



## Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

3 April 2014\*

(Appeal — Financial sector — Serious disturbance in the economy of a Member State — State Aid to a banking group — Form — Capital injection as part of a restructuring plan — Decision — Whether the aid compatible with the common market — Conditions — Amendment to the repayment terms of the aid — Private investor test)

In Case C-224/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 11 May 2012,

**European Commission**, represented by L. Flynn, S. Noë and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

**Kingdom of the Netherlands**, represented by M. de Ree, C. Wissels and J. Langer, acting as Agents, and P. Glazener, advocaat,

**ING Groep NV**, established in Amsterdam (Netherlands), represented by O.W. Brouwer and J. Blockx, advocaten, and M. O'Regan, Solicitor,

applicants at first instance,

**De Nederlandsche Bank NV**, established in Amsterdam (Netherlands), represented by S. Verschuur and H. Gornall, advocaten, and M. Petite, avocat,

intervener at first instance,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça (Rapporteur), G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 September 2013,

\* Languages of the case: Dutch and English.

after hearing the Opinion of the Advocate General at the sitting on 19 December 2013,  
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 2 March 2012 in Joined Cases T-29/10 and T-33/10 *Netherlands and ING Groep v Commission* [2012] ECR ('the judgment under appeal'), whereby the General Court granted the applications for partial annulment of 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, 'the contested decision').

### Background to the dispute

- 2 ING Groep NV ('ING') is a financial institution having its registered office in Amsterdam (Netherlands), and offering banking, investment, life assurance and retirement insurance services to private, corporate and institutional clients in over 40 countries. ING holds 100% of the shares in ING Bank NV and ING Verzekeringen NV, two subsidiaries which in turn control ING's banking and assurance subsidiaries, respectively.
- 3 Owing to the global financial crisis that began in 2007 and worsened significantly in the course of the following year, the Kingdom of the Netherlands adopted various aid measures in favour of ING, of which two in particular are relevant to the present appeal.
- 4 The first aid measure consisted of an increase in capital through the creation of one billion ING securities, without voting rights or dividend entitlement, fully subscribed by the Kingdom of the Netherlands, at an issue price of EUR 10 per security. That measure allowed ING to increase its 'Core Tier 1' (category 1) base capital by EUR 10 billion. Under the repayment terms set out in the agreement on subscription of capital concluded in that regard between the Kingdom of the Netherlands and ING, the securities were, on ING's initiative, either to be repurchased at price of EUR 15 per security (representing a 50% redemption premium as compared with the issue price), or, after three years, converted into ordinary shares. If ING chose the conversion option, the Netherlands authorities could have ING redeem the securities at a unit price of EUR 10, plus accrued interest. A coupon on the securities would be paid to the Kingdom of the Netherlands only if a dividend was paid by ING on the ordinary shares.
- 5 The second aid measure consisted of a cash flow swap relating 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.
- 6 On 22 October 2008, the Kingdom of the Netherlands notified the Commission of the first aid measure, and the increase in ING's capital took place on 11 November 2008.
- 7 On 12 November 2008, the Commission adopted Decision C(2008) 6936, in Case N 528/08, on State aid granted by the Kingdom of the Netherlands to ING ('the initial decision'). In that decision, it found that the purchase by that Member State of the ING securities contained an element of aid within the meaning of Article 87(1) EC. However, the Commission observed that the measure was compatible with the common market within the meaning of Article 87(3)(b) EC, in so far as it sought to remedy a serious disturbance in the economy of a Member State as a result of the global financial crisis. Consequently, it approved the measure for a period of six months. The Commission also

specified that if the Netherlands authorities submitted a credible plan in that regard in the course of that six-month period ('the restructuring plan'), the validity of the initial decision would automatically be extended until the Commission had adopted a decision on that plan.

