Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 March 2018*

(Appeal — State aid — Definition of 'aid' — Definition of 'economic advantage' — Market economy operator principle — Conditions governing applicability and application — Financial crisis — Successive bank bail outs — Whether account to be taken, in the assessment of the second bail out, of the risks arising from commitments entered into by a Member State in the first bail out)

In Case C-579/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 16 November 2016,

European Commission, represented by A. Bouchagiar, L. Flynn and K. Blanck-Putz, acting as Agents,

appellant,

the other parties to the proceedings being:

FIH Holding A/S, established in Copenhagen (Denmark),

FIH Erhvervsbank A/S, established in Copenhagen,

represented by O. Koktvedgaard, advokat,

applicants at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, L. Bay Larsen, T. von Danwitz, J.L. da Cruz Vilaça, C.G. Fernlund and C. Vajda, Presidents of Chambers, J.-C. Bonichot, A. Arabadjiev (Rapporteur), C. Toader, M. Safjan, D. Šváby, E. Jarašiūnas, S. Rodin and F. Biltgen, Judges,

Advocate General: M. Szpunar,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 September 2017,

after hearing the Opinion of the Advocate General at the sitting on 28 November 2017,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 15 September 2016, *FIH Holding and FIH Erhvervsbank* v *Commission* (T-386/14, EU:T:2016:474) ('the judgment under appeal') in which it annulled Commission Decision 2014/884/EU of 11 March 2014 on State aid SA.34445 (12/C) implemented by Denmark for the transfer of property-related assets from FIH to the FSC (OJ 2014 L 357, p. 89) ('the contested decision').

Background to the dispute

2 FIH Erhversbank A/S ('FIH') is a limited liability company formed in accordance with Danish banking legislation and supervised by the Danish banking authorities. FIH and its subsidiaries are wholly owned by FIH Holding A/S.

3 Having been affected by the global financial crisis which began in 2007, FIH benefited from two kinds of measure in the course of the year 2009. First, in June 2009, it received a hybrid tier 1 capital injection of 1.9 billion Danish krone (DKK) (approximately EUR 255 million), under the *Lov om statstligt indskud i kreditinstitutter* (Law on State-funded capital injections) of 3 February 2009 and executive orders adopted under that law. Secondly, in July 2009, the Kingdom of Denmark granted FIH a State guarantee totalling DKK 50 billion (approximately EUR 6.71 billion), under the *Lov om finansiel stabilitet* (Law on financial stability) of 10 October 2008, as amended by Law No 68 of 3 February 2009 (together, 'the 2009 measures'). FIH used the entire amount of the guarantee to issue bonds.

4 Those two laws were approved by the Commission in Decision C(2009) 776 final of 3 February 2009 on State aid scheme N31a/2009 — Denmark, as aid schemes compatible with the internal market.

5 As of 31 December 2011, the value of the bonds issued by FIH and guaranteed by the Danish State was DKK 41.7 billion (approximately EUR 5.59 billion), constituting 49.94% of FIH's balance sheet. Those bonds were due to mature in 2012 and 2013.

6 Between 2009 and 2011, Moody's ratings agency downgraded FIH's rating from A2 to B1 with a negative outlook.

7 As a result, in particular, of that downgrade and because the maturity date of the bonds issued by FIH was approaching, together with the expiry of the guarantee from the Danish State, it became apparent during 2011 that FIH would experience liquidity problems in 2012 or 2013 that were liable to lead to the loss of its banking licence and, therefore, to its liquidation.

8 In those circumstances, on 6 March 2012, the Kingdom of Denmark notified the Commission of a series of measures ('the measures at issue'), including, first, the creation of a new subsidiary of FIH Holding, NewCo, to which the most problematic of FIH's assets, in essence mortgage loans and derivatives with a nominal value of approximately DKK 17.1 billion (approximately EUR 2.3 billion), were to be transferred in order to reduce the size of FIH's balance sheet.

