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EDF, A LEADING CASE REVISITED: THE APPLICACTION OF THE MARKET ECONOMY OPERATOR TEST TO FISCAL MEASURES AND THE ENERGY SECTOR.

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ABSTRACT

The European Energy Internal Market has changed completely the environment of the Energy Sector in Europe. This deep transformation was a consequence, almost in a very significant part, of the regular application of the European Competition Law rules.

The evolution of Energy Sector in Europe, where the most important firms were the old monopolists, generally in hands of the public sector, it is based on the expandable delimitation of the notion of «Services of General Economic Interest» («SGEI») and their missions contained in Article 106.2 TFEU and in the well-known doctrine of the «essential facilities».

In this new context, both the European Commission and the National Competition Authorities started a strong fight not only against anticompetitive agreements and abuses of dominant position, but also against illegal state aid.

In the field of state aid control, many of the «Leading Cases» on the complex notion of State Aid from Article 107.1 TFEU are «energy cases», many of them related with taxation. The «EDF Case» is one of these leading cases, and the principal object of this paper.

In EDF case, the European Commission analyses, in a second decision, after the General Court and the Court of Justice had annulled the first one, the reclassification as capital of the tax-exempt accounting provisions for the renewal of the high-voltage transmission network (RAG) implemented by France in favour of one of the biggest European firms in the energy sector. This decision gives very interesting remarks on the application of the «Market Economy Investor Test», on a measure financed by public resources from a tax instrument.

SUMMARY: I.- PRESENTATION: IS THE NOTION OF STATAE AID AN UNSOLVABLE PROBLEM?. II.- ENERGY SECTOR AND STATE AID: A NECESSARY CONTEXTUALIZATION. III.- THE NOTION OF STATE AID AND

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ENERGY CASES. IV.- STATE AID AS AN «ECONOMIC ADVANTAGE»: THE EDF CASES AND THE APPLICACTION OF THE MARKET ECONOMY OPERATOR TEST (MEO) TO FISCAL ADVANTAGES. V.- SOME CONCLUSIVE REFLECTIONS.

I.- PRESENTATION: IS THE NOTION OF STATAE AID AN UNSOLVABLE PROBLEM?

«*State Aid seem to be sexy today*». With this expressive sentence, the former European Competition Commissioner, Neelie Kroes, described on 2009 the new role of State Aid in European Unión. Only a few year later, on 2016, these words are still valid, especially for State Aid articulated as fiscal measure.

Taxation and State Aid are again and probably more than ever, «sexy today», and not only at European level, but also at International level after the last Commission's decisional practice in «Tax Ruling» cases[2].

The Commission application of State Aid rules to «Tax Ruling» has provoked a critical opinion from U.S. Government officials that consider these Commission's Decisions as an aggressive political action against U.S firms, in an open opposition with bilateral and multilateral agreements on taxation matters[3].

It must be clear that European Union regulation on State Aid is an essential part of European Law, as one of the more dynamic elements of European Competition Law. The Union have exclusive powers in this specific area, thus competition rules are necessary for the functioning of the internal market[4].

It is evident that State Aid control rules are usually misunderstanding out of Competition Law context. That situation comes, almost in a significate part, from the fact that the «notion» of State Aid is just a «puzzle» or almost a «Rubik's Cube» test. In fact, Article 107.1 TFUE gives more than a real definition, what ROBERTI[5] brightly described as a «Complex hypothesis», integrated for some different elements.

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[2] See Commission Decision of 21 October 2015 in Case SA.38374, Starbucks, not yet published, Commission Decision of 21 October 2015 in Case SA.38375, Fiat, not yet published, Commission Decision of 11 January 2016 in Case SA.37667, excess profit exemption state aid scheme, not yet published, all cases are under appeal. About Tax Ruling, see, Communiucation from the Commission Notice on the Notion of State Aid as referred to in Article 107(1) TFEU, in particular, p 50-52, points 169-174 and BUENDÍA SIERRA, J. L., «State Aid and Tax Rullings: An Appropriate Way to Tackle Aggressive Tax Planning?», in *Tax Planning International European Tax Service*, BloombergBNA, 2015, pp. 12-15 and LYAl, R., «Transfer Pricing Rules and State Aid», in *Fordham International Law Journal*, Vol. 38, 2015, pp. 1017-1043.

[3] Cfr. http://www.itic.org/dotAsset/b/0/b0ebde42-b849-42ae-a7f3-0c768d917e22.pdf

[4] It is clearly stablished in Article 3.b) TFEU: «1. The Union shall have exclusive competence in the following areas: [...] (b) The establishing of the competition rules necessary for the functioning of the internal market».

[5] Cfr. ROBERTI, G. M., «Le contrôle de la Commission des Communautés Européennes sur les aides nationales», in *Actualité Juridique-Droit Administrative*, nº 6, 20, juin, 1993, París, pp. 397- 411, p. 399.

According with Article 107.1 TFEU, «1. Save as otherwise provided in the Treaties, 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, in so far as it affects trade between Member States, be incompatible with the internal market.»[6].

It is possible to analyse all these propositions grouped with different criteria. It is thus distinguished between the existence of an «Advantage», as the substrate of the notion of State Aid, the «Origin of the Aid», the «Beneficiary» of the Aid and its «Selectivity» and their «Effects of the Aid» (on competition and intra-EU trade) , without forgetting reference to the irrelevance of the form. All these requirements have to be fulfilled to identify a measure as a «State Aid».

All its propositions are practically clues. Paradoxically, this openness of what a State Aid is the key element of the European State Aid system as was designed by the authors of the Treaty of Rome. This situation is not so far away from the definition of «subsidy» in the Articles 1 and 2 of the 1994 WTO Agreement on Subsidies and Countervailing Measures («SCDA 1994»)[7].

The notion of State aid is practically a «case-by-case» jurisprudential creation, where some of the «Leading Cases» are «Energy cases» related with taxation or, more properly, with state tax measures designed to finance energy firms in public sector. Undoubtedly, in this context, the «EDF Case» is one of these leading cases and, -for this reason-, it is the main object of this paper.

The Commission is sensitive to the practical difficulties raised by this circumstance. For this reason undertook within the framework of the «EU State Aid Modernisation» («SAM»)[8] started in 2012, the preparation of a communication, finally published on May 2016, aimed specifically to clarify the concept of State aid. This is the «Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU» (hereafter «CNSA»)[9].