- 8 On 4 March 2009, the Kingdom of the Netherlands notified the Commission of the second aid measure.
- 9 By letter of 31 March 2009, the Commission notified the Kingdom of the Netherlands of its decision to initiate the procedure laid down in Article 88(2) EC (OJ 2009 C 158, p. 13) because of its doubts as to the compatibility of certain aspects of the impaired assets measure with the Commission's Communication on the treatment of impaired assets in the Community banking sector (OJ 2009 C 72, p. 1). However, by that decision, it authorised the measure for a period of six months. It was stated therein that the Netherlands authorities had undertaken to include the impaired assets relief measure in the restructuring plan that they were to submit pursuant to the initial decision.
- 10 On 12 May 2009, the Kingdom of the Netherlands sent the Commission a restructuring plan for ING. After several months of discussion, that Member State submitted to the Commission, on 22 October 2009, a revised restructuring plan, which included, inter alia, an amendment to the repayment terms of the capital injection granted by the Kingdom of the Netherlands on 11 November 2008 ('the capital injection').
- 11 On 18 November 2009, the Commission adopted the contested decision.
- 12 In recital 34 in the preamble to the contested decision, which is part of section 2 of that decision, entitled 'Description of the facts', the Commission presented the amendment to the repayment terms as follows:

'In the framework of the restructuring plan the Netherlands has submitted an amendment to the agreement for repayment of the [Core] Tier 1 securities by ING. According to the amended terms ING is able to repurchase up to 50% of the Core-Tier 1 securities at the issue price (EUR 10), plus the accrued interest in relation to the 8.5% annual coupon (around EUR 253 million), plus an early repayment penalty when the ING share price trades above EUR 10. The early redemption penalty increases with the ING share price. For the purpose of the calculation of the early redemption premium the share price increase is capped at EUR 12.45. At that level the penalty is equal to 13% on an annual basis. The early redemption penalty could amount to a maximum of EUR 705 million assuming that the EUR 5 billion are repaid [400 days after] the date of issue. Furthermore the penalty/premium has a floor of EUR 340 million, ensuring a minimum internal rate of return for the Netherlands of 15%. In other words, considering that ING would normally have to pay EUR 2.5 billion redemption premium this amendment would result in an additional advantage for ING between EUR 1.79 and 2.2 billion depending on the market price of ING shares. ...'

- 13 Having found, in recital 98 in the preamble to the contested decision, that the amendment to the repayment terms of the capital injection led to 'additional aid of approximately EUR 2 billion', the Commission none the less concluded, in recital 157 in the preamble to that decision, that the additional aid measure must be declared compatible with the common market pursuant to Article 87(3)(b) EC.
- 14 Consequently, the contested decision stated in Article 2:

'The restructuring aid provided by the Netherlands to ING constitutes State aid within the meaning of Article 87(1) of the Treaty.

The aid is compatible with the common market, subject to the commitments set out in Annex II.

The temporary limitation on balance sheet growth set out in the [initial decision], is lifted.’

### **Procedure before the General Court and the judgment under appeal**

- 15 By applications lodged at the General Court Registry on 28 January 2010, the Kingdom of the Netherlands and ING brought the actions in Cases T-29/10 and T-33/10, respectively.
- 16 By order of the President of the Third Chamber of the General Court of 15 March 2010, Cases T-29/10 and T-33/10 were joined for the purposes of the written procedure, the oral procedure and the judgment.
- 17 By order of 14 July 2010, the General Court granted De Nederlandsche Bank NV (‘DNB’) leave to intervene in support of the form of order sought by ING.
- 18 By the judgment under appeal, the General Court upheld the three pleas in law relied on by the Kingdom of the Netherlands and the first plea in law raised by ING. Consequently, it annulled the first and second paragraphs of Article 2 of the contested decision, and Annex II to that decision.
- 19 In examining those pleas in law, the General Court held, *inter alia*, that the Commission could not evade its obligation to assess the economic rationality of the amendment to the repayment terms in the light of the private investor test solely on the ground that the capital injection subject to repayment itself already constitutes State aid.

