



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 19 December 2013¹

Case C-224/12 P

European Commission

v

Kingdom of the Netherlands and ING Groep NV

(Appeal — State aid for a bank comprising a capital injection in exchange for securities — Changes to terms governing remuneration and redemption of the securities — Decision declaring the aid compatible with the common market, subject to commitments — Application of the private investor test)

1. This is an appeal by the Commission against a judgment of the General Court² annulling in part a decision³ concerning aid granted by the Netherlands State to the bank ING Groep NV ('ING'). That decision, *inter alia*, declared restructuring aid in the form of a capital injection in exchange for securities, on specified repayment terms, to be State aid within the meaning of Article 87(1) EC (now Article 107(1) TFEU), but considered it compatible with the common market subject to a number of commitments on the part of ING and the State.

2. The principal issue concerns the application of the private investor test (that is to say, essentially, whether the recipient undertaking could have obtained from a private investor, operating in normal market conditions, the same advantage as that which has been made available to it through State resources)⁴ to an amendment to repayment terms for State aid. The General Court's evaluation of loss of revenue to the State through the amendment to the repayment terms is also called into question. Further matters concern the implications of the annulment of the finding of the existence of State aid within the meaning of Article 107(1) TFEU. How does that annulment affect other elements of the contested decision, particularly the commitments provided by ING and the Netherlands State?

The aid and the contested decision

3. By decision of 12 November 2008 ('the initial decision'), the Commission authorised an emergency recapitalisation in favour of ING whereby the Netherlands State subscribed to a EUR 10 billion issue of securities by ING ('the capital injection'). Under the original terms, ING could choose to redeem the securities at EUR 15 each (50% over their issue price) within three years or, thereafter, to convert them into ordinary shares. In the latter case, however, the Netherlands could opt for ING to redeem at

¹ — Original language: English.

² — Joined Cases T-29/10 and T-33/10 *Netherlands and ING Groep v Commission* [2012] ECR ('the judgment under appeal').

³ — 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[-up] Facility and Restructuring Plan (OJ 2010 L 274, p. 139; 'the contested decision').

⁴ — See, for example, Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraph 68 and case-law cited; Case C-124/10 P *EDF* [2012] ECR, paragraph 78 and case-law cited. The private investor test is also referred to as the private investor principle or the market economy investor test (or principle, sometimes abbreviated to 'MEIP').

EUR 10, plus interest. A coupon (interest payment) on the securities would be paid to the State only if a dividend was paid by ING on ordinary shares. The Commission found that the capital injection constituted State aid to ING and authorised it provisionally. If a restructuring plan was submitted to the Commission within six months, the authorisation was to be automatically extended until the Commission decided on the plan. The initial decision had regard to a number of commitments made by the Netherlands, *inter alia* that the growth of ING's balance sheet would be restricted.

4. On 31 March 2009, the Commission notified the Netherlands of its decision to initiate the procedure laid down in Article 88(2) EC ('the opening decision'⁵) because of its doubts as to the compatibility of an illiquid assets back-up facility granted to ING ('the IABF') with the general principles on asset relief measures.⁶ That measure was, however, approved for a period of six months. It was also stated that the Netherlands had undertaken to submit a restructuring plan covering both the capital injection and the IABF.

5. On 12 May 2009, the Netherlands submitted that plan. Following meetings with the Commission, a revised plan was submitted on 22 October 2009. The revised plan included, on the one hand, commitments regarding the implementation of the restructuring plan and, on the other hand, a change in the original terms for repaying the capital injection, allowing ING to redeem up to 50% of the securities at their issue price, plus interest on the annual coupon of 8.5% and a premium if its shares traded above EUR 10. Depending on share prices, that premium could vary between EUR 340 million and EUR 705 million, to ensure a minimum internal rate of return of 15%.

6. On 18 November 2009, the Commission adopted the contested decision, dealing with the capital injection, the amendment to the repayment terms, the IABF and guarantees accorded under the national credit guarantee scheme.

7. Article 2 of the contested decision provided:

'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 Commission's decision of 12 November 2008 concerning the recapitalisation measure to ING, is lifted.'

8. Annex II contained 11 sets of commitments (also referred to in the proceedings as 'compensatory measures') by the Netherlands State and/or ING, with a view to remedying the distortions of competition caused by the restructuring aid.

9. In its reasoning, the Commission did not apply the private investor test to the capital injection, the amendment to the repayment terms or the IABF, although it did apply the test to the credit guarantees. As regards the amendment to the repayment terms, it considered that ING would previously have had to pay a premium of EUR 2.5 billion but that, since it would now have to pay only between EUR 340 million and EUR 705 million, it enjoyed an additional advantage of between EUR 1.79 billion and EUR 2.2 billion.⁷

5 — See OJ 2009 C 158, p. 13.

6 — Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ 2009 C 72, p. 1).

7 — See further paragraphs 1 to 49 of the judgment under appeal.