9 Next, the Financial Stability Company ('the FSC'), a public body set up by the Danish authorities in the context of the global financial crisis, was to buy the shares in NewCo for DKK 2 billion (approximately EUR 268 million) with a view to that company being wound up within a four-year period. The FSC was to finance and recapitalise NewCo during the winding-up process, should that prove necessary.

10 Lastly, in consideration for those measures, FIH would repay the capital injection of DKK 1.9 billion (approximately EUR 255 million) made in 2009 by the Danish authorities, which would allow the FSC to acquire NewCo without using its own funds.

11 FIH was also required to grant an initial loan to NewCo of DKK 1.65 billion (approximately EUR 221 million), intended to absorb NewCo's expected losses, repayable only if the liquidation of mortgage loans and derivatives transferred to NewCo exceeded DKK 2 billion (approximately EUR 268 million).

12 In addition, FIH would grant a further loan to NewCo of approximately DKK 13.45 billion (approximately EUR 1.8 billion), intended to expire when FIH's bonds, guaranteed in 2009 by the Danish State, matured, and the sums recovered by FIH from the loan were to be used to redeem its bonds guaranteed by the Danish State.

13 As for FIH Holding, it was envisaged that it would provide the FSC with an unlimited loss guarantee, so that on the dissolution of NewCo, initially envisaged for 2016, the FSC would be entitled to recover all the losses that it had incurred, if any, as a result of the acquisition and winding up of NewCo.

14 By Decision C(2012) 4427 final of 29 June 2012 on State aid SA.34445 (12/C) (ex 2012/N) — Denmark, the Commission opened a formal investigation procedure in respect of the measures at issue, on the ground that, in its view, they constituted State aid for NewCo and the FIH Group ('the FIH Group'). Nevertheless, in order to ensure financial stability, the Commission approved those measures for a six-month period or, if a restructuring plan was submitted by the Kingdom of Denmark during that period, until the Commission adopted a final decision on that plan.

15 On 2 July 2012, FIH repaid the Kingdom of Denmark the hybrid tier 1 capital injection of public funds made in 2009.

16 On 4 January 2013, the Kingdom of Denmark submitted a plan for the restructuring of FIH. The final version of that plan was submitted on 24 June 2013.

17 In the course of the administrative procedure, the Kingdom of Denmark submitted, inter alia, that the measures at issue did not involve State aid, since the transactions between the FSC and the FIH Group were in line with market conditions and that group would be liable to pay all the transaction and winding-up costs in respect of NewCo. It also maintained that that plan significantly reduced the risk to which it was exposed on account of the 2009 measures.

18 On 3 October 2013, the Kingdom of Denmark submitted a package of proposals for commitments, the final version of which is dated 3 February 2014, in order to address the concerns expressed by the Commission in the context of the investigation procedure.

19 On 12 March 2014, the Commission notified the Kingdom of Denmark of the contested decision. By that decision, the Commission, first, classified the measures at issue as State aid, within the meaning of Article 107(1) TFEU, and secondly, declared those measures compatible with the internal market, under paragraph 3(b) of that provision, in the light of the restructuring plan and the commitments made by the Kingdom of Denmark.

20 In the first part of its assessment relating to the existence of aid, the Commission examined whether the measures at issue conferred an economic advantage on the FIH Group. For that purpose, it analysed the measures in accordance with the market economy operator principle ('the private operator principle'), consisting in the present case, according to the contested decision, of ascertaining, in essence, whether a private investor in a market economy would have taken part in a given operation on the same terms and conditions as the public investor at the time when the decision to make public resources available was taken ('the private investor test').

21 Having completed its assessment, carried out in paragraphs 84 to 98 of the contested decision, the Commission found that, mainly owing to the insufficient level of remuneration provided in consideration for the resources that had to be committed by the Danish State, the measures at issue were not compatible with the private investor principle and had, therefore, procured an advantage for the FIH Group. According to its calculations, the amount of the aid was approximately DKK 2.25 billion (approximately EUR 300 million).

22 It is apparent from those paragraphs that, although the Commission referred to the 2009 measures, in particular in paragraphs 88 and 98 of that decision, it nevertheless carried out the assessment of the economic rationality of the measures at issue without taking account of the possible cost that the Danish State would have had to bear, in the absence of those measures, because of the risks for that State stemming from the 2009 measures.