### **Developments after the delivery of the judgment under appeal**

- 20 Taking note of the judgment under appeal, 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 (‘the new decision’). 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. The Commission therefore decided that the amendment constituted State aid but that, in the light of the commitments offered by the Kingdom of the Netherlands, the aid in question was compatible with the internal market.
- 21 By two actions brought on 23 July 2012 before the General Court (Cases T-325/12 and T-332/12), the Kingdom of the Netherlands and ING requested that the new decision be annulled on the ground, *inter alia*, that the Commission had erred in its application of the private investor test. Those two parties withdrew their actions however, and, by order of the General Court of 6 December 2012, Joined Cases T-325/12 and T-322/12 *Netherlands and ING Groep v Commission* were removed from the register of the General Court.
- 22 Consequently, the new decision became final.

### **Forms of order sought by the parties**

- 23 By its appeal, the Commission claims that the Court should:
- primarily, set aside the judgment under appeal, reject the applications for partial annulment of the contested decision and order the Kingdom of the Netherlands and ING to pay the costs;

- in the alternative, set aside the judgment under appeal and refer the joined cases back to the General Court for judgment on the second and third pleas in law raised by ING in Case T-33/10, and reserve the costs of the proceedings at first instance and on appeal; or
  - in the further alternative, annul the third paragraph of Article 2 of the contested decision and order the Kingdom of the Netherlands and ING to pay the costs of the appeal.
- 24 The Kingdom of the Netherlands contends that the Court should:
- reject all of the Commission’s grounds of appeal and order it to pay the costs, or
  - in the alternative, should the Court uphold one or more of the Commission’s grounds of appeal and set aside the judgment under appeal, refer the case back to the General Court.
- 25 ING contends that the Court should:
- declare the appeal inadmissible and/or ineffective on the points indicated;
  - in the alternative, to the extent that the appeal is declared admissible and effective, dismiss it in its entirety; and
  - order the Commission to pay the costs of both the appeal proceedings and the proceedings before the General Court; or
  - in the further alternative, to the extent that the Court upholds the appeal and thereby sets aside in whole or in part the judgment under appeal, refer the case back to the General Court and reserve the costs of the proceedings at first instance and on appeal.
- 26 DNB contends that the Court should reject the Commission’s first and fourth grounds of appeal.

## Appeal

*First ground of appeal, alleging that the General Court erred in that it held that the private investor test was applicable to the amendment to the repayment terms for State aid*

### Arguments of the parties

- 27 The Commission claims 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. In this case, a private investor could never find itself in a situation in which it had provided State aid to ING.
- 28 The Kingdom of the Netherlands, ING and DNB submit that the first ground of appeal is unfounded. In particular, they contend that the Commission, wrongly, inferred from the fact that the capital injection was an aid measure granted by that Member State in its capacity as a public authority that every other action of the Kingdom of the Netherlands relating to that injection could no longer be assessed on the basis of the private investor test.

