EUROPEAN UNION - STATE AIDS

The General Court clarifies the application of the presumption of selective advantage

Cases T-479/11 and T-157/12 of the General Court, *République française et IFP Énergies nouvelles contre Commission européenne,* May 29, 2016

In a judgment handed down on May 26, 2016, the General Court ("GC") clarified the standard of proof applicable to the notion of advantage.

This judgment is in line with the GC's 2006 judgment against Le Levant where the GC sanctioned the Commission for having qualified a measure as entailing state aid without conducting an assessment of all the criteria of Article 107 TFEU, particularly the condition on distortion of competition.[1]

In the case at hand, the Commission stated that the change in the legal form of the Institut français du Pétrole ("IFP") into an establishment of an industrial and commercial character (établissement public à caractère industriel et commercial) ("EPIC") granted a selective advantage to the IFP.[2]

First, the Commission noted that EPICs, as legal entities governed by public law, are not subject to insolvency and bankruptcy procedures, which amounts to an unlimited state guarantee. Then the Commission concluded that the state guarantee would give an advantage to the IFP in dealings (i) with banks and financial institutions and (ii) with customers and suppliers. In this respect, the Commission noted that IFP customers or suppliers had rewarded the low risk of default of the IFP by granting it price reductions, thus giving an economic advantage to the IFP.

The plaintiffs did not challenge the first finding of the Commission, i.e., that the legal status of EPICs constituted an unlimited state guarantee. However, the plaintiffs challenged the fact that this unlimited state guarantee granted a selective advantage to the IFP.

The GC ruled in favor of the plaintiffs and sanctioned the Commission for its "purely hypothetical legal approach, which was moreover lacking clarity and coherence" (para. 94). The position of the GC is interesting because it clarifies previous case law on the legal status of EPICs. In the *La Poste* judgment, the Court of Justice determined that the Commission could establish the existence of a selective advantage arising from a state guarantee by way of a presumption without assessing the effects of the guarantee.[3]

In the case at hand, the GC considered that the Commission could not operate with such a presumption. The GC stressed that the validity of the presumption depends on the plausibility of the assumptions on which it is grounded.

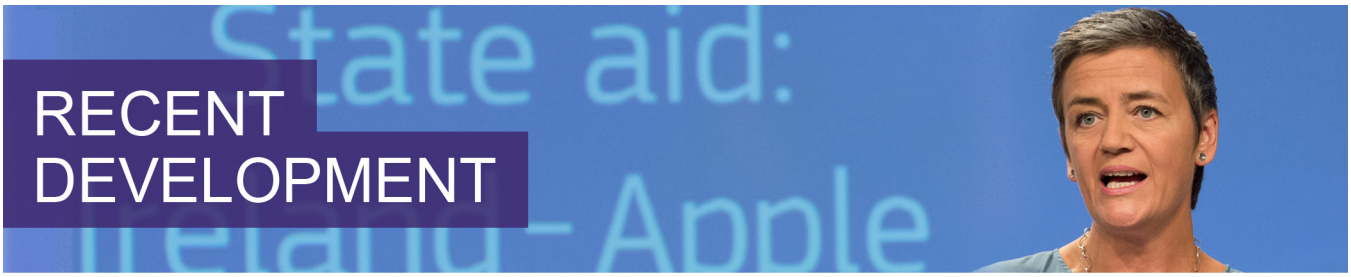
[1] General Court, February 22, 2006, case T-34/02, *Le Levant*.

[2] General Court, May 26, 2016, cases T-479/11 and T-157/12, *République française et IFP Energies nouvelles c/ Commission*.

[3] Commission, Decision n° 2010/605/EU dated January 26, 2010; confirmed by the ECJ on April 3, 2014 in its judgment C-559/12 P, *La Poste*.

Therefore, the Commission was entitled to assume that the state guarantee would give a selective advantage to the IFP in dealings with banks and financial institutions through advantageous credit conditions. However, the Commission erred in law in extending the presumption to demonstrate the existence of a selective advantage in dealings with suppliers or customers. According to the GC, any price decrease provided by the suppliers or the customers could have been explained by several different factors (joint buying, long payment periods, etc.), which were not assessed by the Commission.

Thus, the GC partially annulled the contested decision on the grounds that the Commission extended the presumption developed in the *La Poste* judgment to dealings with suppliers and customers and did not properly assess the existence of a selective advantage.



RECENT DEVELOPMENT

On August 30, 2016, the European Commission ordered the Irish government to revise tax assessments which allegedly led to tax advantages of up to EUR 13 billion and to recover taxes due from Apple, Inc. ("Apple"). The magnitude of this recovery order shows the Commission is determined to enforce its interpretation of State aid rules wherever it believes a fiscal advantage is being granted. While some have applauded the decision, the Commission's approach is also subject to potentially significant questions: some of the concerns raised include (i) whether the Commission has competence to review the tax regime of a member state, (ii) how a tax ruling which simply interprets the existing tax code can be considered to provide an advantage, and (iii) whether the Irish tax code itself should be considered as an existing aid scheme, since presumably it has been in force for more than 10 years. The decision can be appealed by the Irish Government and Apple. However, it is important to note that the Commission has the right to enforce the decision even while the appeal is pending.

Earlier this year, the Commission published, on May 19, 2016, its Communication on the notion of State aid, mostly summarizing its decisional practice and European case law regarding the criteria of qualification of a State aid. In this Communication, the Commission further explains its position with respect to tax rulings. The Communication is available at this **link**.

Now that the Commission's position is clearly stated, undertakings may anticipate and assess the risks they face in relation to their rulings. For further information in this regard, please see our client memorandum: *Tax rulings under EU State aid rules after Apple: What is targeted and what can be done?*, available at this **link**.