Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

19 September 2018(*)

(Appeal — State aid — State aid scheme implemented by France — Unlimited State guarantee conferred on the Institut français du pétrole (IFP) by the grant of the status of publicly owned industrial and commercial establishment (EPIC) — Decision declaring that measure as partially not constituting State aid and as partially constituting State aid compatible with the Internal market, subject to certain conditions — Concept of 'aid scheme' — Presumption of the existence of an advantage — Burden and standard of proof)

In Case C−438/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 4 August 2016,

European Commission, represented by B. Stromsky and D. Grespan, acting as Agents,

appellant,

the other parties to the proceedings being:

French Republic, represented by D. Colas and J. Bousin, acting as Agents,

IFP Énergies nouvelles, established in Rueil-Malmaison (France), represented by E. Morgan de Rivery and E. Lagathu, avocats,

applicants at first instance,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, A. Borg Barthet, M. Berger and F. Biltgen, Judges,

Advocate General: M. Wathelet,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 28 September 2017,

after hearing the Opinion of the Advocate General at the sitting on 7 December 2017,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 26 May 2016, *France and IFP Énergies nouvelles* v *Commission* (T−479/11 and T−157/12, EU:T:2016:320) ('the judgment under appeal'), in so far as, by that judgment, the General

Court annulled Article 1(3), (4) and (5) and Articles 2 to 12 of Commission Decision 2012/26/EU of 29 June 2011 on State aid granted by France to the Institut Français du Pétrole (Case C 35/08 (ex NN 11/08)) (OJ 2012 L 14, p. 1) ('the contested decision').

Legal context

2 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), in force at the time of the facts at issue, was worded as follows:

'For the purpose of this Regulation:

(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article [107(1) TFEU];

…

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

(d) "aid scheme" shall mean any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

(e) "individual aid" shall mean aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;

…'

3 Point 1.2 of Commission Notice on the application of Articles [107 and 108 TFEU] to State aid in the form of guarantees (OJ 2008 C 155, p. 10) ('the Guarantee Notice'), entitled 'Types of guarantee', provides:

'In their most common form, guarantees are associated with a loan or other financial obligation to be contracted by a borrower with a lender; they may be granted as individual guarantees or within guarantee schemes.

However, various forms of guarantee may exist, depending on their legal basis, the type of transaction covered, their duration, etc. Without the list being exhaustive, the following forms of guarantee can be identified:

…

– unlimited guarantees as opposed to guarantees limited in amount and/or time. The Commission also 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 procedures or provides an explicit State guarantee or coverage of losses by the State. The same applies to the acquisition by a State of a holding in an enterprise if unlimited liability is accepted instead of the usual limited liability,

…'

4 Point 2.1 of the Guarantee Notice, entitled 'General remarks', states:

‘Article [107(1) TFEU] states 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, in so far as it affects trade between Member States, be incompatible with the common market.

These general criteria equally apply to guarantees. As for other forms of potential aid, guarantees given directly by the State, namely by central, regional or local authorities, as well as guarantees given through State resources by other State-controlled bodies such as undertakings and imputable to public authorities, may constitute State aid.

In order to avoid any doubts, the notion of State resources should thus be clarified as regards State guarantees. The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if it turns out that no payments are ever made by the State under a guarantee, there may nevertheless be State aid under Article [107(1) TFEU]. The aid is granted at the moment when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment when the guarantee is given.

…’

5 According to Point 2.2 of the Guarantee Notice, entitled ‘Aid to the borrower’:

‘Usually, the aid beneficiary is the borrower. As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium. When the borrower does not need to pay the premium, or pays a low premium, it obtains an advantage. Compared to a situation without guarantee, the State guarantee enables the borrower to obtain better financial terms for a loan than those normally available on the financial markets. Typically, with the benefit of the State guarantee, the borrower can obtain lower rates and/or offer less security. In some cases, the borrower would not, without a State guarantee, find a financial institution prepared to lend on any terms. …’

Background to the dispute and the contested decision at issue

6 IFP Énergies nouvelles (‘IFPEN’), known prior to 13 July 2010 as the Institut Français du Pétrole, is a French public body, responsible in particular for research and development in the fields of oil and gas prospecting and refining and petrochemicals technologies, for the training of engineers and technicians and for the provision of sector information and documentation.

7 Until 2006, IFPEN was a legal person governed by private law which, in accordance with provisions of French national law, operated under the economic and financial supervision of the French Government.

8 Under Law No 2005 781 of 13 July 2005, establishing the energy policy guidelines (JORF, 14 July 2005, p. 11570), IFPEN was converted, with effect from 6 July 2006, into a publicly owned industrial and commercial establishment (‘EPIC’).

9 Under French law, EPICs have a legal personality which is separate from that of the State, they are financially independent and they exercise certain special powers which usually include the performance of one or more public service tasks. As legal persons governed by public law, they are not subject to the ordinary law applicable to insolvency procedures by virtue of the general principle of the immunity from seizure enjoyed by public assets.

10 Since the specific features of the legal status of EPICs attracted the attention of the Commission, the latter, in its Decision 2010/605/EU of 26 January 2010 on State aid C 56/07 (ex E 15/05) granted by France to La

Poste (OJ 2010 L 274, p. 1) ('the "La Poste" decision'), examined that status in the light of the rules governing State aid in the European Union. In that regard, after having found that, on the basis of their status, EPICs benefit from an implied and unlimited State guarantee, the Commission considered, in that case, that such a guarantee constituted State aid for the purposes of Article 107(1) TFEU, in so far as it allowed La Poste to obtain more favourable borrowing terms than those that it would have obtained on its own merits.

11 It is in the context of the proceedings that led to the adoption of the 'La Poste' decision that, during 2006, the French authorities informed the Commission of IFPEN's conversion from a legal person governed by private law into an EPIC. That information was communicated to the Commission in the context of proceedings initiated in 2005 in connection with the investigation, in the light of the rules governing State aid, of public funding granted to IFPEN by the French authorities.

12 The Commission decided to separate the investigation of whether IFPEN's conversion into an EPIC was capable of constituting State aid for the purposes of Article 107(1) TFEU from the investigation of IFPEN's public funding. Accordingly, first, on 16 July 2008, it closed the investigation of the public funding granted to IFPEN by adopting Decision 2009/157/EC on the aid measure implemented by France for the IFP Group (C 51/05 (ex NN 84/05)) (OJ 2009 L 53, p. 13). Secondly, that day, by a decision published in the *Official Journal of the European Union* (OJ 2008 C 259, p. 12), it decided to initiate a formal investigation procedure concerning the unlimited State guarantee in favour of IFPEN and invited interested parties to submit their comments.