## Findings of the Court

- 29 As a preliminary point, it must be pointed out that the debate before the General Court did not concern the specific application of the private investor test to the amendment to the repayment terms of the capital injection, but whether that test is applicable.
- 30 In this connection, it should be recalled that, in paragraph 92 of the judgment in Case C-124/10 P *Commission v EDF* [2012] ECR, the Court held that in view of the objectives pursued by Article 87(1) EC and the private investor test, an economic advantage must, even where it has been granted through fiscal means, be assessed in the light of the private investor test if, on conclusion of an overall assessment, it appears that, notwithstanding the fact that the means used were instruments of State power, the Member State concerned has conferred that advantage in its capacity as shareholder of the undertaking belonging to it.
- 31 It follows that the applicability of the private investor test to a public intervention depends, not on the way in which the advantage was conferred, but on the classification of the intervention as a decision adopted by a shareholder of the undertaking in question.
- 32 Furthermore, that test is one of the factors which the Commission is required to take into account for the purposes of establishing the existence of aid and is therefore not an exception that applies only if a Member State so requests, where the constituent elements of State aid incompatible with the common market referred to in Article 87(1) EC have been found to be present (see *Commission v EDF*, paragraph 103).
- 33 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 (see *Commission v EDF*, paragraph 104).
- 34 The application of that case-law cannot be compromised merely because, in this case, what is at issue is the applicability of the private investor test to an amendment to the conditions for the redemption of securities acquired in return for State aid.
- 35 Indeed, as the Advocate General has stated in point 41 of her Opinion, any holder of securities, in whatever amount and of whatever nature, may wish or agree to renegotiate the conditions of their redemption. It is, consequently, meaningful to compare the behaviour of the State in that regard with that of a hypothetical private investor in a comparable position.
- 36 What is decisive in the context of that comparison is whether the amendment to the repayment terms of the capital injection has satisfied 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.
- 37 In those circumstances, the General Court did not err in law in holding, in paragraph 99 of the judgment under appeal, that the Commission could not evade its obligation to assess the economic rationality of the amendment to the repayment terms in the light of the private investor test solely on the ground that the capital injection subject to repayment itself already constitutes State aid. The General Court therefore correctly held that it is only after such an assessment that the Commission is in a position to conclude whether an additional advantage within the meaning of Article 87(1) EC has been granted.
- 38 Consequently, the first ground of appeal must be rejected as unfounded.



*Second ground of appeal, alleging that the General Court evaluated incorrectly the loss of revenue to the Member State resulting from the amended repayment terms*

Arguments of the parties

- 39 According to the Commission, the General Court erred in law in that it found that, even if the Commission could have concluded that because of the amendment to the repayment terms the Kingdom of the Netherlands had suffered a loss of revenue, the Commission had not correctly determined the amount of that alleged loss of revenue since it had not taken into account the payment of a coupon representing the interest accrued that had become mandatory and unconditional under the amended terms.
- 40 The Kingdom of the Netherlands and ING submit that this is an issue requiring an assessment of fact, which cannot be examined in an appeal.

Findings of the Court

- 41 By its second ground of appeal, the Commission criticises, in essence, the factual analysis made by the General Court, in paragraphs 126 to 142 of the judgment under appeal, regarding the amendment to the repayment terms of the capital injection.
- 42 In paragraph 135 of the judgment under appeal, the General Court found that, following the amendment to the repayment terms, payment of a coupon representing the interest accrued at the time of the early repayment no longer depended, as had been the case under the initial repayment terms, on payment of a dividend to ordinary shareholders.
- 43 By contrast, the Commission claims that, according to the original repayment terms, ING was already required to pay to the Kingdom of the Netherlands accrued interest whenever it repaid the capital injection.
- 44 As the Advocate General has observed in point 47 of her Opinion, the argument as to whether the amended repayment terms were correctly described in the revised restructuring plan, and as to the extent to which they may have differed from the original terms, falls outside the jurisdiction of the Court in an appeal.
- 45 Under Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. Accordingly, the General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, except when the facts or evidence are distorted, constitute points of law subject, as such, to review by the Court in an appeal.
- 46 Since the Commission has not claimed any distortion, it follows that the second ground of appeal must be rejected as inadmissible.

*Third ground of appeal, alleging that the General Court erred in that it was not entitled to annul, in its entirety, the first paragraph of Article 2 of the contested decision*

Arguments of the parties

- 47 Even if it was wrong to treat the amended repayment terms as State aid or to quantify the amount of the aid as it did, the Commission argues, the General Court was not entitled to annul, in its entirety, the first paragraph of Article 2 of the contested decision.