23 As regards the compatibility of the aid with the internal market, the Commission examined the measures at issue in the light of its Communication on the treatment of impaired assets in the Community banking sector (OJ 2009 C 72, p. 1) and its Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ 2011 C 356, p. 7).

24 Having regard to the restructuring plan submitted and the commitments made by the Kingdom of Denmark, which are set out in paragraphs 56 to 62 of the contested decision and reproduced in the Annex thereto, the Commission concluded that the aid in question was compatible. Those commitments provide, inter alia, for additional payments by FIH to the FSC and for FIH's commitment to withdraw from certain activities, including property finance, private equity and private wealth management.

The procedure before the General Court and the judgment under appeal

25 By application lodged at the Court Registry on 24 May 2014, the FIH Group brought an action for annulment of the contested decision.

26 In support of its action, the FIH Group put forward three pleas in law alleging, first, infringement of Article 107(1) TFEU, on grounds of the incorrect application of the private operator principle, second, errors in the calculation of the amount of the aid and, third, infringement by the Commission of the obligation to state reasons.

27 By the judgment under appeal, the General Court upheld the first plea in law and held, consequently, that it was not necessary to examine the second plea. It also rejected the third plea. It therefore annulled the contested decision in its entirety and ordered the Commission to pay the costs.

Forms of order sought by the parties

28 The Commission claims that the Court should:

– set aside the judgment under appeal,

– dismiss the action at first instance and order the FIH Group to pay the costs of both sets of proceedings, or

– in the alternative, refer the case back to the General Court so that it may give a ruling on the second plea and reserve the costs.

29 The FIH Group contends that the Court should:

– dismiss the appeal and order the Commission to pay the costs of both sets of proceedings, or

– in the alternative, refer the case back to the General Court so that it may give a ruling on the second plea and reserve the costs.

The appeal

30 In support of its appeal, the Commission raises a single ground of appeal, alleging that the General Court erred in law in its interpretation of Article 107(1) TFEU, when examining the first plea in law in the action in the main proceedings.

Arguments of the parties

31 By its single ground of appeal, the Commission submits that the General Court committed an error of law in its application of the private operator principle, in holding that it was obliged, in order to assess whether the measures at issue constituted State aid within the meaning of Article 107(1) TFEU, to compare the behaviour of the Danish State at the time of their adoption, not to that of a private investor, but to that of a private creditor in a market economy ('the private creditor test'), taking account of the financial risks to which that Member State was exposed because of the 2009 measures.

32 In the Commission's view, the private operator principle arises from the neutrality of the EU legal order with regard to the rules governing property ownership. It follows that, in accordance with the case-law, economic transactions carried out by public bodies confer no advantage on their recipients, and therefore do not constitute State aid, if they are carried out under normal market conditions. On the other hand, if the public authority has not behaved like a private operator in a comparable situation, the recipient undertaking is deemed to have received an economic advantage.

33 The Commission adds that the private operator principle is applied, leaving aside all considerations that relate exclusively to a Member State's role as a public authority. It follows that, when applying that principle, no account may be taken of obligations stemming from the State's role as a public authority.

34 Therefore, the private operator principle is not simply an 'economic rationality test', as the General Court stated in the judgment under appeal, but is intended to determine whether a specific transaction is economically rational from the perspective of a private operator.

35 In the present case, the Commission submits that the costs that had to be borne by the Danish State in 2012, resulting from the 2009 measures, simply reflected the obligations incumbent on that Member State as a public authority, since they were the direct result of the State aid conferring those measures in favour of FIH. The General Court therefore erred in law when it held, in paragraphs 62 to 69 of the judgment under appeal, that the Commission was wrong, in its application of the private operator principle in the contested decision, not to take account of the cost that would have had to be borne by the Danish State if the latter had not adopted the measures at issue, resulting from the risks to which the 2009 measures exposed that state.