13 On 29 June 2011, the Commission adopted the contested decision.

14 In that decision, the Commission, in the first place, considered, on the basis of reasoning similar to that in its 'La Poste' decision, that IFPEN's conversion into an EPIC had conferred on that establishment, from 6 July 2006, the benefit of an implied and unlimited State guarantee.

15 In that regard, the Commission noted, in essence, that the particular features of EPIC's status implied that the State plays the role of guarantor of last resort for the reimbursement of IFPEN's debts. In that way, there is both an advantage to that establishment and a drain on public resources, since the State waives the remuneration that normally accompanies guarantees. Moreover, the guarantee creates the risk of a potential and future claim on the resources of the State, since the latter could find itself obliged to pay IFPEN's debts.

16 In the second place, the Commission stated that the unlimited State guarantee arising from IFPEN's EPIC status was capable of constituting State aid in so far as it covered its economic activities. It therefore decided to limit the scope of its investigation into the existence of State aid exclusively to the economic activities carried on by IFPEN.

17 In the third place, the Commission examined whether that implied and unlimited guarantee conferred a selective advantage on IFPEN, for the purposes of Article 107(1) TFEU, in its dealings with banks and financial institutions, with suppliers and with customers.

18 First of all, as regards dealings with banks and financial institutions, the Commission concluded that that establishment had not derived any real economic advantage from the State guarantee associated with its EPIC status during the period from its conversion into an EPIC, in July 2006, until the end of 2010 ('the period at issue'). That institution nevertheless noted that such a conclusion was valid only retrospectively, since it could not make any presumptions about how market operators would behave in the future or how their perception of the impact of the State guarantee on the risk of default by IFPEN would evolve.

19 Next, as regards dealings with suppliers, the Commission concluded that IFPEN had benefited from a real economic advantage, consisting in a reduction of prices charged by its suppliers. That price reduction resulted from a more favourable assessment by the latter of the risk of default of IFPEN, since the latter could not be placed into judicial liquidation in virtue of its EPIC status. In that regard, it, in essence,

considered that, in the absence of the State guarantee, a supplier wishing to benefit from a comparable guarantee would require the services of a specialised credit institution or insurance undertaking. Therefore, the price reduction could be expressed in terms of costs of equivalent risk cover.

20 Finally, as regards dealings with customers, the Commission considered that, in the light of the guarantee granted by the State to IFPEN, its customers were assured that the latter would never be subjected to compulsory winding up, and would therefore always be able to fulfil its contractual obligations, or, if it could not, that customers would be compensated. In the absence of that guarantee, a customer wishing to benefit from the same level of protection would be required to obtain a performance bond from a financial intermediary. Therefore, IFPEN benefited from a real economic advantage, consisting in the non-payment of a premium for a performance bond, or at the very least a best efforts guarantee, an advantage which it would have offered to its customers.

21 The Commission considered that the economic advantage derived by IFPEN from the State guarantee was selective, in so far as IFPEN's competitors, who are subject to insolvency procedures provided for under ordinary law, did not benefit from a comparable State guarantee.

22 In the fourth place, the Commission examined the compatibility of that State aid in the light of the rules set out in the Community framework for State aid for research and development and innovation (OJ 2006 C 323, p. 1). It concluded that the State aid granted to the 'IFPEN group' was compatible with the internal market, subject to certain conditions spelled out in the contested decision.

The procedure before the General Court and the judgment under appeal

23 By applications lodged with the Registry of the General Court on 9 September 2011 (Case T−479/11) and on 5 April 2012 (Case T−157/12), the French Republic and IFPEN each brought actions for the annulment of the contested decision.

24 In support of their actions, the French Republic and IFPEN complained that the Commission failed to fulfil its evidential obligations with regard to State aid and wrongly interpreted the concept of 'selective advantage' for the purposes of Article 107(1) TFEU.

25 By order of 2 December 2013, the General Court stayed the proceedings in Cases T−479/11 and T−157/12 pending delivery of the judgment of the Court in Case C−559/12 P, concerning the lawfulness of the 'La Poste' decision.

26 On 3 April 2014, the Court delivered the judgment in *France* v *Commission* (C−559/12 P, EU:C:2014:217).

27 By decision of 8 September 2015, the General Court joined Cases T−479/11 and T−157/12 for the purposes of the oral part of the procedure and the decision closing the proceedings.

28 By the judgment under appeal, the General Court partially upheld the actions brought by the French Republic and by IFPEN in those cases and annulled the contested decision, in so far as it had classified as 'State aid', for the purposes of Article 107(1) TFEU, the guarantee deriving from IFPEN's EPIC status and in so far as it had specified the consequences of that classification. The General Court dismissed the actions as to the remainder.

29 The grounds of the judgment under appeal, which are relevant to the present appeal, are in essence the following.

30 First of all, the General Court explained, in paragraphs 78 to 89 of the judgment under appeal, that the method chosen by the Commission to determine the existence of a selective advantage for the purposes of

Article 107(1) TFEU — consisting in examining the benefit derived by IFPEN from its EPIC status in its dealings with banks and financial institutions and with suppliers and customers — was not erroneous.

31 Nevertheless, the General Court held, in paragraph 90 of that judgment, that the way the Commission had applied that method to the present case demonstrated considerable flaws, in particular as regards the definition of the alleged advantage which IFPEN derived from the unlimited State guarantee, inherent in its EPIC status, in its dealings with suppliers and customers. In particular, in paragraph 94 of that judgment, the General Court considered that the Commission's conclusion, according to which that guarantee had created a 'real economic advantage' in favour of IFPEN, was based on purely hypothetical reasoning.

32 Therefore, first, as regards dealings between IFPEN and its suppliers, the General Court noted, in paragraph 95 of that judgment, that, according to the Commission, the advantage that that institution had been able to derive from the unlimited State guarantee consisted in a price reduction granted to it by its suppliers as a result of the absence of default risk.

33 However, in paragraph 99 of the judgment under appeal, the General Court noted that there was no evidence of the existence, on the market concerned or in the course of business in general, of a tendency for suppliers to grant price reductions to establishments benefiting from a State guarantee against the risk of insolvency.

