankrupt. Given the amounts at stake, such a risk cannot be borne by the other enterprises in the sector. The transfer of such a risk to the enterprises in the sector therefore constitutes a barrier to the entry of competitors into the French markets.

(140) The current pension scheme for the electricity and gas industries therefore creates barriers to entry into the French electricity and gas markets. The reform notified by the French authorities enables these entry barriers to be removed: firstly, it replaces the balancing contributions paid by enterprises in the sector with contributions to the general schemes (basic scheme and compulsory supplementary schemes) that discharge their obligations; secondly, it reduces the amount of the specific pension rights acquired before the reform that exceeds the amount of the ordinary benefits and has to be financed by all enterprises in the sector. At the date of the reform, the specific pension rights that still have to be financed by the enterprises will be definitively apportioned among them on the basis of two criteria: the wage bill of the enterprises concerned and the length of service with them of the employees covered by the arrangements for the electricity and gas industries. The contribution by the enterprises will thus be proportionate to the duration of their presence on the electricity and gas markets; lastly, should the incumbents be declared bankrupt, the enterprises in the sector would take over the specific rights only up to a ceiling that would take account of their own pension liabilities so as not to threaten their viability.

(141) Since the existing pension scheme is on the point of being abrogated, the Commission does not consider it necessary to examine its compatibility with the Treaty rules. This Decision is confined exclusively to examining the compatibility of the new scheme with the Community rules on State aid.

(142) As regards the tariff-based contribution accruing to the National Fund for the Electricity and Gas Industries for the purpose of financing some of the pension rights acquired prior to the reform by employees assigned to electricity or gas transport and distribution, it should be noted that the chargeable event is the connection of consumers to the electricity or gas transport and distribution networks. The contribution is based, for each final consumer, on a 'fixed' component of the standing charge for use of the network which is independent of the energy actually consumed. It is thus paid by the final consumer, even if the latter does not actually consume any energy; payment of the contribution is not therefore linked to the amount of electricity or gas consumed. It follows that the National Fund for the Electricity and Gas Industries is not financed, through the contribution, by electricity or gas imported from other Member States. The way in which the contribution is collected therefore does not reinforce the effects of the aid on competition and trade between Member States, since it is not charged on imported products. Consequently, it does not create a barrier to entry into the French electricity and gas markets.

(143) It should also be noted that the specific pension rights acquired prior to the reform constitute past liabilities linked to the previous monopoly situation: payment by enterprises in the electricity and gas industries of benefits corresponding to specific pension rights did not give rise to any difficulty as long as those enterprises operated in a monopoly environment. They did of course incur higher pension costs than enterprises in other sectors, but they were shielded from any intra-industry competition. In addition, the accounting standards did not require them to set aside provisions in their accounts to cover the amount of the specific rights for which they were liable towards their employees. For their part, employees were sure to obtain payment of their specific pension benefits insofar as those rights were managed by the EDF-GDF pension department, which was covered by the unlimited State guarantee. Since the electricity and gas markets have been opened up to competition, these specific rights have become a burden affecting the competitiveness of enterprises in the sector: the specific rights represent additional wage costs for the enterprises which their competitors do not have to bear; and, once the IAS accounting standards enter into force, enterprises will have to set aside provisions in their accounts to cover the specific rights acquired by their employees. At 1 January 2003, these specific pension rights amounted to […]. Payment of the specific pension benefits, which was not an unbearable burden as long as the enterprises were shielded from any intra-industry competition, today constitutes a major difficulty for these enterprises, now that they are in competition with other electricity or gas enterprises.

(144) These specific pension rights of employees in the electricity and gas industries derive from Article 24 of the National conditions of employment for workers in the electricity and gas industries and Annex 3 thereto, relating to invalidity, pension and death benefits, which date from 1946. These texts have not been amended since 1997.