36 The FIH Group considers, in the first place, that the Commission's analysis is unreasonable in that it implies that the economic exposure of a Member State, resulting from the previous grant of State aid, could never be taken into account in the context of the examination of whether the Member State acted as a private operator would have.

37 The main question raised by the measures at issue is rather whether, by those measures, the Danish State pursued objectives of general interest, and thus acted in its capacity as public authority, or an economic objective that a rational private creditor placed in a comparable situation might have pursued.

38 According to the FIH Group, it is clear that the Danish State acted to protect its economic interests and that a private creditor placed in the same situation would have risked incurring significant losses if it had not attempted to avoid a default. The measures at issue having significantly reduced the previous exposure of the Danish State, there is no reason that would justify State aid provisions preventing orderly restructuring of the exposure of the Member State and, therefore, sound management of public funds.

39 As the General Court stated, in paragraph 67 of the judgment under appeal, that result would be illogical, having regard to the objective of the rules on the control of State aid and would lead to discrimination against public creditors contrary to the principle of neutrality enshrined in Article 345 TFEU.

40 In the second place, the FIH Group submits that it follows from the judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213), that the amendment of the repayment terms for State aid must be assessed in the light of the behaviour that a private creditor would have adopted, taking into account the risk of full or partial failure to reimburse. According to the FIH Group, the Commission must ascertain whether or not such an amendment would have an additional advantage for the beneficiary of the initial aid. Therefore, the Commission may not circumvent, on the sole ground that the Member State's earlier measure constituted State aid, its obligation to examine the economic rationality of the measures at issue, taking into account the reduction of the Danish State's previous exposure.

41 In the third place, the FIH Group is of the opinion that the judgment of 24 October 2013, *Land Burgenland and Others* v *Commission* (C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682) is not relevant, the Court having itself emphasised, in paragraph 62 of that judgment, that the factual and legal circumstances of the case giving rise to that judgment differ substantially from those giving rise to the judgment of the General Court of 2 March 2012, *Netherlands* v *Commission* (T-29/10 and T-33/10, EU:T:2012:98), confirmed by the judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213).

42 According to the FIH Group, the same is true of the judgments of 14 September 1994, *Spain* v *Commission* (C-278/92 to C-280/92, EU:C:1994:325), and of 28 January 2003, *Germany* v *Commission* (C-334/99, EU:C:2003:55), since the circumstances obtaining in those cases were, both in fact and in law, very different from those in the present case.

Findings of the Court

43 As a preliminary point, it should be noted that, according to the settled case-law of the Court, classification of a measure as 'State aid' for the purposes of Article 107(1) TFEU requires all of the conditions set out in that provision to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see, inter alia, judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53 and the case-law cited, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 13).

44 Since the present ground of appeal concerns only the third of those conditions, it should be noted that, according to the Court's settled case-law, measures that, whatever their form, are likely directly or indirectly to favour certain undertakings, or fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions, are regarded as State aid (judgements of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited, and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 65 and the case-law cited).

45 Thus, having regard to the objective of Article 107(1) TFEU of ensuring undistorted competition (see, to that effect, judgment of 11 September 2008, *Germany and Others* v *Kronofrance*, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 66), including between public and private undertakings, the definition of 'aid', within the meaning of that provision, cannot cover a measure granted to an undertaking through State resources where it could have obtained the same advantage in circumstances which correspond to normal market conditions. The assessment of the conditions under which such an advantage was granted is therefore made, in principle, by applying the private operator principle (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 78, and of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraphs 21 and 22).

46 Furthermore, the private operator principle is one of the factors that the Commission is required to take into account for the purposes of establishing the existence of aid and is not, therefore, an exception that applies only if a Member State so requests, when it has been found that the constituent elements of 'State aid', as laid down in Article 107(1) TFEU, exist (judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 103; of 3 April 2014, *Commission* v *Netherlands and ING Groep*, C-224/12 P, EU:C:2014:213, paragraph 32; and of 20 September 2017, *Frucona Košice* v *Commission*, C-300/16 P, EU:C:2017:706, paragraph 23).