II.- ENERGY SECTOR AND STATE AID: A NECESSARY CONTEXTUALIZATION.

Energy Sector is more than ever an essential sector for modern economy, that for different reasons (ideological and economic), historically has not only a special regulation, but also a public ownership. Many of the biggest firms in the energy sector were originally, and remain today, under public control as «sector-specific regulation».

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66 For a historical evolution of the concept of State Aid in European Union Law, see. PIERNAS LÓPEZ, J. J., *The Concept of State Aid Under EU Law. From internal market to competition and beyond*, Oxford University Press, 2015.

7 See https://www.wto.org/english/docs_e/legal_e/24-scm.pdf

8 http://ec.europa.eu/competition/state_aid/modernisation/index_en.html On the definition of Subvention un WTO in relation with State Aid, see RUBINI, L., *The Definition of Subsidy and State Aid. WTO and EC Law in Comparative Perspective*, Oxford University Press, 2009 and LUENGO HERNANDEZ DE MADRID, G. E., *Régulation of Subsidies and State Aids in WTO and EC Law*: Conflits in International Trade Law, Kluwer Law International, 2007.

9 The text is avaiable in: http://ec.europa.eu/competition/state_aid/modernisation/notice_of_aid_en.pdf

The public ownership of firms in general, but specifically in regulated sectors firms, was always a legitimate option under EU Treaties. The Article 345 TFEU stablishes that "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."

The liberalization process transformed progressively the so-called «Regulated Sectors» (energy, postal services, telecommunications...), traditionally considered as legal monopolies, introducing competition rules. The essential legal base for this process of submitting to Competition Law of all those sectors was not only the Article 106 TFEU[10] and in particular, the notion of «Service of General Economic Interest» («SGEI»)[11], but the application of European State Aid rules. Consequently, EU Governments are not free for financing theirs public firms, as they used to do traditionally. Even in regulated sectors as Energy, Member states have to comply with State Aid Rules.

The «red line» between State Aid and legal compensation for SGEI has become a extremely important question, in particular, after the Judgments of the Court of Justice in the Preliminary Rulings in Ferring[12] and Alrmark[13] cases, introducing a methodology to make clear the difference between compensations for SGEI and genuine State Aid[14]. For this reason, Member States try to explore the «grey zones», bordering the notion of State Aid in their interest.

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[10] On Article 1062 and SGEI the Commission explains in the point 2 of the Notice on the notion of State Aid why are not analyzed in it. «This Notice only concerns the notion of State aid as referred to in Article 107(1) of the Treaty, which both the Commission and national authorities (including national courts) have to apply in conjunction with the notification and standstill obligations provided for in Article 108(3) of the Treaty». For the same reason, It «does not concern the compatibility of State aid with the internal market pursuant to Article 107(2) and (3) and Article 106(2) of the Treaty, which is for the Commission to assess». On the topic of SIEG, See CNSA, pp. 22; points 70-71.

[11] On 2012, the Commission approved the «Alumina's Package» to the modernization of Article 106 TFEU. This «Package» is integrated for several instruments: Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.01.2012, p. 4); Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380), OJ L 7, 11.01.2012, p. 3; Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.01.2012, p. 15; Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ L 114, 26.04.2012, p. 8. On SGEI see, PORRAS BELARRA, J., «El Paquete Modernizador del Artículo 106TFUE: evolución y consolidación normativa en materia de SIEG» in *Regulación y Competencia en Servicios de Interés Económico General (SIEG): Análisis Sectoriales y Comparativos*, Universidad de Málaga/Debates, Málaga, 2015, pp. 87-111.

[12] Cfr. Judgment of the Court of Justice of 22 November 2001, Ferring (C-53/00, ECR 2001 p. I-9067) ECLI:EU:C:2001:627.

[13] Cfr. Judgment of the Court of Justice of 24 July 2003, Altmark Trans and Regierungspräsidium Magdeburg (C-280/00, ECR 2003 p. I-7747) ECLI:EU:C:2003:415.

[14] About the difference between State Aid and SIEG and the «Altmark Conditions», see, BUENDÍA SIERRA, J. L., «Finding the right balance: State Aid and Services of General Economic Interest», in *EC State Aid Law. Le droit des Aides d'Etat dans la CE. ;Amicorum Francisco Santaolalla Gadea*, Wolters Kluwer Holanda, 2008, pp. 191-222; BUENDIA SIERRA, J. L./RODRIGUEZ MIGUEZ, J. A., «Ayudas de Estado y Servicios de Interés Económico General:

For all these reasons, it is not strange, that many of the more interesting leading cases are, at the same time, Energy and Tax cases, because many Energy firms remain under public control in a sector that needs heavily investments. Still now, Tax measures were one of this «grey zones» in the notion of State Aid and an easy way to get the resources they need.

III.- THE NOTION OF STATE AID AND ENERGY CASES

In the last years, few «Energy cases» involving tax measures have been leading cases relevant in some of the more complex elements of the notion of state aid: the existence of «Advantage», the «Origin of the Aid» and the «Selectivity».

In «PreussenElektra case»[15], the Court of Justice rejected the existence of State aid in the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices, because it did not involve any direct or indirect transfer of State resources to undertakings which produce that type of electricity.

To the Court, «the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between them and other private undertakings cannot constitute a direct or indirect transfer of State resources either» As the Court explained:

> «61. In those circumstances, the fact that the purchase obligation is imposed by statute and confers an undeniable advantage on certain undertakings is not capable of conferring upon it the character of State aid within the meaning of Article 92(1) of the Treaty.
> 62. That conclusion cannot be undermined by the fact, pointed out by the referring court, that the financial burden arising from the obligation to purchase at minimum prices is likely to have negative repercussions on the economic results of the undertakings subject to that obligation and therefore entail a diminution in tax receipts for the State. That consequence is an inherent feature of such a legislative provision and cannot be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State (see, to that effect, Sloman Neptun, paragraph 21, and Ecotrade, paragraph 36).»