- 48 The Commission submits that the General Court infringed the principle of proportionality by annulling, in its entirety, the first paragraph of Article 2 of the contested decision, given that, first, the General Court acknowledged that the restructuring aid referred to in the first paragraph of Article 2 of the decision did not distinguish between the different elements of that aid and, secondly, the General Court did not contest the classification, set out in the decision, of the capital injection and the impaired assets measure as State aid.
- 49 The Commission also claims that, in any event, the General Court could not annul the first paragraph of Article 2 of the contested decision in so far as that provision contained only confirmatory measures.
- 50 The Kingdom of the Netherlands and ING submit that the General Court had no choice but to annul, in its entirety, the first paragraph of Article 2 of the contested decision, since that provision referred only in general terms to the ‘restructuring aid’, of which the alleged aid resulting from the amendment to the repayment terms formed part. The General Court held that the assessment of that amendment could not be dissociated from the other parts of the measure.

### Findings of the Court

- 51 In order to rule on the merits of that ground of appeal, it is appropriate to consider whether the General Court assessed correctly the possible consequences on the enacting terms of the contested decision, in particular, on the first paragraph of Article 2, of the error by which, according to the General Court, that decision was vitiated, in that the decision found that the amendment to the repayment terms of the capital injection contained additional aid.
- 52 As provided in the first paragraph of Article 2 of the contested decision, the ‘restructuring aid provided by the [Kingdom of the] Netherlands to ING constitutes State aid ...’.
- 53 On the basis of the answers given by the Commission to the General Court’s written questions, the General Court determined that the aid of EUR 17 billion referred to in the contested decision was made up as follows: first, the amount of aid equivalent to the sum of the injected capital, that is to say, EUR 10 billion; second, the amount of aid concerning the amendment to the repayment terms, that is to say, approximately EUR 2 billion; and third, the amount of aid linked to the impaired assets measure, that is to say, EUR 5 billion.
- 54 The General Court was therefore correct in holding, in paragraph 152 of the judgment under appeal, that the additional aid, that is to say, the aid corresponding to the amendment to the repayment terms, was a constituent element of the ‘restructuring aid’ referred to in the first paragraph of Article 2 of the operative part of the contested decision, which did not draw a distinction between the different elements of that aid.
- 55 On that basis, the General Court concluded, in paragraph 153 of the judgment under appeal, that, taking into account the errors which marred the classification as additional aid made in the contested decision, the first paragraph of Article 2 of that decision had to be annulled in its entirety, since it was based on the finding that the amendment to the repayment terms constituted additional aid of approximately EUR 2 billion.
- 56 The Commission complains, in essence, that the General Court did not confine itself to annulling in part the first paragraph of Article 2 of the contested decision. According to the Commission, such an annulment was possible, since the assessment of the aid measure relating to the amendment to the repayment terms was severable from the assessment of the other constituent elements of the restructuring aid.



- 57 In this connection, it should be recalled that, according to settled case-law, partial annulment of an act of the European Union is possible only if the elements which it is sought to have annulled can be severed from the remainder of the measure. That requirement of severability is not satisfied where the partial annulment of a measure would have the effect of altering its substance (Case C-224/03 *France v Parliament and Council* [2005] ECR I-4021, paragraphs 12 and 13, and Case C-441/11 P *Commission v Verhuizingen Coppens* [2012] ECR, paragraph 38).
- 58 In this case, the partial annulment of the first paragraph of Article 2 of the contested decision would have had the effect of altering its substance, given that it was impossible to determine the exact amount of the additional aid.
- 59 Thus, in recital 34 in the preamble to the contested decision, the Commission concluded that the amendment to the repayment terms of the capital injection represented an additional advantage for ING of an amount between EUR 1.79 billion and EUR 2.2 billion, depending on the market price of ING shares.
- 60 By contrast, in paragraph 140 of the judgment under appeal, the General Court, for its part, held that, even supposing the classification as additional aid made by the Commission to be correct, the loss of revenue to the Netherlands State as a result of the amendment to the repayment terms would amount not to approximately EUR 2 billion, but necessarily to a lower sum, reduced in proportion to the interest accrued when the repayment was made.
- 61 However, it was on the basis of the overall amount of EUR 17 billion that the Commission arrived at the conclusion that the restructuring aid to ING represented 5% of the RWA (risk weighted assets) of ING. In addition, it was by using that threshold of 5% of RWA, as an indicator of the size of the aid, that the Commission found, in recital 141 in the preamble to the contested decision that ING had received ‘a significant aid amount’.
- 62 In paragraphs 154 and 156 of the judgment under appeal, the General Court held that the additional aid thus formed an integral part of the Commission’s assessment when it ruled on the compatibility of the aid with the common market and, in particular, when it determined the level of commitments required in order for the aid to be declared compatible.
- 63 With regard to that last point, the General Court explained, in paragraph 158 of the judgment under appeal, that it was clear from the contested decision that the Commission had examined the question of the extent of the compensatory measures in the light of the effects of the restructuring aid made up of the capital injection aid, the aid concerning the amendment to the repayment terms and the aid linked to the impaired assets measure, that is to say, in the light of a total amount of aid of EUR 17 billion.
- 64 The General Court was therefore fully entitled to hold that it proved impossible to dissociate the additional aid from the operative part and the grounds on which it was based.
- 65 The Commission claims, further, that the first paragraph of Article 2 of the contested decision could not be annulled in so far as that provision constituted merely a measure confirming the initial decision.
- 66 However, in this connection, it is clear from the initial decision that the Commission approved ‘the subscription by the Dutch State of the securities issued by ING’ as ‘emergency intervention in the face of the current financial crisis for a period of 6 months’. At the end of that period, the measure was to be re-evaluated.

