



The Court of Justice confirms the partial annulment of the Commission's decision relating to aid granted to ING because of the financial crisis

ING Groep NV is a financial institution which has its registered office in Amsterdam (Netherlands). Owing to the global financial crisis that began in 2007, the Netherlands adopted aid measures in favour of ING.

In that context, ING's capital was increased through the creation of one billion securities. Those securities, without voting rights or dividend entitlement and fully subscribed by the Kingdom of the Netherlands at an issue price of €10 per unit, allowed ING to increase its base capital by €10 billion. In addition, a cash flow swap was applied, as a second aid measure, to the impaired assets of a portfolio of securities backed by residential mortgages granted in the United States, the value of which had declined significantly.

In 2008 and 2009, those aid measures were provisionally approved by the Commission, pending the submission of a restructuring plan by the Netherlands authorities.

On 12 May 2009, that plan was submitted to the Commission. After several months of discussion with the Commission, a revised restructuring plan, which included, inter alia, an amendment to the repayment terms of the capital injection, was submitted on 22 October 2009.

On 18 November 2009, the Commission adopted the contested decision¹. Although declaring the restructuring plan compatible with the common market, the Commission took the view that the amendment to the repayment terms led to 'additional aid of approximately €2 billion'.

On 28 January 2010, the Netherlands and ING brought actions before the General Court.

In its judgment of 2 March 2012², the General Court annulled, in part, the contested decision, holding, inter alia, that the Commission was required to assess the economic rationality of the amendment to the repayment terms in the light of the private investor test. In order to determine the advantage conferred in the case of a capital injection, that test requires the difference in the terms under which the State has granted the injection and the terms under which a private investor would have done so to be taken into account.

On 11 May 2012, the Commission brought an appeal before the Court of Justice³.

¹ Commission Decision 2010/608/EC of 18 November 2009 on State aid C 10/09 (ex N 138/09) implemented by the Netherlands for ING's Illiquid Assets Back Facility and Restructuring Plan (OJ 2010 L 274, p. 139).

² Case [T-29/10](#) *Kingdom of the Netherlands v Commission* and [T-33/10](#) *ING Groep NV v Commission* (see also press release [19/12](#)).

³ Taking note of that judgment, the Commission adopted, on 11 May 2012, Decision C(2012) 3150 final — State aid SA.28855 (N 373/2009) (ex C 10/2009 and ex N 528/2009) — The Netherlands — ING — restructuring aid. In that decision, the Commission re-examined the amendment to the repayment terms of the capital injection in the light of the private investor test and concluded that a market economy private investor would not have agreed to those new terms. It therefore decided that the amendment constituted State aid but that, in the light of the commitments made by the Netherlands, the aid in question was compatible with the internal market. By two actions brought on 23 July 2012 before

In its judgment today, the Court has dismissed the appeal in its entirety.

The Commission, while stating that it is appropriate to apply the private investor test to the behaviour of public authorities only where they are in a position comparable to that in which private operators may find themselves, claims that a private investor could never have found itself in a situation in which it would have been able to provide State aid to ING.

The Court rejects that argument and points out that the private investor test is one of the factors which the Commission is required to take into account for the purposes of establishing the existence of aid. Consequently, where it appears that the private investor test may be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that test are met.

The Court states, in that context, that what is decisive is whether the amendment to the repayment terms of the capital injection satisfies an economic rationality test, so that a private investor might also be in a position to accept such an amendment, in particular by increasing the prospects of obtaining the repayment of that injection.

The Commission also claims that, even if it had been wrong to treat the amended repayment terms as State aid or to quantify the amount of the aid in the manner set out in the contested decision, the General Court was not entitled to annul, in its entirety, the relevant part of the decision. The Commission takes the view that that annulment infringes the principle of proportionality, given that the contested decision does not distinguish between the different elements of the aid and the classification of the capital injection and the impaired assets measure as State was not contested by the General Court.

The Court rejects that argument also. The General Court determined that the aid of €17 billion referred to in the contested decision was made up as follows: (1) the amount of aid equivalent to the sum of the injected capital (€10 billion), (2) the amount of aid concerning the amendment to the repayment terms (approximately €2 billion) and (3) the amount of aid linked to the impaired assets measure (€5 billion). The General Court was therefore correct in holding that the additional aid, that is to say, the aid corresponding to the amendment to the repayment terms, is a constituent element of the 'restructuring aid'.

Similarly, the Court rejects all the other grounds of appeal put forward by the Commission, *inter alia*, the grounds relating to the factual analysis made by the General Court, the claim that the Commission was not in a position to affect the commitments offered by the Netherlands and ING and the claim that the General Court unlawfully expanded the scope of the action brought before it.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355

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the General Court (Cases [T-325/12](#) and [T-332/12](#)), the Netherlands and ING requested that the new decision be annulled. Those two parties withdrew their actions however. Consequently, the new decision became final.