The judgment under appeal

10. Both the Netherlands and ING challenged the contested decision before the General Court.

11. In Case T-29/10, the Netherlands sought annulment of ‘the first paragraph of Article 2 of the contested decision which is based inter alia on the finding in recital 98 in the preamble to that decision that the amendment to the repayment terms for the capital injection represented additional aid to ING of approximately EUR 2 billion’.

12. In Case T-33/10, ING, supported by the Netherlands central bank De Nederlandsche Bank NV (‘DNB’), sought annulment of the contested decision in particular ‘in so far as it finds that the amendment to the repayment terms for the capital injection represents additional aid of approximately EUR 2 billion’.

13. The General Court joined the cases and annulled ‘the first paragraph of Article 2 of [the contested decision], the second paragraph of Article 2 of that decision and Annex II to that decision’. Its relevant reasoning, in paragraphs 95 to 160 of the judgment under appeal, may be summarised very briefly as follows.

14. The amendment to the repayment terms, under which the Netherlands gained a guaranteed return not available under the original terms, should have been assessed in the light of the private investor test. The Commission did not apply the test to that situation and ignored various reports available on foreseeable returns and on the behaviour of a private investor. Its arguments to the effect that ING was bound to redeem the securities under the original terms were unconvincing.

15. In any event, the Commission failed to take account of the coupon payment which became mandatory as part of the amended terms. The amount of any aid therefore had to be reduced in proportion to the amount of the coupon.

16. The Commission thus erred in calculating the amount of State aid involved in the amendment of the repayment terms. If the amended remuneration had been taken into account, that could have affected the assessment of both classification as aid and compatibility with the common market, in particular for the appraisal of ING’s contribution or of the measures intended to remedy the distortions of competition.

17. The restructuring aid classified as State aid in the first paragraph of Article 2 of the contested decision included the aid supposedly resulting from the amendment to the repayment terms, but without distinguishing it from the remainder of the aid. The whole of that first paragraph had therefore to be annulled.

18. The Commission had analysed the extent of the compensatory measures in the light of, inter alia, the aid deriving from the amendment to the repayment terms. As a result of its errors, it could no longer contend that the restructuring aid constituted the significant amount on the basis of which the compensatory measures had been assessed. The Commission had therefore erred in concluding that the amendment to the repayment terms gave rise to State aid of approximately EUR 2 billion. The illegality of that finding entailed the illegality of the second paragraph of Article 2 of the contested decision and of Annex II thereto, in that the compatibility of the restructuring aid depended on an analysis and on commitments to be assessed in the light of the restructuring aid, which included the additional aid.

The appeal and the procedure before the Court of Justice

19. The Commission asks the Court to:

- set aside the judgment under appeal, dismiss the applications at first instance and order the Kingdom of the Netherlands and ING to pay the costs;
- in the alternative, refer the case back to the General Court for consideration and reserve the costs;
- 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.

20. It advances six grounds of appeal:

- first, there is no requirement to apply the private investor test to an amendment of repayment terms for a measure that itself constituted State aid;
- second, the General Court wrongly evaluated the loss of revenue to the State resulting from the amendment to the repayment terms;
- third, even if the Commission wrongly treated the amendment to the terms as State aid, the General Court was not entitled to annul the entire first paragraph of Article 2 of the contested decision;
- fourth, the General Court erred in law in finding that the second paragraph of Article 2 of the contested decision was necessarily unlawful because the Commission had erred in finding that the amendment to the repayment terms constituted State aid;
- fifth, the General Court ruled *ultra petita* in annulling the second paragraph of Article 2 of the contested decision and Annex II thereto;
- sixth, in the alternative, if the General Court was correct to annul the first and second paragraphs of Article 2 of the contested decision and Annex II thereto, it could not refrain from annulling the third paragraph of Article 2.

21. The Kingdom of the Netherlands considers that all six grounds of appeal are unfounded, and asks the Court to:

- dismiss the appeal and order the Commission to pay the costs;
- in the alternative, refer the case back to the General Court.

22. ING considers that several of the grounds of appeal are, in whole or in part, inadmissible, ineffective or devoid of legal purpose and that the appeal as a whole is unfounded. It submits that the Court should:

- declare the appeal inadmissible and/or ineffective in part, dismiss it in its entirety, and order the Commission to pay the costs;
- in the alternative, refer the case back to the General Court and reserve the costs.

23. DNB, intervener at first instance in support of ING, asks the Court to dismiss the first and fourth grounds of appeal as unfounded.

24. The Court of Justice authorised a second round of pleadings confined to the first ground of appeal. The hearing on 26 September 2013 concentrated on the first and fourth grounds of appeal.

Parallel developments

25. On 11 May 2012, the day on which it lodged its appeal in the present case, the Commission adopted a new decision relating to the restructuring aid accorded to ING.⁸ In that decision, it examined the amendment to the repayment terms in the light of the private investor test, and took the view that a market investor would not have agreed to those terms. The Commission therefore concluded that the amendment constituted State aid but, in the light of certain commitments offered by the Netherlands, was compatible with the internal market.