34 Secondly, as regards IFPEN's dealings with its customers, the General Court noted, in paragraph 111 of that judgment, that the Commission had identified the advantage which that establishment had been able to derive from the State guarantee associated with its status as being the non-payment of a premium for a performance bond or best efforts guarantee, an advantage which that establishment had been able to offer to its customers.

35 However, the General Court considered, in paragraph 114 of that judgment, that such reasoning presupposed that, under normal market conditions, customers of research institutes, such as IFPEN, avail themselves that type of guarantee in order to protect themselves against the risk of insolvency on the part of the other contracting party and that, in circumstances involving a guarantee such as that enjoyed by IFPEN, the latter's customers no longer needed to themselves obtain an equivalent guarantee.

36 The General Court held that the Commission had adduced no evidence capable of demonstrating that that reasoning was well founded or likely.

37 Next, in paragraphs 133 to 181 of that judgment, the General Court rejected the arguments presented by the Commission concerning the scope and application of the presumption of advantage established by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217).

38 In that regard, the General Court noted, in paragraph 136 of the judgment under appeal, that the possibility of using a presumption as a means of proof depended on the plausibility of the assumptions on which that presumption was based and pointed out, in paragraphs 139 and 140 of that judgment that the presumption established in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), was based on a twofold premiss that the Court had judged to be plausible, namely the existence of a favourable influence of the guarantee on the creditors' assessment of the risk of default on the part of the beneficiary and a reduction in the cost of credit. However, the General Court held that, conversely, the Commission had not adduced, in the contested decision, any evidence capable of showing the plausibility of those assumptions, in particular the fact that IFPEN's EPIC status was such as to encourage suppliers to agree to price reductions.

39 Therefore, the General Court noted, in paragraph 142 of its judgment, that the Commission could not rely on the presumption laid down by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), to establish the existence of an advantage in IFPEN's dealings with its suppliers and even with its customers. That presumption serves only to establish the existence of an

advantage in the form of more favourable credit terms and thus applies only to an EPIC's dealings with banks and financial institutions.

40 The General Court also ruled, in paragraphs 162 et seq. of the judgment under appeal, on the argument presented by the Commission, based on EU case-law in that regard, according to which where it assesses an aid scheme, that institution may confine itself to examining the general characteristics of the scheme at issue in order to establish whether it involves elements of State aid.

41 In that regard, without ruling on the plea of inadmissibility raised by IFPEN and the French Republic against that argument, alleging that the contested decision did not classify the guarantee at issue as an 'aid scheme', the General Court rejected that argument as unfounded.

42 Although, in paragraph 168 of the judgment under appeal, the General Court considered that the guarantee associated with the EPIC status in general comes within the concept of 'aid scheme' for the purposes of Article 1(d) of Regulation No 659/1999, on the contrary, it held, in paragraphs 169 to 172 of that judgment, that IFPEN's conversion into an EPIC, in so far as it could be classified as 'State aid', constituted aid granted on the basis of an aid scheme which must be notified, that is to say individual aid for the purposes of Article 1(e) of that regulation.

43 Finally, as regards the dealings between IFPEN and banks and financial institutions, the General Court held, in paragraph 187 of the judgment under appeal, that the Commission could, in principle, rely on the presumption established by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217). However, in paragraphs 188 and 189 of the judgment under appeal, the General Court held that that presumption had been rebutted by the Commission itself, since the latter had concluded, in the contested decision, that IFPEN had derived no real economic advantage in the form of more favourable credit terms granted to it by banks and financial institutions in virtue of its EPIC status. The General Court concluded therefrom, in paragraph 190 of that judgment, that the investigation carried out by the Commission had shown that IFPEN had derived no advantage from its conversion into an EPIC in its dealings with banks and financial institutions during the period concerned.

44 At the conclusion of its reasoning, the General Court concluded, in paragraph 197 of the judgment under appeal, that the Commission had not, in the contested decision, shown the existence of an advantage that IFPEN could have derived from the State guarantee associated with its EPIC status, either in its dealings with banks and financial institutions or in those with suppliers or customers.

45 Consequently, the General Court annulled Article 1(3), (4) and (5) and Articles 2 to 12 of the contested decision, by which the Commission had classified the guarantee deriving from IFPEN's EPIC status as 'State aid' for the purposes of Article 107(1) TFEU, and specified the consequences of that classification.

Forms of order sought by the parties

46 The Commission claims that the Court should:

– set aside the judgment under appeal;

– refer the case back to the General Court for reconsideration;

– reserve the costs.

47 The French Republic contends that the Court should:

– dismiss the appeal;

– order the Commission to pay the costs.

48 IFPEN contends that the Court should:

– dismiss the appeal;

– order the Commission to pay all the costs, including those incurred before the General Court.

The appeal

49 The Commission puts forward three grounds in support of its appeal.

The first ground of appeal

50 By its first ground of appeal, divided into three parts, the Commission alleges that the General Court erred in law by prohibiting it from limiting its investigation to the general characteristics of the aid scheme at issue, and by wrongly concluding that the guarantee enjoyed by IFPEN in its dealings with banks and financial institutions does not constitute State aid, relying on the absence of a real advantage for that establishment in the past (first and second parts). The Commission also alleges that the General Court exceeded the limits of its judicial review by upholding a head of claim that had not been raised by IFPEN and which was not sufficiently substantiated by the French Republic (third part).

First part of the first ground of appeal

– *Arguments of the parties*

51 In the context of the first part of the first ground of appeal, directed against paragraphs 162 and 164, and against paragraphs 168 to 173 of the judgment under appeal, the Commission claims that the General Court incorrectly held that the guarantee benefiting IFPEN did not come within the concept of 'aid scheme' referred to in Article 1(d) of Regulation No 659/1999 and that, consequently, it could not rely on the general characteristics of that guarantee in order to show that it constitutes State aid.

52 In that regard, the Commission states that that concept of 'aid scheme' covers measures which are characterised by the fact that certain elements are not defined and remain unspecified at the time of their adoption, or even, in some cases, during their application. Therefore, when the Commission assesses the scope of such measures in order to determine whether they constitute aid for the purposes of Article 107(1) TFEU, it may restrict itself to examining their general characteristics.

