

# ING's landmark victory brightens the outlook for State aid recipients

On 2 March 2012, the General Court in Luxembourg (the "Court") handed down its [judgment](#) in relation to the classification of State aid provided to ING by the Dutch State in the context of the financial crisis. Proceedings were brought by the Dutch State and ING against the European Commission (the "Commission"), disputing the level of aid received and (as far as ING's appeal was concerned) the restructuring measures required from ING to class the aid as compatible with the common market. The Dutch Central Bank ("DNB") acted as intervener in ING's appeal.

**The judgment is a victory for ING (as well as for the Dutch State), as it annuls part of the Commission's State aid decision; it reduces the amount of aid provided by the Dutch State to ING by €2 billion by concluding that the renegotiated terms of the State's recapitalization of the bank did not increase the amount of aid received. In particular, the Court stated that the Commission should have paid heed to the "private investor test", according to which it could be argued that the State's renegotiation was on terms that a private investor would have accepted had it been in the same commercial position as the State at the time the amendments were agreed.**

This is certainly good news for financial institutions who accepted large bail-outs from governments in order to remain financially viable during the systemic crisis. Johan Ysewyn, Antitrust partner in Clifford Chance's Brussels office, is one of a number of legal advisors now

providing guidance to other financial institutions who want to consider renegotiating repayment conditions with governments. As Ysewyn points out: "The court now sets a very useful precedent saying changes in the reimbursement conditions may not necessarily amount to additional state aid and, depending on how the current framework is structured, banks could seek to renegotiate more favourable terms."

The judgment creates an additional set-back for the Commission as it states that the restructuring requirements placed on ING are indissociably linked to the amount of aid received by it from the Dutch State, indicating that remedies in State aid cases must be proportionate to the level of aid provided. The Court's finding reducing the amount of aid received (from €17 billion to around €15 billion) is therefore likely to impact the scope of the bank's restructuring requirements. Since ING had agreed to an onerous restructuring plan – requiring numerous divestments resulting in a

## An exceptional case for Clifford Chance

Michel Petite (Clifford Chance Paris), Steven Verschuur, Helen Gornall and Pier Posthuma de Boer (Clifford Chance Amsterdam) acted for the Dutch Central Bank. The case is highly significant as it is the first time that a central bank has intervened in proceedings before the European courts, providing expert evidence relating to matters of financial stability and the viability of ING during the crisis. Clifford Chance was and is involved in a number of high profile state aid cases in the financial sector.

45% reduction of its balance sheet, an acquisition ban and a price leadership ban – the judgment will now require the Commission to adopt

a new decision, re-evaluating the aid and restructuring measures. Michel Petite, of counsel in Clifford Chance's Paris office, who advised DNB during the proceedings, welcomes the Court's approach: "The Court's findings also create a useful precedent for future dealings with the Commission; parties must be given appropriate opportunities – and an appropriate amount of time – to make their views known. The Commission is also under an obligation to carefully consider all available evidence and to examine aid in the correct context and in light of all relevant facts and scenarios."

## Background

In the context of the systemic financial crisis, ING – like numerous other banks – required financial support from the State. For ING, the bail-out consisted, in particular, of two distinct measures:

- In October 2008, the State agreed to inject €10 billion of Core Tier 1 capital into ING by subscribing to 1 billion newly created ING securities with an issue price of €10 per security (the "recapitalization measure").
- In January 2009, the State agreed to provide an Illiquid Assets Back-up Facility ("IABF") covering 80% of ING's residential mortgage-backed securities granted in the United States (the "Alt-A portfolio").

The original terms of the recapitalization measure were agreed in October 2008 and allowed for the securities, on ING's initiative, either to be repurchased at €15 per security (ie at a 50% redemption premium) or, after three years, to be converted into ordinary shares. If the latter option were to be chosen, the Dutch State

retained the right to opt, instead, for an alternative redemption of the securities at €10 per security plus accrued interest. A coupon on the securities would only be paid to the Dutch State if a dividend was paid by ING on the ordinary shares. The Commission adopted an initial decision in relation to the original recapitalization measure on 12 November 2008, temporarily approving the €10 billion of aid, subject to an adequate restructuring plan being submitted by the Dutch State and ING within six months.

The terms of the recapitalization measure were subsequently amended in relation to part of the capital injection (the "amended recapitalization measure"). The new agreement allowed ING to repurchase up to 50% of the securities at their issue price, plus the accrued interest in relation to the annual coupon of 8.5% and an early redemption premium if ING's share price traded above €10. The premium had a floor to ensure a minimum internal rate of return for the Dutch State of 15%. ING chose to exercise the terms of the amended recapitalization measure on 21 December 2009.