26. That decision was challenged before the General Court by both the Netherlands and ING on the ground, inter alia, that the Commission had erred in its application of the private investor test. However, the applications were later withdrawn and the cases removed from the register.⁹

First ground of appeal (applicability of the private investor test)

27. In the course of its reasoning in paragraphs 95 to 114 of its judgment, the General Court pointed out that, for a measure to be classified as State aid, it must, inter alia, confer on the recipient undertaking an economic advantage which the undertaking would not have obtained under normal market conditions. In the case of a capital injection, it must be assessed whether, in similar circumstances, a private investor of a dimension comparable to that of a public authority could have been prevailed upon to make capital contributions of the same size. Where, having decided to subscribe to capital issued by an undertaking subject to certain repayment terms, the State agrees to amend those terms, both the capital contribution and the amendment to the repayment terms may constitute State aid if the State did not act in each case as a private investor in a similar situation would have done. The Commission could not avoid assessing the amendment to the repayment terms in the light of the private investor test solely because the capital injection itself constituted State aid. Only after such an assessment could the Commission conclude whether an additional advantage had been granted.

28. In paragraphs 115 to 125, the General Court examined the Commission's analysis of the amendment to the repayment terms and concluded that it had misinterpreted the concept of aid by not assessing whether, by accepting that amendment, the State had acted as a private investor would have done in a similar situation, with particular regard to the fact that the amendment provided for early repayment and gave greater certainty of a satisfactory return under market conditions.

29. The General Court went on, in paragraphs 126 to 134, to examine the likelihood that ING would have exercised its option under the original repayment terms to redeem the securities within the first three years, in the light of the Commission's claim that ING would have been de facto obliged to do so, giving the State revenue of EUR 2.5 billion and that, by accepting the amended terms, the State had given up its right to that revenue and thus provided additional aid. The General Court concluded that ING would in fact have exercised the option only in specific circumstances which did not, and were not likely to, occur.

8 — 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. See, in particular, recitals 114 to 156.

9 — Order of the President of the First Chamber of the General Court of 6 December 2012 in Joined Cases T-325/12 and T-332/12 *Netherlands and ING v Commission*.

30. The Commission submits that the General Court was wrong to consider that the private investor test should have been applied to the amendment to the repayment terms. At the heart of its argument is the contention that the amendment could not be viewed as a separate measure, to be assessed in isolation from the capital injection. It is undisputed that the capital injection was a measure of State aid, of which the original repayment terms formed an integral part. That measure was an obligation which the State was bound to assume as a public authority, in order to avoid serious disturbance of the Netherlands economy through the collapse of a systemic national bank. No private investor could ever be in that position, so there was no scope for applying the private investor test to the capital injection – including its repayment terms, whether original or amended. The only assessment required was as to whether the amendment conferred an additional advantage on ING.

31. The other parties take the view, in essence, that the amendment to the repayment terms was separate from the original capital injection. Once that injection had been made, the State was in a position in which a private investor could have found itself – a holder of securities. Such an investor could well wish, on rational economic grounds, to renegotiate the terms on which the securities were to be redeemed. That was the case with the Netherlands State, which preferred to exchange a less certain, albeit potentially higher, return for a guaranteed repayment which, if lower, none the less represented a satisfactory return on investment. That being so, it was not only possible but necessary, according to the case-law, to apply the private investor test in order to determine whether the amendment to the repayment terms constituted State aid.

32. ING further submits that the Commission is putting forward an inadmissible factual argument when it asserts that the capital injection and the amendment to the repayment terms formed part of a series of connected measures.

33. I am unconvinced by that argument on admissibility. The factual links between the measures are not in issue. What is in issue is the question of law as to whether, in the light of those links, the General Court was correct to decide that the Commission should have applied the private investor test when assessing the amendment to the repayment terms.

34. I would stress, moreover, that this ground of appeal is concerned only with that issue. It is irrelevant what the outcome of that test would have been if it had been applied. To a certain extent, the argument has strayed into the latter issue and – to that extent – it should be disregarded. Moreover, the test has now been applied by the Commission and the challenges to the way in which it was applied have been withdrawn.¹⁰ Those circumstances do not, however, detract from the need to resolve the dispute as to whether the General Court was correct to decide that it should have been applied in the contested decision.

35. In my view, there are two questions to be answered when considering the private investor test: (i) was the State's action such that it can meaningfully be compared with an act of a private investor; (ii) if so, was that action determined by considerations which are relevant only or at least primarily to the State in its capacity as public authority, or might the same action have been taken 'in comparable market conditions by a private investor in a situation as close as possible to that of the State'?¹¹ Stage (i) concerns the applicability of the test, stage (ii) concerns its application. Here, we are concerned with applicability alone.

¹⁰ — See paragraphs 25 and 26 above.

¹¹ — *EDF*, paragraph 79.

36. The Commission is concerned to limit the applicability of the private investor test. It may fear that, if that test were applied systematically, a measure which, in the light of all the circumstances, would not have been undertaken by a rational private investor might be analysed as meeting the test.¹² If so, that is a general issue. Here, however, it can only be addressed with regard to the circumstances of the capital injection into ING and the amendment to the repayment terms.