However, only a few years later, in its Judgment of 17 July 2008, in «Essent Netwerk Noord case»[16] the Court of Justice stared that a price surcharge for

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¿BUPA versus Altmark?», In *Gaceta Jurídica de la Unión Europea y de la Competencia*, nº 9, La Ley, Mayo/Junio, 2009, pp. 49- 60 and on the Post-Altmark Jurisprudence, RODRÍGUEZ MIGUEZ, J. A., «El régimen jurídico comunitario de las compensaciones por SIEG y su delimitación por la Jurisprudencia», in *Gaceta Jurídica de la Unión Europea y de la Competencia*, nº 25, enero/febrero, 2012, pp. 9-23.

[15] Judgment of the Court of Justice of 13 March 2001, PreussenElektra (C-379/98, ECR 2001 p. I-2099) ECLI:EU:C:2001:160; in particular, points 59-62.

[16] Judgment of the Court of Justice of 17 July 2008, Essent Netwerk Noord and others (C-206/06, ECR 2008 p. I-5497) ECLI:EU:C:2008:413, points 69 to 73.

electricity to recover standards costs among domestic producers will be contrary, inter alia, to the prohibition of State Aid under Article 107.1 TFEU.

In the Court of Justice opinion, the designated company was not only the centralising body for the tax received, but to manage the monies collected and receive part of those monies. As long as under the legal system the designated company did not appropriate to itself the money, at the time when it was freely able to do so, that amount remained under public control and therefore available to the national authorities, which is sufficient for it to be categorised as State resources, in the sense of Article 107.1 TFEU.

More recently, on 2013, the Court of Justice assessed the existence of state funds in a case very similar to PreussenElektra. In the Judgment of 19 of December 2013[17]. In the «Vent De Colère case»[18] ruled that a mechanism for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind-generated electricity at a price higher than the market price that was financed by all final consumers of electricity in the national territory, constitutes an intervention through State resources.

Last, but not least, on 10 May 2016, the General Court, as Sánchez Graells[19] stressed, «has revisited once more the tricky issue whether publicly-mandated payments between private economic operators can constitute State aid». In its Judgment in Germany v Commission[20], The GC has followed «the functional approach of the Court of Justice (ECJ) in Vent de Colère and Others (…), continuing a line of case law that distinguishes PreussenElektra (…), and further minimising the 'outlier' decision in Doux Élevages and Coopérative agricole UKL-AREE (…)».

This new case analyses a German scheme of financial support for the production of renewable energy created both mandatory purchase obligations of energy from renewable sources at above-market prices, and reductions in such surcharges for certain types of electric-intensive undertakings in the manufacturing sector (or 'EUIs'). Thus, as Sánchez Graells appoints out, this energy financial scheme included both measures in support of producers and of 'heavy-users' of electricity. Importantly. In the omission view, all these financial measures were managed by intermediaries in the energy markets in breach of EU State aid rules, unless stringent conditions applied.

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[17] Judgment of the Court of Justice of 19 December 2013, Vent De Colère and others (C-262/12) ECLI:EU:C:2013:851, point 36.

[18] An interesting comment on this case in in SÁNCHEZ GRAELLS, A., « AG Jääskinen Revisits Preussenelektra and Minimises Implications of Doux Elevages (C-262/12)», in «How to Crack a Nut», July 15, 2013, at http://www.howtocrackanut.com/blog/2013/07/ag-jaaskinen-revisits-preussenelektra.html and «CJEU Follows AG Jääskinen In Revisiting Preussenelektra and Minimising Doux Elevages' Requirements for State Imputability of Aid Measures (C-262/12)», in «How to Crack a Nut», December 20, 2013, at http://www.howtocrackanut.com/blog/2013/12/cjeu-follows-ag-jaaskinen-in-revisiting.html

[19] An interesting critical analyses of this GCJ in SÁNCHEZ GRAELLS, A., «Again, on the 'Tricky' Concept of State Resources under EU State Aid Law: GC Rules on German Financial Support for Renewable Energy (T-47/15)», in «How to Crack a Nut», May 13, 2016, at http://www.howtocrackanut.com/blog/2016/5/12/again-on-the-tricky-concept-of-state-resources-under-eu-state-aid-law-gc-rules-on-german-financial-support-for-renewable-energy-t-4715

[20] Cfr. T-47/15, EU:T:2016:281.

The General Court agrees with the Commission and ruled that, «the fact that the State does not have actual access to the resources generated by the EEG surcharge, in the sense that they indeed do not pass through the State budget, does not affect, in the present instance, the State's dominant influence over the use of those resources and its ability to decide in advance, through the adoption of the EEG 2012, which objectives are to be pursued and how those resources in their entirety are to be used»[21].

In this context, the «EDF case» is another relevant case on the «Advantage» condition and, in particular, of the application of the «Market Economy Investor Principle» («MEIP») or, as the new Commission Notice on the notion of State aid as referred to in Article 107.1 TFEU renames it, in a more general vision, as the «Market Economy Operator» («MEO») Test[22].

IV.- STATE AID AS AN «ECONOMIC ADVANTAGE»: THE EDF CASES AND THE APPLICACTION OF THE MARKET ECONOMY OPERATOR TEST (MEO) TO FISCAL ADVANTAGES.

From the «Market Economy Investor Principle» («MEIP») to the «Market Economy Operator» Test: some basic ideas.

It is to the Court of Justice of the European Union to which can be attributed the merit of having noticed that the essence of State Aid is the existence of an «Advantage». Summarizing the case law, the Commission points out in its recent CNSA, that «An advantage, within the meaning of Article 107(1) of the Treaty, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.»[23]

This broad concept has allowed the Commission to progressively extending the scope of the rules on state aid to an increasingly large number of forms of public intervention in order to assess its impact on effective competition in markets.

In accordance with Article 345 TFEU, the Treaties «not prejudge in any way the system of property ownership in Member States». This open prevision has traditionally legitimized the direct intervention of public authorities in economic activity and, therefore, the weight of the public sector in many Member States has been from the beginning of the European Union very important.

In order to guarantee a level playing field with private sector, from the beginning of the 80s, the European Commission has tried to extend the scope of Article 107.1 TFEU to avoid State aid to public enterprises and to introduce competition rules, especially in regulated sectors, where the biggest firms usually are the old monopolies. .

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[21] Cfr. Point 118 of the GCJ.
[22] About the MEO Test, see, Communication from the Commission Commission Notice on the Notion of State Aid as referred to in Article 107(1) TFEU, in particular, pp 23-36, points 73-114..
[23] Cfr. CNSA, p. 20, point 66.

