Provisional text

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 29 October 2020(1)

Case C-425/19 P

European Commission
v
Italian Republic,
Banca Popolare di Bari SCpA, formerly Tercas-Cassa di risparmio della provincia di Teramo SpA (Banca Tercas SpA),
Fondo interbancario di tutela dei depositi,
Banca d'Italia

(Appeal — State Aid — Measure adopted by a consortium of banks governed by private law for the benefit of one of its members — Definition of State aid — Whether imputable to the State — State resources)

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1. By this appeal, the European Commission requests the Court of Justice to set aside the judgment of 19 March 2019, *Italy and Others* v *Commission* ('the judgment under appeal'), (2) by which the General Court annulled Commission Decision (EU) 2016/1208 of 23 December 2015 on the State aid granted by Italy to the bank Tercas ('the decision at issue'). (3)

2. In the decision at issue, the Commission considered that the measures adopted by the consortium of banks governed by private law, Fondo interbancario di tutela dei depositi (Interbank Deposit Protection Fund) ('the FITD'), for the benefit of Banca Tercas (Cassa di risparmio della Provincia di Teramo SpA) ('Tercas'), authorised by the central bank of the Italian Republic, Banca d'Italia ('the Bank of Italy') on 7 July 2014, constituted unlawful and incompatible State aid which had to be recovered from the beneficiary by the Italian Republic.

3. By the judgment under appeal, the General Court upheld the actions for the annulment of the decision at issue brought by the Italian Republic, Banca Popolare di Bari SCpA ('BPB') and the FITD, on the ground that the measures at issue did not constitute State aid within the meaning of Article 107(1) TFEU. According to the General Court, the first condition that an aid measure must satisfy in order to be classified as State aid was not met, since the measures adopted by the FITD for the benefit of Tercas were neither imputable to the State nor granted through State resources.

4. Given that the entity granting the aid was not a State body or a public undertaking, but a private entity, namely the FITD, the question arose as to whether the imputability to the State of the measures taken by that entity, and their financing through State resources, could be assessed in the same manner as

they are assessed in respect of an aid measure taken by a public undertaking in particular, or whether the Commission had to discharge a heavier burden of proof. That question is at the core of the present appeal.

I. Legal framework

5. Pursuant to Article 96-*ter* of the Italian Banking Act: (4)

‘1. The Bank of Italy, having regard to the protection of depositors and the stability of the banking system:

(a) shall recognise the guarantee schemes by approving their statutes, on the condition that those schemes are not such as to lead to an unbalanced distribution of insolvency risks in the banking system;

(b) shall coordinate the activities of the guarantee schemes with the regulation of banking crises and with the supervisory activity;

…

(d) shall authorise intervention measures by guarantee schemes and the exclusion of banks from those schemes;

…’

II. Background to the proceedings

6. Tercas is a private equity bank which is active principally in the Abruzzo region of Italy.

7. On 30 April 2012, on a proposal by the Bank of Italy, which had identified irregularities within Tercas, the Italian Ministry of Economy and Finance decided to place Tercas under special administration. The Bank of Italy appointed a special administrator to manage Tercas during the special administration (‘the special administrator’).

8. In October 2013, the special administrator started negotiations with BPB, the holding company of a private equity banking group active principally in the south of Italy, which had expressed an interest in subscribing to a capital increase in Tercas, on condition that a due diligence inquiry into Tercas was first carried out and that the FITD covered in full that bank’s negative equity.

9. As mentioned in point 2 above, the FITD is a consortium of banks governed by private law, which aims to guarantee its members’ deposits. In 1996, as a result of the transposition into Italian law of Directive 94/19/EC, (5) the FITD was recognised by the Bank of Italy as one of the deposit guarantee schemes that was authorised to operate in Italy pursuant to the rules laid down in that directive.

10. Under Article 27 of the statutes of the FITD in the version applicable to the facts of the case (‘the statutes of the FITD’), in the event of the compulsory liquidation of one of its members, the FITD is to intervene by repaying the deposits lodged by depositors with that member up to a maximum of EUR 100 000 per depositor.

11. However, the FITD has the power to intervene in favour of its members, not only by way of the deposit guarantee for depositors mentioned in the preceding point (mandatory intervention), but also on a voluntary basis, if that intervention makes it possible to reduce the burden its members may have to bear as a result of the deposit guarantee (voluntary intervention).

12. Thus, under Article 28 of the statutes of the FITD, that consortium may, instead of making the repayment provided for under the deposit guarantee for depositors in the event of the compulsory

liquidation of a member of the consortium, intervene in transactions involving the transfer of assets and liabilities relating to that member (alternative voluntary intervention). Similarly, under Article 29 of the statutes of the FITD, irrespective of whether a compulsory liquidation procedure has been formally initiated, that consortium may decide to intervene by means of financing, guarantees, the acquisition of shares or in the form of other technical support for one of its members placed under special administration, where there are prospects of recovery and a lesser burden is to be expected compared with the burden that would be incurred by the intervention of the FITD in the event of the compulsory liquidation of that member (voluntary intervention by way of support or preventive intervention, as in the case of Tercas).