37. It is uncontested that, as far as the capital injection itself is concerned, there was no meaningful comparison between the State's behaviour and that of a private investor. In 'saving' a systemic national bank in the context of the serious financial crisis which broke in 2008, the Netherlands State was acting entirely in its capacity as supreme public authority concerned with the stability of the national economy as a whole. That is simply not a capacity in which any private investor would or could act. It is also common ground that the capital injection as first proposed fell to be assessed as a whole, including the original repayment terms which were an integral part of the aid package.

38. The question therefore arises whether the amended repayment terms fell to be assessed on the same basis as the original terms, or whether the amendment was to be viewed as a separate measure.

39. It seems to me that two approaches might have been envisaged: reassessing the capital injection as a whole, substituting the amended repayment terms in the place of the original terms, in order to determine anew the amount of aid; or assessing the amendment to the terms as a separate measure, in order to determine whether and, if so, to what extent State resources were used to provide ING with a benefit. In the first approach, assessment of the repayment terms would have formed an integral part of the assessment of the capital injection undertaken by the State in its capacity as public authority and there would have been no meaningful comparison with the behaviour of a private investor. However, the Commission in fact took the second approach. Whether that approach was the correct one is not at issue for present purposes. The fact is that it was the approach taken by the Commission.

40. That being so, it seems to me difficult for the Commission now to assert that the amendment to the repayment terms was inseparable from the capital injection and could be assessed only in accordance with the same criteria. I also consider that, if that amendment is assessed as a separate measure, it becomes quite possible to compare the State's behaviour with that of a private investor.

41. It is true that the initial capital injection was State aid and that a private investor can by definition never be in the position of having granted State aid. However, by its initial grant, the State became a holder of securities to be redeemed on specified terms. A private investor could also be in such a position. If the value of the securities held by the State was higher than would be usual for any private investor, that does not seem to me to be a decisive consideration. Nor does the question whether the securities were of an unusual nature, as the Commission has alleged – which is, in any event a question of fact falling outside the competence of this Court in an appeal. 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. The question, it seems to me, is, quite simply: 'Would it have been rational for a private investor who, for whatever reason, held securities on the same terms, and who was attentive to market conditions, to have agreed to the same amendment to those terms?'

12 — There might also be a practical concern that, since the private investor test involves a complex economic assessment, its systematic application would impose too great a strain on the Commission's resources. I do not think, however, that such a concern can be legally relevant.

42. I stress that I reach that view on the basis that, as was the case, the Commission approached the amendment to the repayment terms as a separate measure capable of being assessed as constituting a grant of an identifiable benefit to ING using State resources. While I take no position on whether that approach was correct or appropriate, it seems to me that, if the Commission had instead reassessed the capital injection as a whole, including the amended repayment terms, any risk of the kind to which I have alluded at point 36 above might have been averted, even if the private investor test had been applied. If the capital injection as a whole used State resources to confer an advantage with no adequate economic compensation or return on the specific transaction (as opposed to a general benefit to the national economy), it would presumably not have satisfied the private investor test. However, that assessment was not made, and the question of the applicability of the test in those circumstances did not arise. In fact, the amendment to the repayment terms was assessed as a separate measure and there was therefore no reason not to apply the private investor test.

43. I would therefore dismiss the first ground of appeal.

Second ground of appeal (evaluation of loss of revenue)

44. In paragraphs 135 to 142 of its judgment, the General Court considered that, even if the Commission could have concluded that the State had suffered a loss of revenue, it did not correctly determine the amount of that loss. The Commission failed to consider the fact that, under the amended repayment terms, payment of a coupon representing interest accrued at the time of the early repayment ceased to depend on payment of a dividend to ordinary shareholders. The Commission was aware of that fact and was not entitled to disregard it. In the event, the Netherlands State received EUR 258.5 million when early repayment occurred on 21 December 2009 – which it would not have received under the original repayment terms, as no dividend was paid for 2009. While the Commission could not have known that amount in advance, it should have enquired as to the effect that the possible payment could have on the amount of additional aid referred to in the contested decision. The amount of any loss to the State was therefore overestimated in the contested decision by several hundred million euro, an error which invalidated the Commission's assessment of the concept of aid.

45. The Commission states, first, that, according to the original terms of repayment as presented by the Netherlands, ING was required to pay accrued interest whenever it repaid the capital injection, and that the Netherlands stated that the repayment terms were unaltered in the revised restructuring plan; the Commission was therefore correct not to deduct the interest actually paid in 2009. The Netherlands Government and ING contest the allegation but consider it to be a factual argument falling outwith the competence of the Court in an appeal.