The first Commission‘s step to reduce the unlimited and without any control allocation of public resources to public enterprises was the approval of the Commission Directive 80/723/EEC, of 25 June 1980 on the transparency of financial relations between Member States and public undertakings[24]. This new Directive was the legal instrument through which the Commission tried to emphasize his power against the opacity that sought to keep Member States for much of its economic activity.

The question raised at first time was the "contributions of capital" that the State, as shareholder, performed in public companies. The Commission's position was clearly set out in a letter to the Member States: «The Commission's position: Application of Articles 92 and 93 (now 87 and 88) of the EEC Treaty to public authorities' holdings,»[25].

The Commission’s position was similar in the context of the «Agreement on Subsidies and Countervailing Measures» of 1979 («SCDA 1979»): to appeal to the market.

Under SCDA 1979[26], when US Department of Commerce («DOC») applied at first time the so-called «Private Investor Standard»[27], also called as the «Creditworthiness/Equityworthiness test»[28]. As we shall see, the parallel between this and the MEIP test applied by the Commission in the framework of the European Union is certainly extraordinary, although it found some differences in their practical application[29].

Latterly, the Commission published a very important document on this topic, the Commission communication to the Member States: Application of Articles 92 and 93 [now 87 and 88] of the EEC Treaty and of Article 5 of the Commission Directive 80/723/EEC to public undertakings in the manufacturing sector[30].

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[24] OJ L 195, 29.7.1980, pp. 35–37. Today, Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Codified version) (Text with EEA relevance), (OJ L 318, 17.11.2006, p. 17–25).

[25] Cfr. The Commission's position: Application of Articles 92 and 93 (now 87 and 88) of the EEC Treaty to public authorities' holdings, Bulletin EC 9-1984.

[26] Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979, T.I.A.S. 9619, 31 U.S.T. 513 [hereinafter Subsidies Code].

[27] Vid. HENDERSON, R. C., «The Private Investor Theory: ITA Equity and Credit Decisions Since 1984», in *World Competition*, nº 33, june, 1988, pp. 6-27.

[28] In the DOC’s practice we can find an interesting definition of *«Equityworthy»,* in *Cold-Roller Carbon Steel Flat-Roller Products from Argentina* (49 FR 18006, 18024 (DOC 1984. *Final determination. Subsidies apendix*), noted by HENDERSON (op. cit., p. 6): «To be “equityworthy” a company must show ability to generate a reasonable rate of return within a reasonable period of time. In making our equtyworthiness determinations, we assess the company's current and past financial health, as reflected in various financial indicators taken from its finantial statements, and, where appropriate, internal account. We give great weight to the company's recent rate of return on equity as an indication of financial health and prospects, as reflected in market studies, country and industry forecasts, and project and loan appraisal, when these types of analyses are available.»

[29] On the application of this «Creditworthiness/Equityworthiness test» by the DOC, see Countervailing Duties Final Rule, 28 November 1998 (19 CFR, part 351). available at http://enforcement.trade.gov/regs/98-30565.pdf

[30] OJ C 307, 13.11.1993, p. 3.

This test bases on the cooperation between the actions carried out by the State, which it was presumed to undertake, in similar circumstances, one private operator, acting in market conditions. In this way raises what in its initial formulation was called as the «Test» or «Principle» of the «Private Investor in a Market Economy».

This criterion was expressed for the first time in the Community rules on state aid to the steel industry and shipbuilding; although, as highlighted PAPPALARDO[31], it had been taken into account almost ten years earlier during the consideration of Italian Law nº 184 of 22 March 1971, «which established government intervention to support the restructuring and conversion of certain industries»[32].

Under this precedent and an early recognition by the Courts, the appeal to the Market on State Aid cases has been extending its scope from capital contributions to others forms of public intervention, like loans, guarantees or purchase/sale by the State. Therefore, the initial MEIP was adapted into the «private creditor test», the «Private seller Test», and the «Private Tax Payer Test»[33].

The MEIP and its variations were introduced in many of the Commission Notices and Communications[34] and finally developed in the CNSA, that introduces the more general version as the «Market Economy Operator Test» («MEO»).

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[31] See PAPPALARDO, A., «Government Equity Participation Under the EEC Rules on State Aids. Recants Developments», in *Fordham International Law* Journal*.*, vol. 2, nº 2, winter, 1988, pp. 310- 331.

[32] Second Report on competition policy (1072), point 122.

[33] On the origin of the MEIP are essential the works of Pappalardo, A: «Aids to Restructuring and Government Equity Participation in the EEC and in International Trade Recent Developments», in It. Year. Inter. L., 1986-7, pp. 80-95; «Government Equity Participation Under the EEC Rules on State Aids. Recants Developments», in *Fordham International Law Journal.*, vol. 2, nº 2, winter, 1988, pp. 310 a 331; «Les participations de l'Etat dans le capital d'enterprisesconstituent-elles des aides au sens de l'article 92 du Traité CEE», in *Documentação e Direito Comparado* (Sep. do Boletim do Ministério da Justiça), Lisbon, 1988; «Public Undertakings-Equity Infusions», in BOURGEOIS, H. J. (ed.): Subsidies and International Trade. A European Lawyers' Perspective, Kluwer Law and Taxation Publishers, Deventer-Boston, 1991, pp. 123 a 138. See also, inter alia, ABBAMONTE, G. B.: «Market Economy Investors Principle: A Legal Analisys of an Economic Problem», in *European Competition Law Review*, nº 4, 1996, pp. 258-268; SLOT, P. J., «State Aid in the Energy Sector in the EC: The Application of the Market Economy Investor Principle», in BILAL, S., NICOLAIDES, P. (ed.): *Understanding State Aid Policy in the European Community. Perspectives on Rules and Practice*, Kluwer Law International, La Hague, 1999, pp. 143-157; SLOCOCK, B., «The Market Economy Investor Principle», in *EC Comp. Newsletter*, Number 2, June 2002, pp. 23-28; RODRÍGUEZ MIGUEZ, J. A.: *La participación en el capital social como modalidad de ayuda pública a las empresas*, Escola Galega de Administración Pública, Colección Monografías nº 24, Santiago de Compostela, 2003. ISBN nº 84-453-3457-3. Avaible in: http://www.notariosyregistradores.com/doctrina/ARTICULOS/2010-ayudaspublicasenelcapialdelasempresas.pdf and several comment on the application of the MEIP in NICOLAIDES, P., *Recent Developments in State Aid. Critical Analyses of Major Judgments and Commission Decuisions*, Lexxion, 2014; and *State Aid Uncovered book Critical Analysis of Developments in State Aid 2014* and *State Aid Uncovered - Critical Analysis of Developments in State Aid 2015*, Lexxion, 2015 and 2016, respectively.