53 In the present case, the Commission considers that the State guarantee in favour of IFPEN, which is not linked to a specific project and which is granted to it for an indefinite period and for an indefinite amount, must be classified as an 'aid scheme'. According to the Commission, it concerns, in particular, a 'scheme of aid schemes', given that the grant of the guarantee in favour of IFPEN itself belongs to a larger aid scheme, namely the implied and unlimited State guarantee associated by law with the EPIC status.

54 The Commission contests, therefore, the findings of the General Court, in paragraphs 168 to 170 of the judgment under appeal that the guarantee associated with the EPIC status must be classified as an 'aid scheme', whereas the recognition of the EPIC status, with the grant of the guarantee resulting therefrom, constitutes individual aid which must be notified to the Commission.

55 In that regard, the Commission states, first, that, contrary to the finding made in paragraph 171 of the judgment under appeal, the requirement to notify the aid in no way proves that the guarantee in favour of IFPEN does not constitute an aid scheme. Both aid schemes and individual aid must be notified to the Commission.

56 Secondly, the Commission highlights the fact that the General Court's interpretation results in depriving it of the possibility of adopting appropriate measures in order to request the French authorities to terminate

the guarantee for a specific EPIC. In accordance with Article 108(1) TFEU, the Commission may propose appropriate measures with respect solely to aid schemes, and not to individual aid.

57 IFPEN responds that the first part of the first ground of appeal is, in two respects, manifestly inadmissible.

58 In that regard, IFPEN notes, firstly, that the reasoning set out by the Commission is based on a novel interpretation of the concept of 'aid scheme', according to which the guarantee in favour of IFPEN is a 'scheme of aid schemes'. Therefore, the first part is based on a new argument, which cannot be admitted at the appeal stage, in accordance with Article 170(1) of the Rules of Procedure of the Court.

59 Secondly, IFPEN points out that, as the General Court itself acknowledged in paragraph 164 of the judgment under appeal, the contested decision did not classify the grant of the guarantee in favour of IFPEN as a 'scheme of aid schemes'. In fact, that decision was adopted on the basis of substantive and procedural rules of law of the Union which preclude the Commission from considering the measure examined to constitute an aid scheme.

60 On the substance, IFPEN and the French Government contest the Commission's arguments.

– *Findings of the Court*

61 It should be noted, first, that, pursuant to Article 1(d) of Regulation No 659/99, 'aid scheme' means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within that act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount.

62 Secondly, Article 1(e) of that regulation defines the concept of 'individual aid' as any aid that is not awarded on the basis of an aid scheme, or which is awarded on the basis of an aid scheme, but which must be notified.

63 Moreover, as is apparent from the Court's case-law in relation to State aid, the Commission may, in the case of an aid scheme, confine itself to examining the general characteristics of the scheme in question, without being required to examine each particular case in which it applies in order to establish whether that scheme involves elements of aid (judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C−71/09 P, C−73/09 P and C−76/09 P, EU:C:2011:368, paragraph 130, and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C−106/09 P and C−107/09 P, EU:C:2011:732, paragraph 122).

64 It is in the light of those considerations that it is necessary to verify whether, as the Commission claims, the General Court erred in law when it held, in paragraphs 169 to 172 of the judgment under appeal, that the guarantee in favour of IFPEN does not constitute an aid scheme and that the Commission cannot, therefore, rely on the general characteristics of that measure in order to demonstrate that it constitutes State aid.

65 In that regard, it must be noted, in the first place, that the General Court correctly held, in paragraph 169 of the judgment under appeal, that the measure examined in the contested decision was not, in general, the guarantee associated with the EPIC status, but, as is apparent in particular from recitals 21 to 24 of that decision, a specific measure, namely the conversion of IFPEN into an EPIC.

66 It must be pointed out that the measure at issue does not contain any provision on the basis of which it would be possible to grant aid, for the purposes of Article 1(d) of Regulation No 659/1999. That measure merely grants to a given legal person, in this case IFPEN, the benefit of an unlimited and implied State guarantee associated with the EPIC status, which results in the grant to that operator of such a guarantee.

67 Consequently, and contrary to what is maintained by the Commission, that measure does not come within the concept of 'aid scheme' referred to in Article 1(d) of Regulation No 659/1999.

68 In the second place, it should be noted, as does IFPEN, that, since the Commission decided to analyse the measure at issue as an ad hoc individual aid measure, it is in the light of that sole classification that the General Court is to examine the lawfulness of the contested decision.

69 In particular, as the General Court noted in paragraph 171 of the judgment under appeal, the Commission stated, in recitals 256 to 259 of the contested decision, that the conversion of IFPEN into an EPIC constituted new aid for the purposes of Article 1(c) of Regulation No 659/1999, subject to the notification obligation, and that, in so far as IFPEN's change in status had not been formally notified to it, but only pointed out incidentally in the context of other proceedings, that obligation had not been fulfilled by the French authorities, so that the conversion of IFPEN into an EPIC constituted unlawful aid.

70 In those circumstances, it should be noted, as the Advocate General pointed out in point 78 of his Opinion, that the General Court did not err in law when it held, in paragraph 172 of the judgment under appeal, that, in so far as the conversion of IFPEN into an EPIC could be classified as 'State aid', it constituted aid granted on the basis of an aid scheme which had to be notified, that is to say individual aid for the purposes of Article 1(e) of Regulation No 659/1999.

71 Moreover, the Commission's argument relating to the concept of 'aid scheme' cannot undermine that conclusion, since, as the Advocate General stated in point 80 of his Opinion, such a concept is not included in Regulation No 659/1999. In that regard, Article 1 of that regulation, which lists the different categories of aid, merely defines aid schemes and individual aid, without providing for the possibility that a measure coming within the concept of 'aid scheme' under Article 1(d) of that regulation could itself belong to a larger aid scheme.

72 The same applies to the Commission's argument that the classification of the conversion of IFPEN into an EPIC as 'individual aid', established by the General Court, has the effect of depriving it of the possibility of adopting appropriate measures, for the purposes of Article 108(1) TFEU, to request the French authorities to terminate the guarantee for a specific EPIC.

73 In that regard, it suffices to point out, as was noted by the Advocate General in point 82 of his Opinion, that the General Court's findings concerning the individual aid character of the measure examined, included in paragraphs 169 to 172 of the judgment under appeal, are based on the specific circumstances connected with the conversion of IFPEN into an EPIC and are not, in principle, applicable to all establishments of that type.