(145) As part of the notified reform, enterprises in the sector will not pay benefits corresponding to the specific rights acquired at the date of the reform by employees assigned to electricity and gas transport and distribution activities. The reform is proportionate to what is strictly necessary, since the enterprises are relieved of the payment of only some of the specific pension benefits acquired in the past. While the specific rights acquired in the past by employees in the sector amount to a total of […], the enterprises are relieved of the payment only of the specific pension benefits acquired before the reform by employees assigned to electricity and gas transport and distribution, which represented a total of […] at 1 January 2003. The enterprises in the sector therefore remain responsible for an amount of […]. The reform of the pension scheme, as notified by the French authorities, does not relieve the enterprises in the sector of the payment of all the specific pension benefits acquired in the past, only some of them.

(146) Any market operating in a monopoly environment has a particular organisation and is not immediately suited to functioning competitively when it is opened up. The liberalisation of the electricity and gas sector therefore requires it to be reorganised so that it can achieve the competitive operation sought. The aid granted by the French State with a view to such sectoral reorganisation is necessary and proportionate: only the electricity and gas transport and distribution activities, traditionally carried on as a monopoly, will receive aid, while the other aspects of the reform do not involve State aid. The aid may therefore be deemed compatible with the common market in accordance with Article 87(3)(c) of the Treaty since it allows the development of the activity in question and does not affect trade to an extent contrary to the common interest.

(147) The Commission regards the situation in the case in point as not dissimilar in nature to that of stranded costs in the energy field. It involves aid aimed at facilitating the transition to a competitive energy sector. Although the methodology which the Commission has adopted for examining aid of that type cannot cover this reform of the pension scheme, the Commission deems it appropriate in the case in point to treat this aid in the same way as compensation for stranded costs and will follow the same approach in its analysis of similar cases.

(148) By eliminating barriers to entry into the French electricity and gas markets, the reform of the pension scheme for the electricity and gas industries allows competition to be stepped up on those markets. This reform of a special scheme also forms part of the general drive to reform Member States' pension systems advocated by both the Council and the Commission ([34]).

(c) *Advantage resulting from the non-payment by EDF in 1997 of corporation tax on some of the accounting provisions created free of tax for the renewal of the high-voltage transmission network*

(149) Article 87(1) of the Treaty provides that aid fulfilling the criteria laid down therein is in principle incompatible with the common market. The exceptions to that rule, laid down in Article 87(2), are not applicable in the case in point because of the nature of the aid, which is not intended to achieve any of the objectives listed in that paragraph.

(150) Neither does the aid measure in question qualify for the exceptions allowed by Article 87(3)(a) or (c), for aid to promote the economic development of certain regions, particularly since it corresponds to operating aid: it is not conditional on investments or on job creation as required by the guidelines on national regional aid.

(151) Article 87(3)(c) of the Treaty also allows an exception to be made for aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The aid measure under examination does not qualify for this exception. The derogation from the applicable tax law, granted for the benefit of a single enterprise, cannot be regarded as being intended to facilitate the development of an activity. Its sole purpose is to assist an enterprise by reducing its operating costs.

(152) As regards the exceptions allowed by Article 87(3)(b) and (d) of the Treaty, the aid measure under examination is not intended to promote the execution of a project of common interest, remedy a serious disturbance in the French economy or promote culture and heritage conservation.

([34]) See in particular the joint Council and Commission report on adequate and sustainable pensions, 18 March 2003.

(153) The compatibility criteria set out in Article 87(2) and (3) of the Treaty are therefore not met. Furthermore, as regards compensation for public service costs, the same observation as that made in connection with the unlimited State guarantee enjoyed by EDF is called for: the French authorities have not cited Article 86(2) of the Treaty in defence of the tax concession, but they have stressed the fact that EDF performs public service tasks. They have not, however, provided any assessment of the cost incurred by EDF in carrying out those tasks. The Commission cannot therefore determine whether or not the tax concession in question compensates for any additional cost linked to the public service tasks entrusted to it ([35]).

(154) In the light of the foregoing considerations, the Commission accordingly takes the view that the aid under examination constitutes operating aid which has had the effect of strengthening EDF's competitive position in relation to its competitors. It is therefore incompatible with the common market.