[34] For example: Commission notice on the enforcement of State aid law by national courts (OJ C 85 of 09.04.2009, p. 1),

The Commission has been exposing how this criterion applies in different documents and communications, incorporating details that case law pointed out in its Judgments.

In this regard, we must remember that Courts have repeatedly stated that the MEIP (in its various forms) implementation involves a «complex economic assessment»[35]. That is, the Courts control over the actions of the Commission should be limited to verifying respect for the rules of procedure and motivation, the material accuracy of the facts relied on in making the contested choice, lack of manifest error in the assessment of those facts or misuse of power.

This issue raised in a relevant way in the EDF case. This case significantly broadened the scope of this principle in respect of a capital injection carried out by its main shareholder, the French State, the equivalent to corporation tax paid by the company, which was reclassified as capital injections and that the Commission had reputedly as State Aid, incompatible with the internal market.

1.- Background of the case.

1.- The first Commission's Decision (2001/2005)

The «EDF case» began on 2002, when the European Commission opened the formal investigation procedure into the advantage resulting from the reclassification as capital of the tax-exempt accounting provisions for the renewal of the high-voltage transmission network («Réseau d'Alimentation Général» or «RAG»), implemented by France in favour of the «Établissement Public à Caractère Industriel et Commercial Électricité de France». Latterly EDF changed into a public limited company, «Électricité de France, SA»[36].

From its creation in 1946 to the entry into force of Directive 96/92/EC[37], EDF enjoyed a monopoly position in the French market with exclusive rights for the transmission, distribution, and import and export of electricity. However, EDF competed with other producers in other Member States, already ahead of the entry into force of Directive 96/92/EC. Moreover, free competition existed in related markets not subject to exclusive rights where EDF had already diversified its activities beyond its exclusive rights in both geographic and sectoral terms. Effects on competition did therefore exist well before the liberalisation provided for by Directive 96/92/EC.

The French authorities denied that EDF had received a tax concession and argued that the additional capital contribution was corrected with an under-capitalisation and was therefore justified.

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[35] See Judgment of the Court of Justice of 22 December 2008, British Aggregates v Commission, C-487/06 P, ECLI:EU:C:2008:757, paragraph 114, and Judgment of the Court of Justice of 2 September 2010, Commission v Scott, C-290/07 P, ECLI:EU:C:2010:480, paragraph 66.

[36] Decision of 16 October 2002 (OJ C 280, 16.11.2002, p. 8).

[37] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27, 30/01/1997, p. 20).

Undouble, as Nicolaides[38] remarks, «Once more, we see that a Member State that does not explicitly invest for the purpose of obtaining a return will certainly fail to prove afterwards that its investment made commercial sense. This is because the investment will leave behind a trail of evidence showing the opposite: that the investment was made for public policy purposes.»

This idea is very relevant. Member States, usually try to hide several measures that very probably the Commission would consider state aid by different manners. They do not make any notification, only put into force, and later, when the Commission asks about the measure in question, Member States try to explain that the measure do not involve, in any way, a state aid. This is why, paradoxically in this case, the irrelevant of the form («in any form whatsoever»), of the «notion» of State aid from Article 107.1 TFEU shows its very logical existence. It is like the classical «cat-and-mouse» game but in these cases, the cat (that is the Commission) is not always the strongest one.

By decision of 16 December 2003[39], the Commission declared the measure in question as and State Aid in favour of EDF, incompatible with the internal market and requested recovery of the aid with interest.

2.- The General Court Judgment (2009)

The French Government appealed against the Commission decision and by judgment of 15 December 2009[40], the General Court annulled this first Commission's decision.

This Judgment of the General Court raised some important questions regarding the scope of Article 107.1 TFEU. In particular, the distinction between exercise of powers and commercial transactions of public authorities and the application of the investor private test to fiscal measures.

Under previous and solid case law (Advocate General Léger had appointed out in his Opinion in Altmark[41]), the criterion of "private investor" was relevant only when the public authorities are acting a economic activity, not when the State acts as authority using its public powers.

As the General Court ruled, «the mere fact that the State has access to financial resources accrued through the exercise of State authority is not in itself sufficient justification for regarding the State's actions as attributable to the exercise of State authority.» [42]

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[38] NICOLAIDES, P., «How to Apply the Market Economy Investor Principle and what Mistakes to Avoid: The Long-running Case of EDF», in the server stateaidhub.eu, on 01.03.2016, vaiable in http://stateaidhub.eu/blogs/stateaiduncovered/post/5433

[39] Commission Decision 2005/145/EC 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) (OJ L 49, 22.2.2005, p. 9).

[40] Judgment of the General Court of 15 December 2009, EDF / Commission (T-156/04, ECR 2009 p. II-4503) ECLI:EU:T:2009:505.

[41] Judgment of the Court of Justice of 24 July 2003, Altmark Trans and Regierungspräsidium Magdeburg (C-280/00, ECR 2003 p. I-7747) ECLI:EU:C:2003:415

[42] Points 233-234 y 236.

Whether it were, the application of the prudent private investor test to the conduct of a State, which is a shareholder, could well be futile or, at least, of disproportionately limited value, since, as a State, it inevitably has recourse to financial resources accrued through the exercise of public power, in particular from taxation

Consistently, in the General Court' opinion, it would be nectary to determine in case-by-case analyses, if the public participation in the capital of the beneficiary undertaking has an economic objective that might also be pursued by a private investor, or not. Only if it is not the case, the actions of a State are not comparable with those of an economic operator or a private investor in a market economy[43].

With this argument, the measure in question in this case, a fiscal measure, «must be examined not solely according to its form, but on the basis of its nature, its object and its objectives, which presupposes that all aspects of it are examined and that its context is taken into consideration.». So, «the fact that the intervention by the State takes the form of legislation is not, in itself, sufficient to rule out the possibility that the intervention by the State in the capital of an undertaking pursues an economic objective which could also be pursued by a private investor.»