74 In those circumstances, and without it being necessary to rule on the admissibility of the first part of the first ground of appeal, it is necessary, in any event, to reject that part as unfounded.

Second part of the first ground of appeal

– *Arguments of the parties*

75 In the context of the second part of the first ground of appeal, the Commission claims that the General Court erred in law when it held that the guarantee associated with the EPIC status did not confer an advantage on IFPEN in its dealings with banks and financial institutions, by relying solely on the lack of a real advantage for that establishment in its dealings during the period concerned.

76 In that regard, the Commission notes, first of all, that, since the measure at issue constitutes an aid scheme, the General Court should have verified whether that guarantee was, in the light of its general characteristics, capable of conferring an advantage on IFPEN in the future, and that regardless of the lack of a real advantage in terms of credit conditions during the period concerned. The Commission points out in that regard that it examined the actual effects of the guarantee over that period with the sole aim of

verifying whether a specific advantage had come into existence over that period and not in order to examine whether the guarantee constituted State aid, a question which depended exclusively on an assessment of the potential effects of that measure.

77 Moreover, according to the Commission, the approach adopted by the General Court amounts to treating Member States which do not notify the grant of unlimited guarantees more favourably than those which do so in accordance with Article 108 TFEU, although, according to a settled principle of State aid, the former Member States cannot be treated advantageously vis-à-vis the latter.

78 When a Member State notifies its intention of granting that type of guarantee, the Commission, in so far as it cannot know the actual effects of the measure, examines only the potential effects thereof. If, by contrast, a Member State grants such a guarantee without previously notifying it, it could then show that that measure has produced no specific effect and, consequently, exclude its classification as 'State aid'. As a result, the Member States would be encouraged not to notify the grant of unlimited guarantees.

79 Alternatively, the Commission claims that, even if it can be considered that the guarantee in favour of IFPEN does not constitute an aid scheme but individual aid, the General Court should have based its examination on the potential effects of the guarantee, namely on the effects that that measure was likely to produce.

80 IFPEN and the French Government contest those arguments.

– *Findings of the Court*

81 It should be noted at the outset, as was held in the context of the first part of the first ground of appeal, that the measure at issue does not constitute an aid scheme for the purposes of Article 1(d) of Regulation No 659/1999.

82 Therefore, the General Court was correct to conclude, in paragraph 173 of the judgment under appeal, that the case-law relating to the evidential obligations imposed on the Commission in the area of aid schemes was not applicable in the present case.

83 In those circumstances, in so far as the second part of the first ground of appeal is based on the mistaken premiss that the measure at issue constitutes an aid scheme, that part must be rejected as unfounded.

84 As regards the argument put forward in the alternative by the Commission, it is necessary to verify whether, as the latter claims, the General Court erred in law when it held that, in order to show the existence of an advantage for IFPEN in its dealings with banks and financial institutions, the Commission could not limit its examination to the potential effects that the measure at issue was capable of producing and that it should also have examined the actual effects produced by the guarantee associated with the EPIC status.

85 However, that argument is based on an erroneous reading of the judgment under appeal.

86 In paragraphs 79 and 182 of that judgment, the General Court stated that, in the contested decision, the Commission had acknowledged that, during the period concerned, IFPEN had derived no real economic advantage from the guarantee associated with its EPIC status in its dealings with banks and financial institutions. In particular, the General Court noted that, in recital 199 of that decision, the Commission had stated that the potential advantage which IFPEN could have derived from the unlimited guarantee in the form of more advantageous market rates did not materialise over the period concerned.

87 In the light of that finding, the General Court held, in paragraph 188 of the judgment under appeal, that the simple presumption for the purposes of the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), according to which the unlimited and implied State guarantee associated with the EPIC

status results in an improvement in the financial position of the beneficiary undertaking concerned, had been rebutted in the present case.

88 Therefore, and contrary to what is claimed by the Commission, the General Court did not state that it should have verified the actual effects of the measure at issue over the period considered in order to establish the existence of an advantage for IFPEN in its dealings with banks and financial institutions. The General Court merely held that, since the Commission had itself noted the lack of actual effects over that period, the simple presumption established by the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217) was rebutted.

89 Consequently, the second part of the first ground of appeal must be rejected in its entirety.

Third part of the first ground of appeal

– *Arguments of the parties*

90 By the third part of the first ground of appeal, the Commission complains that the General Court ruled on matters which were not the subject matter of pleas put forward by the parties as regards the existence of an advantage for IFPEN in its dealings with banks and financial institutions.

91 In that regard, the Commission notes that its analysis relating to the existence of such an advantage had not been criticised by IFPEN in its application at first instance. As regards the French Republic, it merely contested the existence of that advantage on the sole ground that the Commission had not demonstrated it, without putting forward any argument in support of that assertion.

92 Consequently, by upholding a claim that had not been raised by one of the applicants at first instance and which had been raised only in an insufficiently detailed way by the other applicant, the General Court failed to observe the limits of its jurisdiction.

93 IFPEN and the French Government contest those arguments.

– *Findings of the Court*

94 It should be noted, at the outset, that it is apparent from paragraphs 58 and 185 of the judgment under appeal, that the French Republic indeed contested, in the context of the first part of its plea in law before the General Court, the Commission's conclusions, contained in the contested decision, relating to the existence of an advantage for IFPEN in its dealings with banks and financial institutions.

95 Likewise, as was noted by the Advocate General in point 92 of his Opinion, IFPEN contested on several occasions, in its application and its reply lodged before the General Court, the Commission's analysis relating to the existence of such an advantage.

96 In those circumstances, the third part of the first ground of appeal must be rejected as unfounded.

97 Since none of the parts of the first ground of appeal have been upheld, it must be rejected.

The second ground of appeal

Arguments of the parties

98 By its second ground of appeal directed, in essence, against paragraphs 134 to 137 and 188 to 193 of the judgment under appeal, the Commission complains that the General Court, first, erred in law concerning the definition of the scope of the presumption of the existence of an advantage established by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), and, secondly, that it wrongly held that that presumption had, in the present case, been rebutted with respect to IFPEN's dealings with banks and financial institutions.

99 In the context of that ground of appeal, the Commission notes, first of all, that, in accordance with that judgment, it is not required to show the actual effects of a guarantee in order to establish the existence of an advantage on the part of the entity benefiting from the EPIC status. It could rely, in that regard, on a simple presumption, resulting from the guarantee itself.

