General Court of the European Union
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Press and Information

Judgment in Case T-499/12
HSH Investment Holdings Coinvest-C Sàrl, HSH Investment Holdings FSO Sàrl v Commission

The General Court dismisses the action brought by two minority shareholders of HSH Nordbank and therefore upholds the Commission decision of 2011 authorising, under certain conditions, rescue measures in respect of that bank

HSH Nordbank, a public limited-liability company established in 2003 following the merger between the Hamburgische Landesbank and the Landesbank Schleswig-Holstein, is the fifth largest German regional bank (Landesbank). Since it was affected by the 'subprime' crisis in 2007 and exposed to further difficulties in September 2008 by the bankruptcy of Lehman Brothers[1], HSH Nordbank was the subject of a series of rescue measures. It therefore benefited from (i) a €3 billion recapitalisation by issuing shares in HSH Nordbank (those shares were entirely subscribed by its majority shareholder HSH Finanzfonds, a public entity), [2] (ii) a general guarantee of €10 billion[3] granted by the Länder of Hamburg and Schleswig-Holstein and (iii) a liquidity guarantee of EUR 17 thousand million, granted by the German Special Fund for Stabilising the Financial Markets.

By decision of 20 September 2011,[4] the Commission considered that those measures, while constituting State aid, were compatible with the internal market, subject to compliance by Germany with certain commitments and conditions. According to those conditions, HSH Nordbank was required to grant HSH Finanzfonds the right to a lump-sum payment of €500 million which HSH Finanzfonds was then required to contribute to HSH Nordbank's through an ordinary contribution in kind. In addition, HSH Nordbank was prohibited from paying dividends until the financial year 2014 inclusive. Finally, the possibility of paying dividends was restricted for 2015 and 2016. [5]

Two minority shareholders of HSH Nordbank, the Luxembourg investment funds HSH Investment Holdings Coinvest-C and HSH Investment Holdings FSO, brought an action before the General Court for the full or at least partial annulment of the Commission decision. Those funds and other investment funds advised by the American company JC Flowers & Co. held 25.67% of the capital of HSH Nordbank prior to the recapitalisation. After that recapitalisation, they held only 9.19% thereof.

By its judgment today, the General Court dismisses the action brought by the two shareholders.

The General Court holds first of all that the action is admissible only to the extent that the two minority shareholders request the annulment of the condition relating to the increase of HSH Nordbank's capital for the sole benefit of HSH Finanzfonds in exchange for the lump-sum payment of €500 million. Since their interests with respect to that transaction do not coincide with those of HSH Nordbank, the two shareholders must be able to take direct legal action and not content

[1] According to the file, HSH Nordbank suffered a loss of €3,195 billion in 2008 and of €838 million in 2009.
[2] HSH Finanzfonds is held in equal shares by the Länder of Hamburg and Schleswig-Holstein.
[3] At issue is a so-called 'second-loss guarantee', intended to protect HSH Nordbank against losses likely to affect its impaired asset portfolio and thereby to strengthen the bank's capital ratios. The 'first loss' segment continued to be borne by HSH Nordbank itself.
[4] Commission Decision 2012/477/EU of 20 September 2011 on State aid granted by Germany to HSH Nordbank AG SA.29338 (C 29/09 (ex N 264/09)) (OJ 2012 L 225, p. 1).
[5] According to the decision, the payment of dividends during that period may not exceed 50 % of the annual surplus for the previous financial year, on condition that they do 'not jeopardise compliance with the Basel III provisions on the capital of credit institutions in the medium-term'.

themselves with the possibility of defending those interests by exercising their rights as shareholders of HSH Nordbank in order for the latter to bring an action. The General Court notes in that regard that the transaction at issue was neutral for HSH Nordbank, [6] while the minority shareholders saw their relative shareholding in that bank diluted, with the result that their rights as shareholders were reduced. By contrast, as regards the authorisation of rescue measures as such and the prohibition and then the restriction on the distribution of dividends, it seems to the General Court that the interests of the shareholders and those of the company coincide.

The General Court next rejects the arguments of the two minority shareholders seeking to show that, as regards the increase of capital in exchange for the lump-sum payment of €500 million, the Commission decision is vitiated by errors.

The General Court notes in particular that, even if it results, in economic terms, in a reduction of the value of the holding of minority shareholders in the capital of HSH Nordbank, the lump-sum payment is well-founded in law, in so far as it requires those minority shareholders to make an effort proportionate to that made by the public shareholders during the recapitalisation: it follows that the minority shareholders do not benefit indirectly from aid and that the measures at issue may be declared compatible with the internal market. Moreover, HSH Finanzfonds received the new shares not in its capacity as shareholder, but solely in its capacity as provider of aid. In order to achieve the necessary rebalancing, it would have been possible to rely on a new body governed by public law which would not have been a shareholder, but merely a recipient of the funds; there would then have been an equal distribution of costs between all the shareholders in favour of the provider of aid represented by the body at issue.

The General Court concludes that the two minority shareholders have failed to establish that the lump-sum payment, the sole aim of which was to make the State aid compatible with the internal market, constituted a condition which is disproportionate or contrary to the principle of equal treatment.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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[6] The expenditure of €500 million of cash resources was immediately set off against the increase of share capital by €500 million.