3.- Judgment of the Court of Justice (2012)

The Commission appealed to the Court of Justice, and the Court of Justice, surprisingly for many of us[44] and, of course, for the own Commission, upheld the ruling of the General Court, in its judgment of 5 June 2012[45].

Obviously, as Nicolaides pointed out, the Commission argued before both Courts, the General Court at first, and after appealing by it side to the Court of Justice, that by using tax revenue, a State has an advantage over other investors because its cost of capital is lower.

This is in fact a relevant question and a solid argument. By definition, as summarized Nicolaides, a state relies on its coercive powers when it levies taxes. This implies that it does not have to pay a "fee" for the money it collects. By contrast, a private investor would incur financial costs such as interest on a loan or dividends on equity capital. Both Courts dismissed this argument and pointed out that if there were any differences in costs, they ought to have been taken into account by the MEIP. However, the Commission did not elaborate further how precisely such costs would have to be accounted.

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[43] Point 233.

[44] In addition to the Advocate General Mazak's Opinion, delivered on 20 October 2011, see. RODRÍGUEZ MIGUEZ, J. A./GIPPINI FOURNIER, E., «El Principio del Inversor Privado en una Economía de Mercado ¿Quién da más?», in Noticias de la Unión Europea, nº 330, 2012 (Special Competition Law), pp. 45-59.

[45] Judgment of the Court of Justice of 5 June 2012, Commission/EDF (C-124/10 P) ECLI: EU:C:2012:318.

Apart from the Commission Legal Services arguments to the cassation of the GCJ, the Advocate General Mazak is Opinion, delivered on 20 October 2011, is in line with the Commission. However, finally, not with the Court of Justice.

The Opinion of the AG Mazáka can be opinion summarized as follows:

- The General Court's approach in the judgment under appeal must be rejected a fortiori because, if the State wishes to act potentially as a private investor, it still can: all it needs to do is to proceed to inject capital in an undertaking after it has exercised its fiscal powers and thus used its prerogatives of public authority[46].

- The State imposes taxes in the exercise of its public authority. It can hardly be claimed that the State has the power to tax in its capacity as a private investor. The corollary of imposing taxes — the waiving of tax debts — is also an activity, which the State undertakes as a public authority. Consequently, fiscal activities of the State — the imposition, collection, refund or remitting of taxes — are undoubtedly undertaken in the exercise of its public authority and cannot by definition be undertaken as a private investor[47].

- The General Court breached a distinction meticulously marked by the Court between acta iure gestionis and acta iure imperii. the General Court's approach might lead to legal uncertainty and a lack of transparency, as well as (tax) privileges for public enterprises. I would add that the last possibility could have a particularly adverse impact on the numerous sectors which were recently liberalised or which are in the process of being liberalised[48].

- The approach of the General Court runs counter to the requirement of transparency prescribed by EU law. As the Court of Justice has held 'a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators'[49].

- The Commission was right to take a principled line in the contested decision, insofar as there should be a visible separation of the role of the State qua public authority from the role of the State qua shareholder. The MEIP test should not be applicable until there is a level playing field for the various economic operators, and equality before tax. It must not be forgotten that the ratio of the MEIP is precisely to prevent any discrimination as between public enterprises and private enterprises, with a view to ensuring the correct application of the Treaty provisions on State aid. As we have seen, however, in the judgment under appeal, the General

[46] Cfr. Point 77.
[47] Cfr. Point 79.
[48] Cfr. Point 92.
[49] Cfr. Point 93.

Court strayed away from this equality and, accordingly, from the very raison d'être for the MEIP[50].

Nevertheless, the Court of Justice upheld the General Court Judgment. Again, in a summary way, the main arguments of the Court of Justice were as follow:

- It is clear from settled case law that the conditions which a measure must meet in, order to be treated as 'aid' for the purposes of Article 87 EC are not met if the recipient public undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources. In the case of public undertakings, that assessment was made by applying, in principle, the private investor test[51].

- The roles of the State as shareholder of an undertaking, on the one hand, and of the State acting as a public authority, on the other, must be distinguished[52].

- The applicability of the private investor test ultimately depends, therefore, on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it[53].

- If a Member State relies on that test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as shareholder[54].

  a) That evidence must show clearly that, before or at the same time as conferring the economic advantage took the decision to make an investment, by means of the measure actually implemented, in the public undertaking,
  b) it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability.
  c) It is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen.
  d) If the Member State concerned provides the Commission with the requisite evidence, it is for the Commission to carry out a global

[50] Cfr. Point 96.
[51] Cfr. Point 78.
[52] Cfr. Point 80.
[53] Cfr. Point 81.
[54] Cfr. Point 82.

assessment, taking into account — in addition to the evidence provided by that Member State — all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority. In particular, are relevant in that regard, as is its context, the objective pursued and the rules to which the measure is subject[55].

- The objectives underlying Article 87(1) EC and the private investor test, an economic advantage must — even where it has been granted through fiscal means — be assessed inter alia in the light of the private investor test, if, on conclusion of the global assessment that may be required, it appears that, notwithstanding the fact that the means used were instruments of State power, the Member State concerned conferred that advantage in its capacity as shareholder of the undertaking belonging to it[56].

4.- The Second Commission's Decision:

As Bartosch[57] pointed out in a comment of the GCJ, before the Court of Justice upheld it, the crucial issue of this case is the ambit of the MEIP, nor the differences between the possible roles of the State: as public authority using its public powers or as a investor; that is, acting in an economic capacity. The GCJ stressed that it had only ruled on the criterion to be applied to the measure under review – a fiscal measure transformed in a capital injection-, and that this did in no way whatsoever pre-empt a positive outcome of the State aid investigation to be-recon ducted by the Commission.

This opinion is especially relevant and in such way, premonitory, because this is what finally the Commission has done revisiting for second time this case.

The Commission re-opened the case and its investigations, producing a second decision, stablishing again, but in a more solid approach that the Frenech tax measure was indeed an illegal and incompatible State aid.