100 Next, the Commission notes that the General Court wrongly considered, in paragraphs 188 to 192 of the judgment under appeal, that the presumption of an advantage had been rebutted due to the absence of an actual effect on IFPEN's dealings with banks and financial institutions during the period concerned, since that fact did not suffice to rebut that presumption. To establish that that presumption had been rebutted, it would have been necessary to show that the guarantee at issue was not capable, due to the particular characteristics of IFPEN, of conferring an advantage on that establishment in its dealings with those operators.

101 Finally, the Commission concludes that, by thus restricting the scope of the presumption of an advantage, the General Court infringed Article 107(1) TFEU and the rules of evidence for the existence of an advantage for the purposes of that provision.

102 IFPEN and the French Republic contest those arguments.

103 IFPEN claims that the General Court correctly held that, in the present case, the Commission could not rely on the presumption deriving from the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217).

104 IFPEN notes that that presumption constitutes an exception to the principle that it is for the Commission to show that a measure fulfils the conditions to be classified as 'State aid' for the purposes of Article 107(1) TFEU. Such a presumption should therefore be strictly construed and, consequently, applied only where the existence of a real advantage is plausible.

105 IFPEN adds that, in the contested decision, the Commission failed to specify the reasons why it is plausible to presume the existence of an advantage in favour of IFPEN. As a result, that decision does not meet the requirements to state reasons deriving from Article 296 TFEU.

106 As regards the rebuttal of the presumption, IFPEN notes that the General Court correctly held, in paragraphs 189 to 192 of the judgment under appeal, that during the period concerned, that establishment had derived no benefit from the guarantee associated with its EPIC status in its dealings with banks and financial institutions. Moreover, the Commission adduced no evidence capable of establishing a possible change to the situation after 2010, which would have resulted in IFPEN borrowing amounts under conditions which differ from market conditions.

107 The French Republic considers that the Commission's second ground of appeal must be rejected as unfounded. In that regard, that government refers, in essence, to the arguments presented in the context of its response to the second part of the first ground of appeal.

Findings of the Court

108 It should be noted that, according to the settled case-law of the Court, the classification of a national measure as 'State aid' for the purposes of Article 107(1) TFEU requires that all the following conditions are fulfilled. Firstly, there must be intervention by the State or through State resources. Secondly, that intervention must be liable to affect trade between Member States. Thirdly, it must confer a selective advantage on the recipient. Fourthly, it must distort or threaten to distort competition (judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C−20/15 P and C−21/15 P, EU:C:2016:981, paragraph 53 and the case-law cited, and of 18 May 2017, *Fondul Proprietatea*, C−150/16, EU:C:2017:388, paragraph 13).

109 As regards, in particular, the third of those conditions, it must be noted that, according to the Court's equally settled case-law, measures that, whatever their form, are likely directly or indirectly to favour certain undertakings, or fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions, are regarded as State aid (judgments of 2 September 2010, *Commission* v *Deutsche Post*, C−399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited, and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C−74/16, EU:C:2017:496, paragraph 65 and the case-law cited).

110 It must be noted that, as the General Court stated in paragraph 71 of the judgment under appeal, it is for the Commission to provide proof of the existence of State aid within the meaning of Article 107(1) TFEU. In particular, it is apparent from the Court's case-law relating to the principles governing the administration of proof in the sector of State aid that the Commission is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose (judgment of 3 April 2014, *France* v *Commission*, C−559/12 P, EU:C:2014:217, paragraph 63).

111 However, it follows from the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217, paragraphs 98 and 99), that, in the context of that examination, the Commission can rely on a simple presumption that the grant of an implied and unlimited State guarantee in favour of an undertaking which is not subject to the ordinary compulsory administration and winding-up procedures results in an improvement in its financial position through a reduction of the charges that would normally encumber its budget. Consequently, in the context of the procedure relating to existing aid, to prove the advantage obtained by such a guarantee to the recipient undertaking, it is sufficient for the Commission to establish the mere existence of that guarantee, without having to show the actual effects produced by it from the time that it is granted.

112 It is in the light of those considerations that it is necessary to verify whether, as the Commission claims, the General Court erred in law when it defined the scope of the simple presumption of the existence of an advantage established by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), and, consequently, held that that presumption had been rebutted in the present case.

113 In that regard, it must be noted that, in paragraphs 134 to 137 of the judgment under appeal, the General Court, in the first place, emphasised that possibility of using a presumption as a means of proof depended on the plausibility of the assumptions on which that presumption was based. In particular, the presumption established in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), is based on the dual premiss, recognised as plausible by the Court, to the effect, first, that the existence of a guarantee by the public authorities of a Member State has a favourable influence on the assessment by creditors of the risk of default on the part of the beneficiary of that guarantee and, secondly, that that favourable influence is reflected in a reduction in the cost of credit.

114 In the second place, as regards IFPEN's dealings with banks and financial institutions, the General Court held, in paragraphs 188 to 190 of the judgment under appeal, that the presumption thus established by the Court had, in the present case, been rebutted, because the investigation carried out by the Commission had revealed that, during the period concerned, IFPEN had not derived any real economic advantage from the guarantee associated with its EPIC status.

115 It must be noted that the reasoning of the General Court set out in paragraphs 134 to 137 and 188 to 190 of its judgment is vitiated by errors of law.

116 As the Advocate General, in essence, stated in point 123 of his Opinion, the mere fact that IFPEN benefits from a State guarantee was such as to enable the Commission to rely on the presumption of an advantage, as developed by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), since that presumption is based on the idea that, thanks to the guarantee associated with

its status, an EPIC benefits or could benefit from better financial terms than those normally available on the financial markets. In order to rely on that presumption, the Commission was therefore not required to show the actual effects produced by the guarantee at issue (see, to that effect, judgment of 3 April 2014, *France* v *Commission*, C−559/12 P, EU:C:2014:217, paragraph 99).

117 Therefore, although it is true that such a presumption is only a simple presumption, and thus rebuttable, it can nevertheless be rebutted only in so far as it is shown that, in light of the economic and legal context in which the guarantee associated with the EPIC status concerned takes place, the latter did not obtain in the past and, according to any plausibility, will not obtain in the future any real economic advantage from that guarantee.

