



Press and Information

General Court of the European Union
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Judgment in Joined Cases T-29/10 Netherlands v Commission
and T-33/10 ING Groep NV v Commission

The General Court annuls in part the Commission decision concerning various forms of aid granted to ING on account of the financial crisis

The Commission has not established in the present case that the amendment to the repayment terms for a capital injection constitutes an advantage which a private investor in the same situation would not have granted

ING Groep NV (ING), established in Amsterdam (Netherlands), provides banking, investment, life assurance and asset management services to more than 85 million customers in more than 40 countries. With around 125 000 staff and a consolidated balance sheet of €1 332 billion at the end of 2008, ING is one of the largest financial institutions in the world.

Aid granted to ING to remedy a serious disturbance in the Netherlands economy

In the context of the financial crisis of autumn 2008, characterised by the collapse of Lehmann Brothers bank on 15 September 2008, a number of Member States decided to take measures to maintain the stability and proper functioning of financial markets in the European Union.

In the Netherlands, the financial crisis led to a number of interventions by the Netherlands State, including a grant of aid to the Fortis group, of which the Netherlands part, including ABN Amro bank, would be nationalised on 3 October 2008, and recapitalisation measures concerning Aegon and SNS Reall of 28 October 2008 and 11 November 2008.

For its part, ING, an institution regarded as fundamentally sound throughout that crisis, was the subject of three State aid measures designed to maintain the continuity of the payments system and the inter-bank market in the Netherlands.

The first aid measure was an increase in capital undertaken on 11 November 2008 by issuing hybrid securities without voting rights or dividend entitlement which were fully subscribed by the Netherlands State. That transaction enabled ING to increase its category 1 base capital by €10 billion, meaning that it passed from 6.5 % to 8.5 % after the capital increase.

On the basis of the repayment terms initially agreed, the securities were, *on ING's initiative*, either to be repurchased at €15 per security (representing a 50 % redemption premium compared with the issue price of €10) or, after three years, converted into ordinary shares on a one for one basis. If ING chose the conversion option, the Netherlands State would however still be able to obtain the repurchase by ING of the securities at the unit price of €10, plus accrued interest. A coupon on the securities would be paid to the State only if a dividend was paid by ING on the ordinary shares.

Those initial terms were then amended with regard to part of the capital injection. The new terms, which were communicated by the Netherlands State to the Commission, enabled ING to buy back half of the securities at the issue price of €10 per security, plus the accrued interest in relation to the annual coupon of 8.5 % and an early redemption premium if ING's share price was higher than €10. That transaction ensured the Netherlands State a minimum internal rate of return of 15 %.

The second aid measure was an exchange of cash flows applied to impaired assets in relation to a portfolio of residential mortgage-backed securities granted in the United States, the value of which

had declined significantly, whereas the third aid measure took the form of guarantees given on ING liabilities amounting to more than €12 billion.

Assessment by the Commission

After a number of administrative procedures, the Commission ruled, in its decision of 18 November 2009, on the compatibility of the abovementioned aid measures with the common market.

In that decision, the Commission classified ING's increase in capital subscribed for by the Netherlands State as aid and found that it contained inter alia 'additional aid of approximately €2 billion' following the amendment to the repayment terms for that aid.

Concluding its analysis, the Commission considered, in the first paragraph of Article 2 of that decision, that 't]he restructuring aid provided by the Netherlands to ING constitutes State aid within the meaning of Article 87(1) [EC]' and, in the second paragraph, that that 'aid is compatible with the common market, subject to the commitments set out in Annex II'.

The Netherlands and ING – ING being supported by the DNB, the central bank of the Netherlands – challenged the decision of 18 November 2009 before the Court, inter alia, in so far as the Commission considered that the aid measures contained additional aid of €2 billion.

Findings of the Court

According to the Court, the Commission could not limit itself to finding that the amendment to the capital injection repayment terms constituted by its very nature State aid, without first examining whether the amendment conferred on ING an advantage to which a private investor in the same situation as the Netherlands State would not have agreed. That examination presupposed in particular a comparison of the initial repayment terms with the amended terms.

The Court finds that it is not apparent from the decision of 18 November 2009 that the Commission carried out such a comparison. The Commission rather limited itself to stating that the amendment to the repayment terms resulted in a loss of resources for the Netherlands State, without taking into account the fact that the initial terms do not lay down an obligation, but provide only for an option for ING to repurchase the securities subscribed for by the Netherlands State within the three-year period provided for in that regard. In addition, in November 2008, the Commission had considered that 'reflecting the current distressed market conditions', the yield attained by the market for securities of the type issued at the time of the capital injection was '15% or more'. That return was considered by the Commission to be excessive and it indicated its satisfaction at that stage with a return of 'more than 10%'. It follows that the Commission considered that private investors could be attracted by such securities. The Court therefore holds that it could not be ruled out that such investors could still have been interested in such securities in November 2009, when the financial crisis was less strongly felt and it was possible to believe that the market return could have been lower.

In that regard, the Commission did not examine how a return of between 15% and 22% in favour of the Netherlands State following the amendment to the repayment terms did not correspond to that which could reasonably be expected by a private investor confronted by a similar situation, that is to say a holder of securities of the type issued at the time of the capital injection which can be repaid by the issuer. The Court finds that the Commission could not adopt its decision without taking such information into consideration and examining its effect on its assessment of the aid.

The Court thus annuls the Commission decision in so far as it is based on the finding that the amendment to the repayment terms for the capital injection constitutes additional aid of approximately €2 billion and assesses, consequently, the compatibility of the aid with the common market, and in particular the extent of the compensatory measures, with reference to such aid.

Having regard to that finding, it is not necessary for the Court to examine the arguments submitted by ING and the Commission with regard to the commitments set out in Annex II of the decision of

18 November 2009, since those commitments assume that the restructuring aid referred to by Article 2 of that decision has been correctly classified, which is not so in the present case.

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

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