- 67 It was therefore a temporary measure that was justified by exceptional circumstances and the validity of which was conditional on the submission by the Netherlands authorities of a plan for ING's long-term viability. Were such a plan to be submitted, the measure would automatically be extended until the Commission adopted a decision on that plan.
- 68 Moreover, the initial decision concerned only the aid measure relating to the capital injection of EUR 10 billion, no reference being made therein to the other measures concerning the additional aid and the impaired assets.
- 69 Whilst it is true, according to the case-law of the Court, that a purely confirmatory measure may not be the subject of an action for annulment (see, inter alia, Case C-123/03 P *Commission v Greencore* [2004] ECR I-11647, paragraph 39), the fact remains that the Court has also held that a measure is to be regarded as purely confirmatory of an existing measure if it contains no new factors as compared with the existing measure (see Case 23/80 *Grasselli v Commission* [1980] ECR 3709, paragraph 18, and Case C-417/05 P *Commission v Fernández Gómez* [2006] ECR I-8481, paragraph 46).
- 70 As it is, by approving overall aid for the restructuring of ING, which involved three aid measures and amounted to EUR 17 billion, the contested decision did not merely confirm what had been approved in the initial decision.
- 71 Indeed, an initial examination of a single aid measure carried out in the context of the exceptional circumstances of a global financial crisis that required the adoption of emergency measures cannot meet the same criteria as those that must govern a final decision as to the compatibility with the internal market of three aid measures of a significantly greater amount.
- 72 The contested decision presents therefore several new factors as compared with the initial decision, which preclude it from being treated as a 'confirmatory measure'.
- 73 Having regard to all of the foregoing considerations, the third ground of appeal must be rejected as unfounded.

*Fourth ground of appeal, alleging that the General Court erred in law in concluding that the first paragraph of Article 2 of the contested decision was unlawful on the ground that the Commission had, wrongly, classified the amended repayment terms as 'State aid'*

#### Arguments of the parties

- 74 The Commission complains that the General Court inferred from the finding of an error affecting the Commission's assessment of the additional aid that there was an effect on the commitments required in order for the restructuring aid to be declared compatible with the common market. The General Court therefore erred in holding that, once the aid relating to the amended repayment terms had been overstated, the commitments offered by the Netherlands authorities might have gone beyond the minimum required to render the aid to ING compatible with the common market.
- 75 In this connection, the Commission claims that it does not have the power to refuse commitments made by a Member State in conjunction with a notified measure on the ground that they go beyond what is necessary to render State aid compatible with the common market. According to the Commission, since the commitments offered by the Kingdom of the Netherlands were sufficient to render compatible the capital injection, the impaired assets measure and the amendment to the repayment terms taken together, they were therefore sufficient to render compatible two of those measures.