118 In those circumstances, contrary to the findings of the General Court in paragraphs 134 to 137 and 188 to 190 of the judgment under appeal, the mere fact that the beneficiary of such a guarantee in the past derived no real economic advantage from its EPIC status does not suffice, in itself, to rebut the presumption of the existence of an advantage.

119 Consequently, the General Court was wrong to hold, in paragraphs 134 to 137 of the judgment under appeal, that the possibility of relying on the presumption established by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), was based on the existence of actual effects on the part of the beneficiary of the guarantee, and, consequently, in paragraphs 188 to 190 of that judgment, that, with respect to IFPEN's dealings with banks and financial institutions, that presumption had been rebutted.

120 Having regard to the foregoing, the second ground of appeal must be upheld.

The third ground of appeal

Arguments of the parties

121 By its third ground of appeal directed against paragraphs 134 to 161 of the judgment under appeal, the Commission claims that the General Court wrongly concluded that it could not rely on a simple presumption of the existence of an advantage in favour of IFPEN in the context of its dealings with its suppliers and its customers.

122 According to the Commission, such a conclusion on the part of the General Court is based, first, on a mistaken interpretation of the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), and of the Guarantee Notice, and, secondly, on an alleged absence of plausible influence of the guarantee on IFPEN's dealings with its suppliers and its customers.

123 In the first place, as regards the interpretation of the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), the Commission claims that it in no way follows from that judgment that the presumption of the existence of an advantage could not apply to an EPIC's dealings with its suppliers and its customers. In that regard, it notes that the advantage identified by the Court in that judgment is based on two factors, namely improved credit conditions and the non-payment by the EPIC of the appropriate premium corresponding to the risk borne by the State. However, those considerations apply also to dealings between an EPIC, such as IFPEN, and its trade creditors.

124 Moreover, the fact that the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), and the Guarantee Notice refer, in the context of the examination of the presumption of the existence of an advantage, only to loans granted by banks or financial institutions does not exclude that that presumption may also be applied in the context of an EPIC's dealings with its trade creditors, in so far as it is only by way of example that the Court, in that judgment, made such a reference.

125 In the second place, as regards the alleged absence of plausible influence of the guarantee over the dealings of an EPIC, such as IFPEN, with its suppliers and its customers, the Commission notes, first of

all, that it cannot be reasonably maintained that trade creditors are in general indifferent to the repayment of their claims. On the contrary, in every credit transaction, whether it be financial credit or trade credit, the risk of non-repayment is a factor which weighs on the relationship between the contracting parties. Consequently, in the present case, the assurance for a trade creditor of IFPEN to have its credit repaid by the State in the event of default on the part of IFPEN would be of significant importance for that creditor.

126 Next, the Commission notes that, in paragraph 139 of the judgment under appeal, the General Court considered that the plausibility of the hypothesis of a favourable influence of the existence of a guarantee over IFPEN's dealings with its suppliers, amounting to a reduction of the prices agreed by the latter, was not per se evident. According to the Commission, although a price reduction can derive from a variety of factors and not only from the existence of a guarantee associated with the EPIC status, it is nevertheless appropriate to reject the application of the presumption of an advantage established in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217) in relation to the dealings of an EPIC with its suppliers.

127 IFPEN replies that, by its third ground of appeal, the Commission seeks in reality to contest the assessments of fact and evidence made by the General Court in paragraphs 90 to 131 of the judgment under appeal. That ground should therefore be rejected as inadmissible.

128 On the substance, IFPEN and the French Republic contest the Commission's arguments.

129 IFPEN notes that, in so far as the grant of the guarantee associated with the EPIC status constitutes individual aid and the presumption established by the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217) is not applicable in the present case, the General Court correctly concluded, in paragraph 129 of the judgment under appeal, that the Commission was obliged to examine the actual effects of the guarantee, in order to show the existence of an advantage for IFPEN.

130 Moreover, IFPEN maintains that, contrary to what the Commission claims in its appeal, the latter did not identify, in the contested decision, an advantage on the part of its creditors, in particular its suppliers and its customers.

131 In that regard, it notes that, in the contested decision and in its appeal, the Commission wrongly concluded, first, as regards IFPEN's dealings with its suppliers, that the latter are exempt from paying a factoring commission in order to assign their claims to IFPEN, since they benefit from the implied State guarantee, and, secondly, as regards IFPEN's dealings with its customers, that, thanks to the guarantee associated with its EPIC status, IFPEN was able to offer its customers a performance bond or best efforts guarantee. Therefore, the General Court correctly considered, respectively in paragraphs 99 to 108 and in paragraphs 111 to 120 of the judgment under appeal, that the hypothesis relied on by the Commission, in the light of the alleged advantage in favour of IFPEN in its dealings with customers and suppliers, was theoretical and not plausible.

132 The French Republic considers that the General Court did not err in law as regards the definition of the scope of application of the presumption of the existence of an advantage deriving from the implied and unlimited State guarantee. According to that Member State, the General Court was correct not to extend that guarantee to the EPIC's dealings with its suppliers and customers.

133 In that regard, the French Republic notes that the presumption established by the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217) is not based on an assumption concerning the EPIC's dealings with its suppliers or customers so that the Commission could not rely on such an assumption in those circumstances.

134 In any event, as the General Court noted in paragraph 136 of the judgment under appeal, the possibility of recourse to such a presumption as a means of proof depends on the plausibility of the assumptions on which that presumption is based.

135 In that regard, the contested decision is based, first, on the assumption that the EPIC which benefits from a State guarantee enjoys a price reduction granted by its suppliers. The General Court correctly noted that a price reduction in dealings between a supplier and the EPIC concerned is based on a variety of factors, including the volume of orders placed by the customer, the payment terms granted by the supplier or the length of the contractual relationship. A price reduction therefore does not result from the existence of a guarantee by the public authorities in favour of the EPIC.

136 Secondly, as regards IFPEN's dealings with its customers, that Member State claims that the General Court was correct to consider, in paragraph 141 of the judgment under appeal, that the Commission had not defined in the contested decision the advantage which IFPEN would derive from the existence of the State guarantee and that, consequently, the presumption it intended to rely on was, in that regard, devoid of purpose. According to the French Republic, the Commission has not shown how the implied and unlimited State guarantee associated with the EPIC status resulted in an improvement of its situation in its dealings with its customers.