The Commission approved the aid on 18 November 2009 (the "contested decision"). The contested decision required extensive restructuring requirements from ING, to compensate for a total of €17 billion of various aid measures received (namely, €10 billion for the original recapitalization measure, €2 billion for the amended recapitalization measure, and €5 billion for the IABF.)

In this context, ING (supported by DNB) and the Dutch State brought appeals before the Court against the contested decision. In particular, the appeals sought the annulment of the

Commission's finding of €2 billion additional aid under the amended recapitalization measure. ING also sought annulment of the price leadership ban and annulment of the decision in so far as it provided for disproportionate restructuring requirements.

## The Court's findings

The Court's judgment finds in favour of ING and the Dutch State, thereby annulling the operative parts of the decision classing the measures as constituting aid granted to ING and requiring commitments in order to deem the aid compatible with the common market. The Commission will now have to reassess its position and adopt a new decision in light of the Court's findings.

### The private investor test

The parties successfully argued that the "private investor test" should have been applied to the amended recapitalization measure, according to which the Commission should have established that the amendments were ones which a private investor would have entered into if it had been in the position of the Dutch State at the time of the renegotiation. Under this State aid-specific legal test, a measure cannot be classed as aid if the terms on which it is provided are such that the incentives would be sufficiently attractive for a private investor to make the same commercial decision as the State in question.

The Court states that the amended recapitalization measure should not have been classed as €2 billion of additional aid because the Commission failed in its duty to

consider whether the private investor principle should be applied. As a result, the restructuring measures – which the Court states are inherently linked to the level of aid taken – must be reconsidered to ensure that they are proportionate.

Furthermore, the Court acknowledges that, whilst the Commission has a wide discretion in relation to economic assessments, this does not prevent the judicature from carrying out a comprehensive review of the facts in order to decide whether the Commission's conclusions are sound. In this regard, the Commission erred in its assessment on a number of grounds.

In relation to the Commission's duty to consider the private investor principle in its assessment of the amended recapitalization measure, the Court notes that the Commission should have carried out a comparison of the initial repayment terms with the amended terms. This would have required the Commission to look at the benefits of the renegotiation from the Dutch State's perspective, rather than solely focusing – as it did – on the benefits to ING.

Much of the Court's judgment outlines the facts available at the time of the Commission's review of the measure, which indicated that there was a tangible up-side for the Dutch State in accepting the amended terms. For example:

- The Commission failed to properly appreciate that, under the original terms, ING (and not the Dutch State) was the sole party able to decide, within the first three years, how and when the securities would be redeemed. As a result, the

Commission did not take into account the fact that the State's position was uncertain, as it had no control over if, how and when repayment would occur.

- Under the amended capitalization measure, the Commission failed to consider why a return for the Dutch State of between 15% and 22% would not be a rate which a private investor would accept, given the return that the State would have otherwise probably received had the original terms remained in place. The lack of such a finding was surprising given the Commission's own view expressed in its initial decision (temporarily approving the aid) that a return of 10% or more would be an acceptable one in light of the market conditions.
- The Commission failed to respond to the supposition that the amendment to the terms was implemented to ensure equal treatment of ING *vis-à-vis* other Dutch financial institutions in receipt of State aid, namely AEGON and SNS Reaal, who were already able to repurchase a third of their capital at issue price subject to paying accrued interest and an early redemption premium.

More generally, from the chronology of events and context in this case, it is clear that – in the Court's view – the Commission's evaluation was insufficiently detailed (lacking in adequate explanation as to how the Commission reached its findings) and did not provide for sufficient input from the Dutch State, ING or DNB. The judgment will be a helpful precedent in future dealings with the Commission, as it makes quite clear

that parties must be given appropriate opportunities – and an appropriate amount of time – to make their views known.

### Proportionality link between aid amount and restructuring requirements

Last – but certainly not least – the judgment sets a very important legal precedent in relation to the link between the amount of aid and the appropriate level of restructuring required to rectify the anti-competitive effects of that aid. Whilst the Commission effectively argued that the two issues are not necessarily linked, the Court rejects this view, stating that it "proves impossible to dissociate the additional aid from the operative part and the underlying grounds when it comes to examining the assessment carried out by the Commission with regard to both the compatibility of the aid with the common market and the determination of the level of commitments required so that the aid can be declared compatible with the common market."

Previously, it was the Commission's practice not to state extensive reasons for requiring the commitments sought to restore viability of the entity receiving aid and to mitigate the resulting distortions of competition. Now, this judgment makes it clear that parties have the right to expect the Commission to explain its motivation, outlining why certain compensatory measures are required.

The Commission has stated that it is currently considering whether to appeal the judgment. It will also reconsider its decision in this case, in light of the Court's findings.

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