47 Consequently, when it appears that the private operator principle might be applicable, it is for the Commission to ask the Member State concerned to provide it with all the relevant information enabling it to determine whether the conditions for applying that test are satisfied (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 104; of 3 April 2014, *Commission* v *Netherlands and ING Groep*, C-224/12 P, EU:C:2014:213, paragraph 33; and of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 24 and the case-law cited).

48 In that regard, the Court has stated that where a Member State confers, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking, the applicability of the private operator principle does not depend on the means used to place that undertaking at an advantage nor on the nature of the means used, which may fall within the State's public powers (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 81 and 91 to 93).

49 Moreover, the Court has held that the applicability of the private operator principle to an amendment to the conditions for the redemption of securities of an undertaking is not compromised because the acquisition of securities giving the State the status of an investor in that undertaking was financed by means of State aid in favour of that undertaking (see, to that effect, judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep*, C-224/12 P, EU:C:2014:213, paragraph 34).

50 In the present case, the Commission applied, in the contested decision, the private operator principle when it examined the measures at issue. Furthermore, none of the parties disputes the applicability of that principle for the purpose of assessing whether those measures conferred an advantage on the FIH Group, within the meaning of Article 107(1) TFEU.

51 The present appeal, on the other hand, concerns whether the Commission should take into account, using the private creditor rather than the private investor test, the risks to which the Danish State was exposed on account of the 2009 measures.

52 In that regard, first, it should be noted that, when the private operator principle applies, the test to be employed in practice in a given case must be determined on the basis, inter alia, of the nature of the transaction envisaged by the Member State concerned. The tests that may be applied include those of the private investor and the private creditor.

53 It is not disputed that the measures at issue involved investments in NewCo by the FSC and that the Kingdom of Denmark claimed, during the administrative procedure, that those investments were compatible with market conditions. That Member State also maintained that the measures at issue reduced the risk to which it was exposed, on account of the 2009 measures and therefore constituted management of the debts that it held in respect of FIH.

54 In those circumstances, it must be stated that both the private investor test, used by the Commission, and that of the private creditor, the use of which is argued for by the FIH Group and which the General Court considered relevant in assessing the measures at issue in the judgment under appeal, may be taken into account.

55 Secondly, according to settled case-law, in order to assess whether the same measure would have been adopted in normal market conditions by a private operator in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as a private operator, to the exclusion of those linked to its situation as a public authority, are to be taken into account (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 79 and the case-law cited, and of 24 October 2013, *Land Burgenland and Others* v *Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 52).

56 Thus, in the assessment of the economic rationality of a State measure, required by the private operator principle, the Court has found it necessary to disregard the costs incurred by the State as a result of redundancies, unemployment benefits and aid for the restructuring of the industrial infrastructure (see, to that effect, judgment of 14 September 1994, *Spain* v *Commission*, C-278/92 to C-280/92, EU:C:1994:325, paragraph 22) and also from guarantees granted and loans held by the State, in so far as they constitute State aid (see, to that effect, judgments of 28 January 2003, *Germany* v *Commission*, C-334/99, EU:C:2003:55, paragraphs 138 and 140, and of 24 October 2013, *Land Burgenland and Others* v *Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraphs 55, 56 and 61).

57 In particular, as regards the latter situation, the Court has stated that, since, by granting aid, a Member State pursues, by definition, objectives other than that of making a profit from the resources made available to undertakings, it must be held that those resources are, in principle, granted by the State exercising its prerogatives as a public authority (see, to that effect, judgment of 24 October 2013, *Land Burgenland and Others* v *Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 56).

58 It follows that the risks to which the State is exposed and which are the result of State aid that it has previously granted are linked to its actions as a public authority and are not among the factors that a private operator would, in normal market conditions, have taken into account in its economic calculations (see, to that effect, judgments of 28 January 2003, *Germany* v *Commission*, C-334/99, EU:C:2003:55, paragraphs 138 and 140).