46. Second, the Commission argues that the interest which it had not deducted (a maximum of EUR 303 million) could not have affected the classification of the amendment to the repayment terms as aid or the assessment of its compatibility with the internal market or of the scope of the commitments made by way of compensatory measures. The Netherlands Government and ING respond that the commitments in question (in Annex II to the contested decision) were not made voluntarily but were dictated by the Commission in the light of the amount of aid found to exist. If that amount had been correctly determined, the extent of the necessary commitments would have changed.

47. I agree that 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 outwith this Court's competence on appeal. The General Court found that the two sets of terms differed and that the Commission was aware of that fact. Although the Commission has put forward a different version of the facts, it does not allege that the General Court distorted the clear sense of the evidence.

48. The substantive legal issue is whether the General Court was justified in concluding from the facts as it found them that it was ‘not possible to rule out the assumption’ that, if the Commission had taken account of the additional interest received by the State, that ‘could have affected’ the classification of the amendment to the repayment terms as aid or the assessment of its compatibility with the internal market or of the scope of the compensatory measures, and in considering that the ‘assessment of the concept of aid’ was thereby invalidated by a factual error.¹³

49. It is clear from the account of the facts at paragraph 14 et seq. of the judgment under appeal that, overall, the commitments given by the Netherlands and ING to remedy the distortions of competition were essentially imposed by the Commission as a condition for finding the aid compatible with the internal market. However, the amendment to the repayment terms – with the assessment of which this appeal is concerned – was notified to the Commission only on 22 October 2009, and there is no indication in the judgment under appeal that any change was thereafter made to the commitments in the light of the amendment. It also seems to me to be uncertain that a difference of EUR 303 million, out of a total of EUR 1.79 billion to EUR 2.2 billion (a difference of between 14% and 17%, approximately) would have influenced the decision as to whether there was State aid or, if there was, whether it was compatible with the internal market. I do, however, regard it as at least plausible that the commitments would have needed to be reviewed.

50. The formulation used by the General Court (‘it is not possible to rule out the assumption’ that the assessment ‘could have’ been ‘affected’ as a result of the factual error found) does not seem unjustifiable in those circumstances. But was the ‘assessment of the concept of aid’ thereby invalidated? Given that the General Court was not competent to substitute its own assessment, it seems to me that the only conclusion it could reach was that the Commission needed to carry out a new assessment on the correct factual basis.

51. I would therefore dismiss the second ground of appeal.

Third ground of appeal (annulment of the entire first paragraph of Article 2 of the contested decision)

52. In paragraphs 151 to 153 of its judgment, the General Court considered that, in the first paragraph of Article 2 of the contested decision, no distinction was made between the different elements of the ‘restructuring aid’ found to constitute State aid, but that it included the additional aid of approximately EUR 2 billion resulting from the amendment to the repayment terms. The General Court concluded that, in view of the errors marring the classification of the amendment as additional aid, the paragraph had to be annulled in its entirety.

53. The Commission submits that the General Court was not entitled to annul the first paragraph of Article 2 as a whole. Since the classification of measures other than the amendment to the repayment terms (in particular, the capital injection and the IABF) as State aid was dissociable from any error in classifying the amendment as such, the annulment breached the principle of proportionality. Moreover, the first paragraph was a purely confirmatory act as regards those other measures (which had already been assessed in the initial decision), and such an act is not open to challenge in annulment proceedings. The annulment of the first paragraph of Article 2 of the contested decision should therefore be overturned to the extent that it concerns measures other than the amendment to the repayment terms.

¹³ — Paragraphs 141 and 142 of the judgment under appeal.

54. The Netherlands Government and ING point out that the paragraph in question is a single sentence, no part of which could be annulled so as to leave formally intact the finding of State aid in relation to measures other than the amendment to the repayment terms. But the annulment must be read in the light of the General Court's reasoning, from which it is clear that only the classification of the aid resulting from the amendment to the repayment terms was impugned. Moreover, that annulment in fact revived the initial decision, in which the capital injection had been found to be State aid, and the paragraph in question was not 'purely' confirmatory, inasmuch as it was based on a re-examination of the facts, including the new facts relating to the amended terms.

55. The issue here is largely formal. It is not disputed that the General Court did not intend to annul, as such, the contested decision's classification as State aid of measures other than the amendment to the repayment terms, nor is it alleged that it should have done so. The questions which arise are: what was the effect of the annulment of the whole of the first paragraph of Article 2 of the contested decision; and could the General Court, having reached the conclusion that the classification of the amendment to the repayment terms as State aid was flawed, have proceeded otherwise?

56. With regard to the effect of the annulment, the Commission is correct to point out that an action for annulment brought against a decision which is merely confirmatory of an earlier decision that was not challenged within the time-limit for bringing proceedings is inadmissible.¹⁴ However, that rule, which concerns the admissibility of an application for annulment, simply reflects the fact that the earlier decision can no longer be annulled, so that annulment of the confirmatory decision would have no effect on the legal position. Therefore, to the extent that the first paragraph of Article 2 of the contested decision confirmed earlier decisions classifying measures as State aid, its annulment could have no effect on those earlier findings. That conclusion concerns, in any event, the findings that the capital injection and the IABF constituted State aid.¹⁵ As regards the guarantees, the situation is less clearly stated in the contested decision, but I find no indication that there had been an earlier decision finding the guarantees already paid to constitute State aid.¹⁶

57. Annulment of the whole of the first paragraph of Article 2 of the contested decision would therefore appear (a) to have been without effect on the earlier classification as State aid of the capital injection and the IABF, but (b) to have annulled the classification as State aid, in the contested decision itself, not only of the amendment to the repayment terms but also of the aid under the credit guarantee scheme. However, the classification of the latter aid was not challenged in the proceedings at first instance.