76 The Kingdom of the Netherlands and ING, supported by DNB, state that while they did offer the commitments in question, this was because the Commission indicated that it would not give a favourable decision if those minimum compensatory measures were not offered. Consequently, the Commission cannot claim that those commitments were not attributable to it.

#### Findings of the Court

77 It must be observed, at the outset, that, as the Advocate General has stated in point 64 of her Opinion, it is apparent from the General Court's account, in paragraphs 9 to 37 of the judgment under appeal, of the administrative procedure that resulted in the adoption of the contested decision, that the Commission set out on several occasions the measures it considered necessary and stated that the restructuring plan would not be approved without those measures.

78 Thus, in paragraph 14 of the judgment under appeal, the General Court noted that, at a meeting that was held on 24 April 2009 of the Commission, the Kingdom of the Netherlands, ING and DNB, the Commission stated that the aid measures at issue 'would not be approved' if ING was not willing 'to accept significant restructuring measures in order to restore its viability and to mitigate the resulting distortions of competition'.

79 The General Court also noted, in paragraph 29 of the judgment under appeal, that, on 12 October 2009, ING submitted to the Commission another restructuring plan, which 'referred, several times, to the options presented by the Commissioner responsible for competition policy in her e-mail of 6 October 2009. In particular, the plan included numerous divestments resulting in a reduction of ING's balance sheet by 45%, that is to say almost three times the balance sheet reduction proposed in the restructuring plan submitted on 12 May 2009, a ban on all acquisitions and behavioural commitments, as required by the Commission'.

80 It is apparent from that factual assessment that, contrary to what the Commission has claimed, the commitments listed in Annex II to the contested decision were not the result of merely unilateral proposals by the Kingdom of the Netherlands and ING, in relation to which the Commission played no part. The General Court concluded that, on the contrary, the commitments to a large extent had their origin in the requirements that the Commission imposed on the Kingdom of the Netherlands and ING during the administrative procedure.

81 Accordingly, the proposition put forward by the Commission in that ground of appeal, that it was not in a position to affect the commitments offered by the Kingdom of the Netherlands and ING, is inconsistent with the findings of fact made by the General Court.

82 Analysis of the substance of that ground of appeal would accordingly involve a new assessment of the facts at issue. However, since the Commission has not claimed that they were distorted by the General Court, and for the reasons set out in paragraph 45 of the present judgment, such an assessment does not fall within the jurisdiction of the Court of Justice in an appeal.

83 Consequently, the fourth ground of appeal must be rejected as inadmissible.

*Fifth ground of appeal, alleging breach by the General Court of the principle of ne ultra petita*

## Arguments of the parties

- 84 The Commission claims that the applications submitted to the General Court by the Kingdom of the Netherlands and by ING in Cases T-29/10 and T-33/10, respectively, did not contain a request for annulment of the second paragraph of Article 2 of the contested decision, or of the Annex to that decision. By annulling those provisions, the General Court unlawfully expanded the scope of the action brought before it and, consequently, ruled *ultra petita*.
- 85 The Kingdom of the Netherlands and ING dispute that claim.