59 This consideration applies, in particular, to the obligations arising for the State from loans and guarantees previously granted to an undertaking and constituting State aid. Taking those obligations into account in the assessment of State measures adopted in favour of the same undertaking would be

liable to prevent those measures from being classified as State aid even though they do not satisfy normal market conditions, on the sole ground that they prove economically more advantageous for the State than if they had not been adopted. Such a consequence would compromise the objective of ensuring undistorted competition, set out in paragraph 45 above.

60 In the present case, as the General Court noted in paragraphs 2 and 3 of the judgment under appeal, the two laws adopted in 2009, under which the Danish State took the 2009 measures, were approved by the Commission as a State aid scheme compatible with the internal market by Decision C(2009) 776 final. It is apparent from paragraphs 47, 53 and 55 of that decision that the Commission, like the Danish Government itself, considered that the measures envisaged in those two laws constituted State aid, since a private investor would not have decided to make, to a comparable extent and in similar circumstances, the capital increases and the grants of guarantees at issue.

61 Furthermore, there is nothing in the judgment under appeal or in the contested decision to indicate that the Danish State pursued, even in part, a profit objective by means of the 2009 measures. Moreover, it does not appear that such an objective was invoked in the administrative or judicial proceedings in this case, in support of which objective and verifiable evidence has been submitted. In those circumstances, it must be held that there is nothing in the file to show that the 2009 measures were not, at least in part, State aid.

62 It follows that, in the present case, the Commission was fully entitled, when applying the private operator principle, not to take into account risks related to State aid granted to FIH by the 2009 measures. Consequently, the General Court erred in law when it held, in essence, in paragraphs 69 and 71 of the judgment under appeal, that the Commission had, by failing to take those risks into account, incorrectly applied the private operator principle in the contested decision.

63 In so doing, the General Court wrongly required the Commission to assess the economic rationality of the measures at issue from the point of view not of a private operator in a comparable situation but from that of the State in its capacity as a public authority which had, by the 2009 measures, previously granted FIH State aid, the financial consequences of which it sought to limit.

64 Those findings are not invalidated by the arguments of the FIH Group drawn, first, from paragraphs 34 to 37 of the judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213), second, from the judgments of 5 June 2012, *Commission* v *EDF* (C-124/10 P, EU:C:2012:318), and of 24 January 2013, *Frucona Košice* v *Commission* (C-73/11 P, EU:C:2013:32), and, third, from the principle of sound management of public funds.

65 In the first place, as regards the FIH Group's argument alleging that there are similarities between the factual and legal circumstances of the present case and those giving rise to the judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213), it should be noted that the ground of appeal, to which the paragraphs of that judgment cited by FIH Group referred, concerned whether the private operator principle, which the Commission had disregarded, was applicable and not, as in the present case, its application to the measures concerned. In particular, the Court held, in essence, in paragraphs 34 and 37 of that judgment, that the applicability of that test to a State measure cannot, in principle, be excluded from the outset merely because of the links that may exist between the disputed State intervention and the exercise of public authority in the form of the earlier grant of State aid.

66 Indeed, it is apparent from paragraphs 35 and 36 of the judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213), that it was, in that case, for the Commission to examine the economic rationality of the amendments proposed by the Dutch State to the terms governing repayment of the capital injection, which had previously been made by means of State aid, by reference to the conduct that a private investor might have adopted.

67 However, as the Advocate General noted in points 63 and 65 to 68 of his Opinion, there is nothing to suggest that the Court required that institution to make an assessment that went beyond ascertaining the inherent economic rationality of the proposed amendments and that therefore required risks arising for the Dutch State from the State aid that it had previously granted to the recipient undertaking to be taken into account.

68 Similarly, the Court stated, in paragraph 36 of the judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213), that a private investor might accept an amendment to the repayment terms of the earlier capital injection in order, in particular, to increase the prospects of obtaining the repayment of that injection. However, that does not mean that when analysing the inherent economic rationality of a measure in order to determine whether a private investor would have behaved in the same way as the State concerned, risks arising for that Member State from the previous grant of State aid may be taken into account.