(155) Lastly, the Commission considers that, contrary to what is claimed by the French authorities, the rule on limitation periods does not apply in the case in point. Although EDF created the accounting provisions free of tax between 1987 and 1996, it should be pointed out, on the one hand, 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, on the other hand, that the Act providing that the grantor rights were to be reclassified as capital injections 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.

VI. **CONCLUSIONS**

(156) This Decision has been drawn up on the basis of the information provided by the French authorities. It should be stressed that, despite the injunction to provide information issued in October 2002, the French authorities persisted in their refusal to supply the Commission with full copies of some of the documents requested. In particular, they communicated only extracts from the French Court of Auditors' reports covered by the injunction.

(157) The Commission finds, firstly, that the unlimited State guarantee enjoyed by EDF must be withdrawn so that the enterprise is subject to the ordinary law on collective proceedings.

([35]) It is consequently not possible in the case in point to examine whether the conditions set out in the judgment in *Altmark*, for escaping the application of Article 87(1) of the Treaty, and the criteria for qualifying for the exception allowed by Article 86(2) of the Treaty are fulfilled.

(158) The Commission takes note of the French authorities' undertaking to ensure that the affiliation of the pension scheme for the electricity and gas industries to the ordinary schemes is in all respects financially neutral for the transferee schemes and for the State. The Commission finds that such affiliation will not involve any State aid provided that this undertaking is fulfilled.

(159) The Commission notes, secondly, that the specific pension rights acquired at the date of the reform by employees assigned to electricity and gas transport and distribution will no longer be financed by the enterprises in the sector but by a tariff-based contribution. The non-payment by enterprises in the sector of benefits corresponding to some of the specific rights acquired in the past constitutes State aid that is compatible with the common market pursuant to Article 87(3)(c) of the Treaty.

(160) The Commission finds, lastly, 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 constitutes State aid that is incompatible with the common market. Such tax aid amounts to EUR 888,89 million,

HAS ADOPTED THIS DECISION:

Article 1

The unlimited guarantee granted by France to Electricité de France (EDF) constitutes State aid that is incompatible with the common market and must be withdrawn by 1 January 2005.

Article 2

The affiliation of the French pension scheme for the electricity and gas industries to the ordinary pension schemes does not constitute State aid within the meaning of Article 87(1) of the Treaty insofar as such affiliation is financially neutral for the enterprises, the transferee schemes and the State.

The non-payment by enterprises in the electricity and gas industries of benefits corresponding to the specific rights acquired at the date of the reform by employees assigned to electricity and gas transport and distribution and the financing of those rights by a tariff-based contribution constitute State aid that is compatible with the common market pursuant to Article 87(3)(c) of the Treaty.

The guarantee granted by France to the National Fund for the Electricity and Gas Industries in respect of those acquired specific rights does not constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 3

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.

Article 4

France shall take all necessary measures to recover from EDF the aid referred to in Article 3 and unlawfully made available to it.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of EDF until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid, applied on a compound basis in accordance with the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered ([36]).

Article 5

France shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Such information shall be communicated to the Commission with the aid of the form set out in the Annex.

Article 6

This Decision is addressed to the French Republic.

Done at Brussels, 16 December 2003.

For the Commission

Mario MONTI

Member of the Commission

([36]) OJ C 110, 8.5.2003, p. 21.

ANNEX

INFORMATION SHEET

on implementation of Commission Decision 2005/145/EC concerning EDF

Article 1 of the Decision

Please give the date when EDF's status changed and attach a copy of the documents substantiating the change of status.

Article 3 of the Decision

1. How will the interest on the amount of aid to be recovered be calculated [1]?

2. What measures are to be taken to secure immediate and effective recovery of the aid in accordance with Article 14 of Regulation (EC) No 659/1999?

3. What measures have already been taken to secure immediate and effective recovery of the aid in accordance with Article 14 of Regulation (EC) No 659/1999?

4. What deadline has been set for obtaining full reimbursement of the aid?

5. Any other comments.

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[1] In accordance with the Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered (OJ C 110, 8.5.2003, p. 21), the reference rate is to be applied on a compound basis. The calculation of compound interest, compounding on a yearly basis, uses the formula: Interest = [Capital (1 + Interest rate) Number of years] — Capital.