58. With regard to the possibility for the General Court to have proceeded otherwise, the Commission cites an example in which that Court did indeed annul a comparable paragraph in a State aid decision, to the extent that it related to certain amounts included under, but not separately identified in, that paragraph.¹⁷ This Court has done much the same in comparable circumstances, annulling for example a decision ordering recovery of aid granted to four companies in so far as the amount included interest falling due after two of those companies, not specifically identified in the relevant paragraph of the operative part of the decision, were declared insolvent.¹⁸ I see no reason why a similar approach should not have been taken by the General Court in the judgment under appeal.

14 — See, for example, Case C-416/11 P *United Kingdom v Commission* [2012] ECR, paragraph 32.

15 — See recitals 97 and 99 in the preamble to the contested decision.

16 — Future guarantees are also dealt with in the contested decision, but it is stated that they will be assessed in a separate decision (see recital 47 in the preamble).

17 — Joined Cases T-415/05, T-416/05 and T-423/05 *Greece and Others v Commission* [2010] ECR II-4749.

18 — Case C-480/98 *Spain v Commission* [2000] ECR I-8717.

59. I am therefore of the view that the third ground of appeal should be upheld to the extent that, by annulling the whole of the first paragraph of Article 2 of the contested decision, the General Court annulled the finding in that decision that the guarantees received by ING from the national credit guarantee scheme constituted State aid.

Fourth ground of appeal (consequential annulment of the second paragraph of Article 2 of the contested decision)

60. In paragraphs 154 to 160 of its judgment, the General Court considered the additional aid represented by the amendment to the repayment terms to be an integral part of the restructuring aid assessed by the Commission. Such additional aid could not be dissociated from the operative part of the contested decision and the underlying examination of ‘the determination of the level of commitments required so that the aid can be declared compatible with the common market’. The illegality of the finding of additional aid of approximately EUR 2 billion thus necessarily entailed the illegality of the second paragraph of Article 2 of the contested decision, stating that the aid was compatible with the common market ‘subject to the commitments set out in Annex II’, and of Annex II itself, in so far as the compatibility of the restructuring aid depended on an analysis and on commitments whose content was to be assessed in the light of the amount of the aid, which included that additional aid.

61. The Commission submits, essentially, that the General Court was wrong to take that approach, since the commitments were offered by ING and the Netherlands State, and the Commission had no power to refuse them even if they went beyond what was necessary in order to remedy the distortions of competition. Thus, even if the Commission did overestimate the total amount of aid, that had no consequence as to the compensatory measures offered and accepted, and therefore did not justify annulling those parts of the contested decision which set out the commitments in the light of which the aid could be declared compatible. The Commission also argues that, since the contested decision was not a decision closing a formal investigation procedure under Article 7 of Regulation No 659/1999,¹⁹ it was not empowered to attach conditions to its decision pursuant to paragraph 4 of that article.

62. The other parties refer to paragraphs 14 to 36 of the judgment under appeal, which indicate that the Commission in fact insisted upon the commitments required in order for the aid to be considered compatible. The General Court found that the amount of aid had been overestimated; if that assessment had not been flawed, the Commission need not have insisted on such weighty commitments as it did.

63. It is necessary first, in my view, to look at the facts as found by the General Court concerning the genesis of the commitments set out in Annex II to the contested decision. In that regard, I do not consider relevant the Commission’s argument that the contested decision was not a decision closing a formal investigation procedure. What matters is whether – in the General Court’s findings – the Commission did in fact dictate the terms of the commitments listed in Annex II to the contested decision; if so, it cannot rely simply on the argument that it was powerless to accept lesser commitments.

64. The account of the administrative procedure in paragraphs 9 to 37 of the judgment under appeal contains clear findings that the Commission repeatedly indicated the measures it considered necessary and stated that the restructuring plan would not be approved without those measures. The General Court uses phrases such as ‘requirements laid down by the Commission’ (paragraph 20), ‘as required by the Commission’ (paragraph 29) and ‘to comply with the Commission’s demand’ (paragraph 31). By

¹⁹ — Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

contrast, there is no indication of any similar behaviour by the Commission following the notification of the amendment to the repayment terms on 22 October 2009, and this Court is not competent to make any finding as to whether, between that date and 6 November 2009 when exchanges concerning the draft decision came to an end, any of the commitments in Annex II were modified, either at the Commission's initiative or at that of any other party.