69 In that regard, it should be noted that, in the case giving rise to the judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213), and in contrast to the present case, the beneficiary of the previous aid was not, at the time when those amendments were contemplated, in financial difficulties affecting the continuous functioning of their operations and that those amendments did not involve a bail out by means of significant public investment.

70 Those amendments were intended, in particular, to encourage the undertaking receiving the aid to make early repayment of the capital injected and to increase the chances for the Dutch State to be satisfactorily remunerated, which the initial conditions did not in any event guarantee.

71 In the second place, the FIH Group relies upon the judgments of 5 June 2012, *Commission* v *EDF* (C-124/10 P, EU:C:2012:318), and of 24 January 2013, *Frucona Košice* v *Commission* (C-73/11 P, EU:C:2013:32), in support of the argument that, in essence, the fiscal nature of a debt owed to the State by an undertaking, even if it is related to the exercise of public authority powers, does not preclude the application of the private operator principle in the assessment, under Article 107(1) TFEU, of a measure by which the State grants that undertaking a restructuring of the debt.

72 In that regard, it should be noted that the case-law cited in the previous paragraph is relevant as regards the applicability of the private operator principle but not the application of that principle in a particular case (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 100, and of 24 October 2013, *Land Burgenland and Others* v *Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 51).

73 It follows that that case-law in no way affects the finding, made in paragraphs 57 to 59 above, that the risks to which a Member State is exposed because of a debt originating from the grant of State aid to an undertaking, where those risks are inextricably linked to its role as a public authority, cannot be taken into account when the private operator principle is applied to a subsequent measure adopted by that Member State in support of that undertaking.

74 In the third and last place, as regards the proper management of public funds, the FIH Group's submission, in essence, that the application of the private operator principle in the contested decision has the consequence that the economic exposure of a Member State resulting from the earlier grant of State aid and its desire to protect its economic interests may not be taken into account in the context of the review under Article 107 TFEU, cannot be accepted.

75 While it is true that such considerations are not taken into account in the assessment, under Article 107(1) TFEU, of the existence of State aid, the fact remains that, as the Commission pointed out at the hearing before this Court and as the Advocate General noted in points 81 and 83 of his

Opinion, such considerations may be taken into account by the Commission in the assessment, under Article 107(3) TFEU, of the compatibility of any subsequent aid measure with the internal market and may therefore lead the Commission to find, as in the present case, that the measure is compatible.

76 In the light of all the foregoing considerations, the sole ground of appeal must be upheld and, consequently, the judgment under appeal must be set aside.

The case at first instance

77 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

78 In the present case, the Court has the information necessary for giving final judgment on the first plea at first instance, alleging an infringement of Article 107(1) TFEU, on the grounds of incorrect application of the private operator principle.

79 As follows from paragraphs 51 to 63 above, the argument of the FIH Group seeking a finding that the Commission ought to have applied the private creditor test and not the private investor test in the present case cannot succeed.

80 The first plea in law must, therefore, be rejected.

81 On the other hand, contrary to the Commission's principal claim, the case is not ready for judgment on the second plea of the action at first instance.

82 As is apparent from paragraph 85 of the judgment under appeal, the General Court held that, the first ground of appeal having been upheld, there was no need to examine the second plea, alleging errors of calculation in the amount of the aid.

83 Consequently, the case must be referred back to the General Court for it to give judgment on the second plea raised before it, on which it did not rule.

Costs

84 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

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

1. **Sets aside the judgment of the General Court of 15 September 2016, *FIH Holding and FIH Erhvervsbank* v *Commission* (T-386/14, EU:T:2016:474);**

2. **Dismisses the first plea in the action before the General Court;**

3. **Refers the case back to the General Court of the European Union for it to give judgment on the second plea in law;**

4. **Reserves the costs.**

Lenaerts	Tizzano	Bay Larsen
von Danwitz	Da Cruz Vilaça	Fernlund

Vajda	Bonichot	Arabadjiev
Toader	Safjan	Šváby
Jarašiūnas	Rodin	Biltgen

Delivered in open court in Luxembourg on 6 March 2018.

A. Calot Escobar	K. Lenaerts
Registrar	President