In Decision (EU) 2016/154, of 22 July 2015[58], the Commission developed a new and deeper analyses of the case, and applying the MEIP, concluded that «[t]he exemption from corporation tax in favor of Électricité de France for an amount of 5 882 849 762 French francs, relating to the reclassification as capital of the provisions corresponding to the value of the assets in kind allocated under concession to the high-voltage transmission network, constitutes State aid within the meaning of Article 107(1) of the TFEU.»[59],

[55] Cfr. Points 83 to 87.
[56] Cfr. Point 92.
[57] BARTOSCH, A, «Case Note on EDF v. Commission (T 156/04-Under Appel)», in *European State Aid Law Quarterly*, nº 3, 2019, pp. 679-582, p. 681.
[58] Commission Decision (EU) 2016/154 of 22 July 2015 on State aid SA.13869 (C 68/2002) (ex NN 80/2002) — reclassification as capital of the tax-exempt accounting provisions for the renewal of the high-voltage transmission network (RAG) implemented by France in favour of EDF (OJ L 34, 10.2.2016, p.152).
[59] Cfr. Article 1 of Decision (EU) 2016/154.

And ordered to the French Government the recovery of the aid.

The Commission summarized the two previous Judgments of the Courts in this same case in only two points of its long decision. Two basiC ideas:

> 1) «it was incumbent on the Commission to determine whether a private investor would have invested a comparable amount in similar circumstances. The General Court took the view that the Commission should have checked whether the operation satisfied the private investor test.»; and
>
> 2) «The Court of Justice considered that the finding made by the General Court, to the effect that the obligation for the Commission to verify whether the capital had been provided by the state in circumstances corresponding to normal market conditions existed regardless of the way in which that capital had been provided by the state, was not vitiated by an error of law. The Court of Justice also took the view that the General Court did not err in law either in finding that the private investor test may be applicable even where fiscal means have been employed.»

Under these two premises[60], the Commission re-opened the case and applied the MEIP, among other relevant elements of the notion of state aid to the measure in question, because also had to prove that the other criteria of Article 107.1 FTEU were satisfied as well. This time we are only focusing our attention in the Commission's application of the MEIP.

First, it is evident that this case clearly confirms that the Commission's investigations have to reinforce the «economic approach» in order to prove the advantage element. For this purpose and these type of cases, the MEIP or, in a more generally way, the MEO test is a very useful and necessary instrument of analyses.

The Commission explicitly remarked the basic elements of the analyses it had to do, in order to «determine whether the principle of the prudent private investor in a market economy is applicable, an overall assessment must be made of whether the French Republic granted the tax exemption in its capacity as shareholder or in its capacity as public authority.»[61]

For this purpose, the Commission has focused in all these factors, «examined in more detail below in relation to the circumstances of the case»: The four factors of the Commission's decision are better expose in the Nicolaides's systematization as follows:

> 1. The Member State must establish on the base of objective evidence that the measure was implemented by it acting as a shareholder.

[60] Nevertheless it is remarkable that the Commission's references to both Judgments are continues through the decision, supporting every affirmation related with the MEIP analyses of the case.

[61] In the point 126 of the new Decision,

2. The evidence must show that the Member State concerned took the decision to make an investment at the time the measure was implemented.
3. The decision must be based on economic evaluations comparable to those which a rational private investor would have had carried out, before making the investment, in order to determine its future profitability.
4. The Commission may refuse to examine evidence established after the investment was made.
5. The nature of the measure is relevant in that regard.
6. The application of the private investor test must make it possible to determine whether a private shareholder would have injected a similar amount.

Even the Commission, as Nicolaides remakes, «did not find any evidence that the French government acted as a shareholder [...] or that any ex ante studies had been carried out that showed the profitability of the investment [...]. However, the Commission proceeded to examine whether the French government could expect to be remunerated on its investment.»

Even that evidence, the Commission examined whether the French government could expect to be remunerated on its investment. The Commission came to the conclusion[62] that, «The vast majority of the evidence described above []points 140-153] clearly shows that France did not, either before or at the same time as conferring the economic advantage resulting from the non-payment of the corporation tax, take a decision to make an + in EDF by way of the tax exemption. Accordingly, the prudent private investor in a market economy principle does not appear to be applicable to this measure. The considerations set out below on the application of the private investor test are therefore provided in the alternative.»]

The Commission applied the MEIP as an alternative way to prove its first conclusions and to comply with the Court of Justice that, in its Judgment of 5 June 2012, held that the application of the private investor principle should make possible to determine whether, in similar circumstances, a private shareholder would have subscribed, to an undertaking in a situation comparable to that of EDF, an amount equal to the tax due[63].

Consequently, any difference between the cost to the private investor and the cost to the state as investor may be taken into account when assessing whether the conditions laid down by that principle are met[64].

The assessment was carried out by reference to the objective and verifiable evidence which was available and the developments which were foreseeable, at the time when the decision to make the investment was taken[65].

[62] Point 154.
[63] The decision noted to paragraph 95 of the judgment of CJEU.
[64] The decision noted to paragraph 96 of the judgment of the judgment of CJEU.
[65] The decision noted to paragraphs 102 and 105 of the judgment of the judgment of CJEU.

On that view, the Commission concluded that «only the benefits and obligations linked to the situation of the state as shareholder — to the exclusion of those linked to its situation as a public authority — are to be taken into account[66].»

From this point, the Commission's is, as Nicolaides commented, «a textbook case of how to carry out a meticulous analysis of the possible application of the MEIP.».

In the decision, the Commission determined the «MEIP benchmarks», that is, «benchmark of an investor pursuing an objective of long-term profitability»[67] the «Risk-free benchmark» and finally, the «Benchmark with risk margin»[68].

Among the various methods used in finance to estimate the «opportunity cost or the rate of return required of an ownership interest transferable against consideration in the capital of an undertaking», the Commission applied, as usual, the «most common»[69], the «Capital Asset Pricing Model» («CAPM»)[70].

After this exhaustive analyse, the Commission come to the conclusion that the France had unlawfully implemented the aid in question in breach of Article 108(3) of the TFEU. The Commission considers that the exemption from corporation tax relating to the reclassification as a capital contribution, provided for by Act No 97-1026, of accounting provisions for the renewal of the high-voltage transmission network, already implemented to the tune of FRF 14 119 065 335, constitutes aid that is illegal and incompatible with the internal market[71].