65. However, the General Court did not base the conclusion which the Commission contests in this ground of appeal on the assumption that specific commitments were required as a consequence of the amendment to the repayment terms. It considered, rather, that the extent of the commitments which the Commission was willing to accept, as a whole, was directly and proportionately dependent on the amount of the aid, again as a whole and thus including the aid resulting from the amendment to the repayment terms, the assessment of which the General Court had already found to be vitiated by errors. It is in that context that the Commission objects that it had no power to determine the extent of the commitments and considers that the General Court's reasoning is flawed.

66. It seems to me that the reasoning in question is indeed inadequate, but not on the ground advanced by the Commission. The only conclusion which can be drawn from the factual findings in paragraph 9 et seq. of the judgment under appeal is that the extent of the commitments which the Commission was willing to accept was determined before 20 October 2009. Consequently, the notification of the amendment to the repayment terms after that date did not affect those commitments. There was therefore no cause for the General Court to annul the parts of the contested decision which made the finding of compatibility subject to those commitments. If the Commission had challenged that part of the judgment under appeal on those grounds, I would have been prepared to uphold the challenge.

67. However, the Commission's ground of appeal must stand or fall with its contention that it had no power to influence the commitments made voluntarily by the Member State and the bank, which is gainsaid by the General Court's findings of fact. Since the Commission has not alleged that the facts were distorted, I consider that the present ground of appeal should be dismissed.

Fifth ground of appeal (*ultra petita* annulment of the second paragraph of Article 2 of the contested decision)

68. In paragraphs 64 and 66 of its judgment, the General Court set out the forms of order sought by the applicants. The Kingdom of the Netherlands sought annulment of 'the first paragraph of Article 2 of the contested decision which is based *inter alia* on the finding in recital 98 in the preamble to that decision that the amendment to the repayment terms for the capital injection granted by the Netherlands authorities represents additional aid to ING of approximately EUR 2 billion'; ING sought three forms of order, of which the General Court examined only the first: annulment of the contested decision 'in so far as it finds that the amendment to the repayment terms for the capital injection represents additional aid of approximately EUR 2 billion'.

69. In the operative part of the judgment, the General Court annulled the first and second paragraphs of Article 2 of the contested decision and Annex II thereto.

70. The Commission submits that, in annulling the second paragraph of Article 2 of the contested decision and Annex II thereto, the General Court exceeded its jurisdiction, infringed the principle that the subject-matter of the proceedings is delimited by the parties, ruled *ultra petita*, and committed a breach of procedure that adversely affected the interests of the Commission. The annulment sought in the heads of claim which were examined by that Court was confined to the first paragraph of Article 2, and nothing in the wording of the forms of order sought (in particular, the words '*inter alia*') or in the parties' answers to written questions posed by the General Court before the hearing could extend that to other parts of the contested decision.

71. The Netherlands Government states that, once the first paragraph of Article 2 of the contested decision (the finding that the restructuring aid constituted State aid) was annulled, the finding in the second paragraph (that the aid was compatible ‘subject to the commitments set out in Annex II’) became devoid of purpose, as did those commitments; the General Court did not therefore rule *ultra petita* in annulling those parts of the contested decision in response to a request for annulment of the first paragraph of Article 2. ING asserts that the ground of appeal is inadmissible because the Commission did not raise at first instance the issue of the clarity and precision of the forms of order sought. Both parties submit that, in its second head of claim (for annulment of the contested decision ‘in so far as the Commission made approval of the aid conditional upon the acceptance of price leadership bans, as set out in the decision and in its Annex II’), ING did seek annulment of the second paragraph of Article 2.

72. I cannot agree with ING’s objection to the admissibility of this ground of appeal. It is clearly only once the General Court has ruled that any question of whether it ruled *ultra petita* can arise.

73. On the substance, I agree with the Netherlands Government’s submission. Annulment of the finding that the restructuring aid constituted State aid within the meaning of Article 87(1) EC – and was thus, in principle, by definition incompatible with the common market – meant that it was no longer State aid and thus no longer incompatible. That being so, the finding that the aid was compatible with the common market subject to certain commitments could not stand, as it would have been tantamount to requiring commitments to be made in respect of aid which was already compatible without those commitments. Consequently, annulment of the second paragraph of Article 2 of the contested decision and Annex II thereto was an inevitable corollary of the annulment of the first paragraph of Article 2, as sought by the parties in the heads of claim examined by the General Court.

74. I would therefore dismiss the fifth ground of appeal.

Sixth ground of appeal (in the alternative: failure to annul the third paragraph of Article 2 of the contested decision)

75. In the operative part of its judgment, the General Court annulled the first and second paragraphs of Article 2 of the contested decision (finding, respectively, that the restructuring aid constituted State aid and that the aid was compatible with the common market, subject to the commitments in Annex II), thereby leaving intact the third paragraph, which lifted the temporary limitation on balance sheet growth imposed on ING.

76. If its preceding grounds of appeal should be unsuccessful, the Commission submits in the alternative that, having annulled the first and second paragraphs of Article 2 of the contested decision, the General Court erred in law by not annulling the third paragraph also.