## Findings of the Court

- 86 It must be observed at the outset, that, by its first plea in law in Case T-33/10, ING requested that the General Court annul the contested decision in so far as it found that ‘the amendment to the CT1 transaction constituted (additional) State aid’.
- 87 It is apparent from the application for annulment submitted by ING to the General Court, that the ‘CT1 transaction’ corresponded to the agreement concluded between ING and the Kingdom of the Netherlands concerning the injection of EUR 10 billion CT1 (Core Tier 1) capital and that the amendment to that transaction consisted of the amendment to the repayment terms of the capital injection.
- 88 It follows that, by its first plea in law, ING requested that the General Court annul the contested decision in so far as it found that the amendment constituted additional aid. That head of claim was not therefore directed at a particular article or paragraph of the operative part of the contested decision.
- 89 Furthermore, in paragraph 147 of the judgment under appeal, the General Court noted that, ‘in its first head of claim, ING ... seeks, in essence, the annulment of the first paragraph of Article 2 of the contested decision, the second paragraph of Article 2 of and Annex II to that decision, in so far as the Commission considered that the amendment to the repayment terms constitutes additional aid of approximately EUR 2 billion’.
- 90 In the light of the foregoing, it must be held that the ground of appeal raised by the Commission that, by annulling the second paragraph of Article 2 of the contested decision and Annex II to that decision, the General Court ruled *ultra petita* cannot succeed.
- 91 Accordingly, the fifth ground of appeal must be rejected as unfounded.

*Sixth ground of appeal, alleging, in the alternative, that if the General Court was correct to annul the first and second paragraphs of Article 2 of the contested decision, it should also have annulled the third paragraph of Article 2*

## Arguments of the parties

- 92 The Commission observes that recital 30 in the preamble to the initial decision records the commitment made by the Kingdom of the Netherlands and ING that ING would limit its balance sheet expansion in order to restrict the distortion of competition which would result from the capital injection. However, in the light of the commitments on which the finding, in the contested decision,

that the aid was compatible with the common market was based, the Commission decided, in the third paragraph of Article 2 of that decision, to lift the temporary limitation on ING's balance sheet growth.

- 93 According to the Commission, if the General Court was correct to annul the analysis and the commitments on which the second paragraph of Article 2 of the contested decision and Annex II to that decision were based, the necessary consequence would be that ING should not be freed from the constraints on balance sheet growth to which it was subject before the adoption of that decision. The finding that the aid was compatible with the internal market in view of the commitments set out in Annex II to the contested decision and the lifting of the limitations on balance sheet growth formed an indivisible whole.
- 94 The Kingdom of the Netherlands contends that the question whether the annulment of the first and second paragraphs of Article 2 of the contested decision must lead to the annulment of the third paragraph of Article 2 as well, requires a substantive assessment which the General Court could not make because it had not been requested. According to the Kingdom of the Netherlands, the Court of Justice may not make that assessment in an appeal, since this would involve an assessment of the facts.
- 95 ING submits that this sixth ground of appeal is manifestly inadmissible since the Commission did not seek any such relief before the General Court and may not, therefore, do so now.

#### Findings of the Court

- 96 By this ground of appeal, the Commission complains, in essence, that the General Court did not, of its own motion, raise a plea in law as to the annulment of the third paragraph of Article 2 of the contested decision, following the annulment of the first and second paragraphs of that article.
- 97 In this connection, it must be stated that, to the extent that the question raised by the Commission cannot be considered to be one involving a matter of public policy, the General Court could not determine it of its own motion, lest it rule *ultra petita* (see, to that effect, Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* [2006] ECR I-4845, paragraph 45, and Case C-272/12 P *Commission v Ireland and Others* [2013] ECR, paragraph 28).
- 98 It follows that the sixth ground of appeal must be rejected as inadmissible.
- 99 Since none of the six grounds raised by the Commission in support of its appeal can succeed, the appeal must be dismissed in its entirety.

#### Costs

- 100 Under Article 184(2) of the Rules of Procedure of the Court, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 101 Since the Commission has been unsuccessful and the Kingdom of the Netherlands and ING have applied for costs to be awarded against it, the Commission must be ordered to pay the costs.
- 102 In accordance with Article 140(1) of the Rules of Procedure, which also applies to appeal proceedings by virtue of Article 184(1) of those rules, DNB is to be ordered to bear its own costs.



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

- 1. Dismisses the appeal;**
- 2. Orders the European Commission to pay the costs;**
- 3. Orders De Nederlandsche Bank NV to bear its own costs.**

[Signatures]