Findings of the Court

137 Firstly, it should be noted that, contrary to what is maintained by IFPEN, the Commission does not seek, by its third ground of appeal, to contest the assessments of fact and evidence made by the General Court in the judgment under appeal.

138 By that ground of appeal, the Commission claims that the General Court erred in law when it held, in paragraphs 134 to 160 of the judgment under appeal, that it could not rely on the presumption of the existence of an advantage established by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), to show the existence, in favour of IFPEN, in its dealings with its suppliers and customers, of an advantage deriving from the State guarantee.

139 In that regard, it is true that, in that judgment, the Court expressly recognised the existence of a simple presumption of advantage connected with the guarantee associated with the status of an EPIC in relation only to the dealings which the latter can have with banks and financial institutions. However, as was noted by the Advocate General in point 168 of his Opinion, it does not follow from that judgment that such a presumption could not, in principle, apply to the EPIC's other dealings, in particular to those it has with its suppliers and its customers.

140 First of all, contrary to what was stated by the General Court in paragraph 147 of the judgment under appeal, no useful conclusion can be drawn from the fact that, in the 'La Poste' decision, which was contested in the context of the case that gave rise to the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), the demonstration of the existence of an advantage in favour of the EPIC had been made by the Commission by examining solely the EPIC's dealings with banks and financial institutions, without examining its dealings with suppliers and customers. Such a circumstance was in no way stated by the Court in paragraphs 94 to 99 of that judgment, in which the simple presumption of an advantage associated with the EPIC status was established.

141 Next, as regards the consequences which the General Court drew, in paragraph 152 of the judgment under appeal, from the reference to the judgment of 8 December 2011, *Residex Capital IV* (C−275/10, EU:C:2011:814), made by the Court in paragraph 96 of the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), it should be noted that, in the first of those judgments, the Court held, in essence, that national courts have jurisdiction under Article 108(3) TFEU to cancel a State guarantee in a situation in which unlawful aid was implemented by means of that guarantee, which had been given by a public authority in order to cover a loan granted by a finance company to an undertaking which would not have been able to secure such financing under normal market conditions.

142 In the case giving rise to the judgment of 8 December 2011, *Residex Capital IV* (C−275/10, EU:C:2011:814), the classification of the guarantee granted by the public authority as State aid in favour of the borrower was not discussed before the Court, since it was common ground that, at the time when the

guarantee was created, the borrower was already in difficulty and would not therefore have been able to obtain financing on the capital markets without it.

143 Therefore, contrary to what was held by the General Court in paragraph 152 of the judgment under appeal, the reference to that judgment supplies no useful information concerning the scope of the simple presumption of an advantage established by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217).

144 Likewise, in paragraph 156 of the judgment under appeal, the General Court could not come to any conclusions about the scope of that presumption from the reference made by the Court, in paragraph 97 of the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), to points 1.2, 2.1 and 2.2 of the Guarantee Notice.

145 Admittedly, it is true that those paragraphs of the Guarantee Notice refer solely to the advantage which could be derived by the beneficiary of a State guarantee in the form of better credit terms, such as a lower lending rate or less stringent security requirements. However, the reference made by the Court to those paragraphs of the Guarantee Notice was justified in the light of the circumstances of the case giving rise to the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), which was concerned solely with the issue of the advantage that the EPIC at issue could derive from the guarantee associated with its status in its dealings with banks and financial institutions.

146 Finally, it should be noted that the argument which the General Court, in paragraph 159 of the judgment under appeal, intended to derive from the observations made by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), in particular in paragraph 104 thereof, lacks, at the very least, clarity. It is not clear how those observations confirm, as the General Court nevertheless stated, that the alleged means of proof accepted by the Court to establish whether an implied and unlimited State guarantee, associated with the EPIC status, constitutes an economic advantage is solely applicable to the case of a borrower who, as a result of that guarantee, benefits from lower interest rates or is able to provide less security.

147 In those circumstances, it must be noted that the General Court erred in law when it held, in paragraph 160 of the judgment under appeal, that the presumption of the existence of an advantage established by the Court in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), is restricted to dealings which involve a financing transaction, a loan or, more broadly, credit from an EPIC's creditor, in particular that EPIC's dealings with banks and financial institutions.

148 Consequently, the third ground of appeal must be upheld.

149 However, it must be noted that that judgment can also not be interpreted as meaning that that presumption can be automatically extended to the dealings of an EPIC with its suppliers and its customers, without it being necessary to examine, in advance, whether, in the light of the conduct of those operators, the advantage that the establishment could derive therefrom is similar to that it derives from its dealings with banks and financial institutions.

150 As was stated in paragraph 116 of the present judgment, the presumption established in the judgment of 3 April 2014, *France* v *Commission* (C−559/12 P, EU:C:2014:217), is based on the hypothesis that, thanks to the guarantee associated with its status, the EPIC concerned benefits or could benefit from better financial conditions than those which are normally granted on the financial markets. Therefore, the application of that presumption to the EPIC's dealings with suppliers and customers is justified only in so far as such more advantageous conditions arise also in the latter's dealings on the markets concerned.

151 Consequently, when the Commission seeks to apply that presumption, it must examine the economic and legal context of the market affected by the dealings in question. In particular, the Commission is required to verify whether the conduct of players on the market concerned justifies a hypothesis of an advantage similar to that found in the EPIC's dealings with banks and financial institutions.

152 It follows from all the foregoing that the judgment under appeal must be set aside in so far as, by that judgment, the General Court annulled Article 1(3), (4) and (5) and Articles 2 to 12 of the contested decision.

Referral of the case back to the General Court

153 According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the latter may, where the decision of the General Court has been annulled, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court.

154 Since the state of the proceedings does not permit a decision on the arguments underlying the second and third grounds of appeal, the Court must refer the case back to the General Court for those grounds to be assessed.

Costs

155 Since the case has been referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

On those grounds, the Court (Fifth Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 26 May 2016, *France and IFP Énergies nouvelles* v *Commission* (T−479/11 and T−157/12, EU:T:2016:320), in so far as, by that judgment, the General Court annulled Article 1(3), (4) and (5) and Articles 2 to 12 of Commission Decision 2012/26/EU of 29 June 2011 on State aid granted by France to the Institut Français du Pétrole (Case C 35/08 (ex NN 11/08));**

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves the costs.**

[Signatures]

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* Language of the case: French.