V.- SOME CONCLUSIVE REFLECTIONS

The first idea we can highlight is that EDF was a Energy sector company and that the measure in question was a tax nature. Both circumstances are relevant.

Energy is a strategical sector and many of the biggest energy companies are still in hands of the public sector. This strategical character and the fact that energy

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66 The decision noted to paragraph 79 of the judgment of the judgment of CJEU.

67 Point 157.

68 See points 158-215

69 Point 183.

70 As the Commission explained in footnote (1): «The model estimates the target rate of return required by an investor in an undertaking's capital (k) as the result of an addition to the rate of return on a financial asset deemed to be risk free or low risk, namely, a sovereign bond in the reference financial market (rf), a market- risk premium reflecting the higher risk of an investment in shares (Km – rf) multiplied by a risk coefficient specific to the share of the undertaking concerned (β) which can be, preferably, that of the undertaking itself or, failing this, that of comparable undertakings used as a reference. Parameter β must be estimated for an undertaking with no debt (gearing) in order to measure the inherent risk of (the share of) the undertaking in relation to the market. The model is $k = rf + \beta \times (Km - rf)$. The Commission has applied the CAPM model to estimate the required rate of return on capital investments in an undertaking, endorsed by the General Court of the European Union: T-319/12 — Spain v Commission, 'Ciudad de la Luz', EU:T:2014:604, paragraphs 48 to 66. For a fuller description, see Vernimmen et al. Corporate Finance John Wiley & Sons ed. 2nd edition, 2009, Chap. 22; for the findings of surveys of the frequency of use of estimation methods, see p. 460. The theoretical bases and a numerical application of the CAPM model to the present case are also contained in the study carried out by Oxera on behalf of EDF (recital 70), in particular Annex I.»

71 Point 216.

companies need of heavy investments to compete in the ongoing «European Energy Internal Market».

Under the Commission surveillance of State Aid it is more difficult than ever to Member States the design of alternatives ways to finance their energy firms. For this reason, Member States try to explore what Mattera[72] called "more sophisticated" State Aid. Tax measures are an easy answer to this political and strategical need.

This second EFD Commission's decision show us that the Commission is a hard fighter and things will not be so easy in the future for the States and for the old monopolies that remain in public hands. Even State Aid for environment in Energy Sector are monitored by Commission in a more strict way[73].

Some of Bartosch's brilliant comments on the General Court Judgment in EDF Case remain of interest, especially after the Second Commission's Decision, and we are basically agree with him.

As we noted before, Bartosch[74] had pointed out that the crucial issue of this case was the ambit of the MEIP, nor the differences between the possible roles of the State: as public authority using its public powers or as an investor; that is, acting in an economic capacity. The General Court stressed that it had only ruled on the criterion to be applied to the measure under review – a fiscal measure transformed in a capital injection-, and that this did in no way whatsoever pre-empt a positive outcome of the State aid investigation to be re-conducted by the Commission.

This opinion is especially relevant, because this is what finally the Commission has done, revisiting the EDF case, re-opening its investigation and producing a second decision, stablishing again, but in a more solid approach, that the Frenech tax measure was indeed an illegal and incompatible State Aid.

On the same comment, this author asked himself three questions that, in our opinion, are of full interest after the Court of Justice Judgment and the Secord Commission decision too[75]:

1) Was the ruling in EDF in contradiction with the existing jurisprudence?
2) Did the EDF ruling charged the Commission's basement in tax cases?, and
3) Will there be an enforcement gap?

- Answering the first question, Bartosch argued that the previous general rule that every fiscal advantage had consistently qualified as to belong to the exercise of public power, which prevented the application of the MEIP Is no more a general rule. From the

[72] See. MATTERA, A., El Mercado Único, sus reglas, su funcionamiento, Civitas, Madrid, 1991, pp. 90 a 92.
[73] See. «Energy and environment: State aid to secure electricity supplies», at http://ec.europa.eu/competition/sectors/energy/overview_en.html
[74] BARTOSCH, A, «Case Note on EDF…, op. cit., p. 681.
[75] BARTOSCH, A, «Case Note on EDF…, op. cit., pp. 681-682.

> General Court Judgment, especially after its confirmation by the Court of Justice, it would be analyzed in a case-by-case basement. Not all fiscal measures must be analysed under the MEIP, only in such special cases when it is necessary by the nature and structure of the measure in question. That is, even fiscal measures have as primary objective to get money to public budget in order to pursuit general or specific public interests, it is possible that these measure would be, in particular circumstances, only the instrument to pursuit a goal of its own entrepreneurial interest. In this case the capital injetion into a public firm where the only owner its the French State.

We agree with this opinion and with the General Court, especially after the evidence that a fiscal measure can be considered, almost theatrically, as State aid if all the requirements of the Article 107.1 TFUE are fluffed. Probably, when French Government articulated this singular way for financing EDF was thinking that only the fiscal nature of the measures avoided the application of State aid rules. It was a fail, and this second Commission Decision probes it.

Today is much clear than ever that a fiscal measure can be a State Aid and, as consequence, it will be someted to potential Commission investigations and to the obligations imposed in Article 108 TFUE. On 1997, this idea was probably not so clear.

(2) The answer to the second Bartosh's question is so clear too and we are in agree with him. Does the EDF ruling charge the Commission's basement in tax cases? In the rare cases when the fiscal measure is an instrument for a entrepreneur public activity, the Commission have to applied the MEIP, (or more generally, the MEO test). The Commission «would not be allowed to choose the easy way out and merely look at the normal tax rate compared to the one applied to the beneficiary undertaking».

We only disagreed that this is not a easy way, but a different and not less complex way of basement the existence of State aid. The MEIP is a tool to the assessment of the advantage element and the other (the comparative tax rates) is to assessment of the selective element.

(3) In relation with the third question («Will there be an enforcement gap?»), it is clear after the second Commission's Decision in EDF that the answer is not. The Commission has the power and the capacity to investigate fiscal measure under the MEIP when it is necessary. This Decision proves that it will do when it is so. We believe that this is the only way to guarantee a Level Playing Field in strategical sectors as Energy and to make the Internal Market possible.

As we usually watch on TV serials, the story «To Be Continued», but, step by step, the European State Aid Regulation is going on, meantime «grey zones» are reducin slowly but without return.

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