
The General Court annuls the European Commission's state aid decision in the FIH case

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The General Court has now again given a judgment in the case concerning state aid to FIH Erhvervsbank. The General Court initially ruled that a capital injection did not constitute state aid, but the judgment was subsequently set aside by the European Court of Justice and referred back to the General Court. The General Court has now annulled the European Commission's original decision and referred back the case to the European Commission.

By assistant attorneys Emil Petri and Maria Gartenmann

Judgment of the General Court in case T-386/14 RENV, dated 19 September 2019.

Background

By judgment of 6 March 2018, the European Court of Justice decided on the question whether the capital injection received by FIH Erhvervsbank ("FIH") from the Danish State in 2012 constituted state aid. The European Commission had originally decided that the capital injection constituted state aid. By its original judgment of 15 September 2016, the General Court had reached the opposite conclusion on the ground that the European Commission had applied the "private operator principle" incorrectly.

However, during its review of the General Court's 2016 judgment, the European Court of Justice concluded that the capital injection constituted state aid, because it was held that it was rather the General Court that had applied the "private operator principle" incorrectly. Consequently, the European Court of Justice decided to refer the case back to the General Court for it to review the repayment question and the calculation of the amount of the aid. This is also the background for the recent judgment stating that the European Commission applied wrong figures when calculating the aid.

[Read our previous mention of the European Court of Justice's judgment of 6 March 2018](#)

Review by the General Court: allegations about calculation errors

In connection with the review by the General Court, FIH continued to argue that the European Commission had made several errors in the calculation of the aid. FIH therefore submitted that the European Commission's decision must be annulled. The views were the same as those submitted by FIH during the original proceedings before the General Court, but they had never been examined because the General Court delivered its 2016 judgment on a more general basis.

By way of example, FIH submitted that in five specific situations the European

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Commission had made errors in the calculations. The fifth of those situations concerned the calculation of the capital relief effect achieved by FIH as a result of a transfer of certain assets and liabilities to a new subsidiary, NewCo, in connection with the Danish Financial Stability Company's subsequent acquisition of NewCo.

FIH submitted that the European Commission had calculated the capital relief effect at the level of FIH Holding, rather than FIH. The European Commission had set the capital relief effect at DKK 375 million despite the fact that the Danish State had stated on several occasions that the correct amount was DKK 275 million. In response to that, the European Commission asserted that in calculating that amount, it had relied on documents provided by the Danish State.

The General Court's judgment

First of all, the General Court stated that the European Commission enjoys a broad discretion when it is to adopt a measure involving a complex economic appraisal. Therefore, judicial review of such measures will be limited to verifying:

- whether the European Commission complied with the relevant rules governing procedure and the statement of reasons
- whether the facts on which the decision was based have been sufficiently documented
- whether there has been any manifest error of assessment or a misuse of powers.

Furthermore, the General Court stated that in order to establish that the European Commission made a manifest error in assessing the facts such as to justify the annulment of the contested decision, the evidence presented must be sufficient to make the factual assessments made in the decision at issue implausible.

In the light of the above, the General Court rejected the first four parts of FIH's submission and referred mainly to the fact that the European Commission had not breached its discretionary powers in any of those situations.

As regards the fifth part of the submission, however, the General Court rejected the European Commission's assertion that it had just relied on documents provided by the Danish State. Although the amount of DKK 375 million was mentioned in some of the tables in the relevant documents, it had been pointed out several times that the figures were merely for illustrative purposes and that the correct figure was DKK 275 million. The European Commission had therefore no authority to maintain that the Danish State and FIH had provided evidence or that they had otherwise accepted the said (incorrect) calculation.

Referral back to the European Commission

The General Court therefore held that the basis for calculating the state aid had been incorrect. Consequently, the General Court decided to annul the European Commission's original state aid decision and to refer the case back to the European Commission for renewed consideration.

This means, in principle, that the European Commission must now make a new decision based on the correct facts. However, the European Commission still has the opportunity to appeal the General Court's judgment. It is currently unknown whether the Commission will take that opportunity.