77. The initial decision noted the commitment that ING would limit its balance sheet expansion in order to restrict the distortion of competition from the capital injection. The Commission decided, in the light of that commitment, that it could temporarily approve the capital injection. The third paragraph of Article 2 of the contested decision lifted the temporary balance sheet limits resulting from the initial decision. The decision to remove those constraints and the finding of compatibility were based on the same analysis and commitments and formed an indivisible whole, the reasoning for which cannot be severed. If the General Court was correct to annul that analysis and those commitments, ING should not have been freed from the balance sheet limits to which it had been subject before the contested decision was adopted. To leave the third paragraph intact alters the substance of the decision. By its annulment, the General Court could not put ING in a better position than it was before the contested decision, nor substitute its assessment for that of the Commission in the initial decision, when it provisionally authorised the capital injection.

78. The Netherlands Government queries how the General Court was to annul the third paragraph of Article 2 when no such annulment had been requested. The third paragraph did not lose its purpose after the annulment of the first and second paragraphs. Whether that annulment should lead to annulment of the third paragraph requires a substantive assessment which the General Court could not make unless requested to do so and which the Court of Justice cannot make on appeal. Moreover, the ground of appeal has become devoid of purpose. On 11 May 2012, the Commission took a new decision in which it again determined that the amendment to the repayment terms constituted State aid (but without quantifying it) and authorised the aid under the same conditions. ING raises similar arguments: the ground of appeal is manifestly inadmissible since the Commission did not seek such relief at first instance; and it is devoid of purpose following the decision of 11 May 2012.

79. It seems to me that the annulment of the first paragraph of Article 2 of the contested decision (and with it, as an inevitable corollary, the second paragraph of that article) had the effect (as the Netherlands Government argued in the context of the third ground of appeal) of reviving the initial decision, in which the capital injection had been found to be State aid. The judgment under appeal records that, in that decision, the Commission stated that, if a restructuring plan was submitted within six months, the validity of the initial decision would automatically be extended until it adopted a decision on the plan.²⁰ That validity was therefore extended until the contested decision was adopted. The annulment of the first two paragraphs of Article 2 of the contested decision meant that there was no longer a decision on the restructuring plan. As a logical consequence, the initial decision, which incorporated a limitation on ING's balance sheet growth, should have enjoyed anew its extended validity pending a new final decision.

80. However, the General Court left intact the third paragraph of Article 2 of the contested decision, thus – inadvertently, it may be assumed, since the judgment under appeal contains no reasoning in that regard – changing the content of the initial decision.

81. The parties' arguments in this regard contrast, unsurprisingly, with their arguments in the context of the fifth ground of appeal. There, the Commission submitted that the General Court was not entitled to annul a part of the decision whose annulment had not been specifically sought by the applicants, and the other parties submitted that such annulment flowed as a matter of course from the annulment of the first paragraph of Article 2 of the contested decision. Since the present ground of appeal is raised by the Commission only in the alternative, there is no inconsistency in its approach, but there does appear to be an inconsistency in that of the other parties.

82. For my part, I consider it consistent with my analysis of the fifth ground of appeal to find that the General Court, having annulled the first paragraph of Article 2 of the contested decision, was not merely entitled but required to annul not only the second but also the third paragraph of that article, in order to avoid altering the substance of the initial decision, whose validity was revived and extended by the annulment of the first paragraph.

83. I further consider that ING's objection to the admissibility of this ground of appeal is unsustainable. The Commission could not have been expected at first instance to seek the relief it is now seeking, since its whole aim was to maintain the contested decision.

84. I would therefore uphold the sixth ground of appeal.

20 — Paragraph 10 of the judgment under appeal; recitals 71 to 74 in the preamble to the initial decision.

Consequences of the assessment

85. I have reached the view that the third ground of appeal should be upheld in part and the sixth ground of appeal in its entirety. As a consequence, the judgment under appeal should be set aside to the extent that, in annulling the whole of the first paragraph of Article 2 of the contested decision, it did not exclude from that annulment the finding that the guarantees received by ING from the national credit guarantee scheme constituted State aid and to the extent that it failed to annul the third paragraph of the same article.

86. It seems to me that such a ruling is adequate to dispose of the appeal, without there being any need to refer the case back to the General Court for further determination. Moreover, the existence of the subsequent Commission decision of 11 May 2012 means that the practical consequences of the ruling will be limited.

87. In accordance with Articles 138, 140 and 184 of the Court's Rules of Procedure, I consider that each of the parties should be ordered to bear its own costs.

Conclusion

88. In the light of all the foregoing considerations, I propose that the Court should:

- set aside the judgment under appeal to the extent that, in annulling the whole of the first paragraph of Article 2 of the contested decision, it did not exclude from that annulment the finding that the guarantees received by ING from the national credit guarantee scheme constituted State aid and to the extent that it failed to annul the third paragraph of the same article;
- order the parties to bear their own costs in the appeal proceedings.