13. On 28 October 2013, following a request by the special administrator of Tercas on the basis of Article 29 of the statutes of the FITD, the Executive Committee of the FITD decided to support Tercas in an amount up to EUR 280 million. That decision was ratified by the FITD's Board on 29 October 2013. On 4 November 2013, in accordance with Article 96-*ter*(1)(d) of the Italian Banking Act, the Bank of Italy approved that support measure.

14. However, although it had been granted authorisation by the Bank of Italy, the FITD decided to suspend the planned measures in view of uncertainties regarding Tercas' economic situation and its assets and liabilities and the tax treatment of those measures. On 18 March 2014, following the audit of Tercas' assets requested by BPB, a disagreement arose between the FITD and BPB's experts. That disagreement was subsequently resolved following an arbitration procedure. In addition, the FITD and BPB agreed to share any costs resulting from the taxation of the measures in the event that the tax exemption envisaged was not applied.

15. Following the suspension of the measures on 18 March 2014 and in order to satisfy itself that the measures adopted for the benefit of Tercas were economically more advantageous than reimbursement of that bank's depositors, the FITD appointed an auditing and advisory company. In the light of the conclusions presented by that company in a report dated 26 May 2014 and in view of the cost of the measures compared with the cost of compensation under the deposit guarantee scheme in the event of liquidation, on 30 May 2014, the Executive Committee and the Board of the FITD decided to take steps for the benefit of Tercas.

16. On 1 July 2014, the FITD sent the Bank of Italy a new authorisation request. On 7 July 2014, the Bank of Italy authorised the measures to be adopted by the FITD for the benefit of Tercas, namely, first, a EUR 265 million contribution intended to cover Tercas' negative equity, secondly, a guarantee of EUR 35 million intended to cover the credit risk associated with certain exposures of Tercas, and, thirdly, a guarantee of EUR 30 million intended to cover the costs arising from the tax treatment of the first measure ('the measures at issue').

17. On 27 July 2014, the Tercas' shareholders' general meeting decided, first, to partially cover the losses, inter alia by reducing the capital to zero and cancelling all the ordinary shares in circulation, and, secondly, to increase the capital to EUR 230 million by issuing new ordinary shares to be offered to BPB. The capital increase took place on 27 July 2014.

18. On 8 August and 10 October 2014, the Commission requested information from the Italian authorities regarding the measures adopted by the FITD for the benefit of Tercas. Those authorities replied on 16 September and 14 November 2014.

19. By letter of 27 February 2015, the Commission informed the Italian Republic of its decision to open the procedure laid down in Article 108(2) TFEU in respect of those measures.

20. On 23 December 2015, the Commission adopted the decision at issue. As mentioned in point 2 above, by that decision, the Commission found that the measures at issue constituted unlawful and incompatible State aid and ordered the recovery of that aid. (6)

III. Proceedings before the General Court and judgment under appeal

21. As mentioned in point 3 above, by the judgment under appeal, the General Court annulled the decision at issue on the ground that the Commission had erred in finding that the measures at issue constituted State aid. In the view of the General Court, those measures did not meet the first condition that a national measure must satisfy for classification as State aid, namely, that it must be granted directly or indirectly through State resources and be imputable to the State. (7)

22. First, the General Court made a preliminary observation on the concept of 'aid granted by a Member State'. The General Court noted that, according to case-law, advantages granted by bodies distinct from the State are included within the scope of Article 107(1) TFEU since, should this not be the case, the rules on State aid could be circumvented merely through the creation of autonomous institutions charged with allocating aid. According to the General Court, while that case-law is intended to counteract a risk of under-inclusion of advantages granted by bodies distinct from the State, it also gives rise to a risk of over-inclusion. Consequently, where the body distinct from the State granting the aid is not a public undertaking, but a private entity, the Commission must prove not only that the State is able to exercise a dominant influence over that entity, but also that it was in a position to exercise that control in the circumstances of the particular case.

23. Secondly, the General Court held that the Commission did not prove to the requisite legal standard that the measures at issue were imputable to the State.

24. In the view of the General Court, where an aid measure is taken by a private entity such as the FITD rather than by a public undertaking, it is not sufficient that the Commission shows that the absence of an actual influence and control by the public authorities over that entity is unlikely. Rather, it must prove that that measure was adopted under the actual influence or control of the public authorities. In the present case, the Commission had not adduced that proof. In the first place, the measures at issue did not, according to the General Court, give effect to a public mandate conferred on the FITD by Italian law: first, intervention measures taken by that consortium in support of a member bank, such as the measures at issue, were aimed principally at furthering the private interests of its member banks (as they sought to avoid the more onerous economic repercussions of repaying deposits in the event of compulsory liquidation), and, secondly, the public mandate conferred on the FITD by Italian law consisted solely in reimbursing depositors, not in adopting such intervention measures. In the second place, as regards the FITD's autonomy when adopting the measures at issue, the General Court found that the imputability of those measures to the State could not be inferred from the following indicators: first, the mandatory authorisation of those measures by the Bank of Italy (because such authorisation was given subject to compliance with prudential rules in the banking sector, not subject to verification by the Bank of Italy of the appropriateness of the intervention); secondly, the presence of Bank of Italy representatives at the meetings of the FITD's governing bodies (such representatives being mere observers with no voting rights); thirdly, the fact that the Bank of Italy was informed of the progress of the negotiations between the FITD of the one part, and BPB and the special administrator of the other (as there was no evidence that the Bank of Italy had used those contacts in order to influence the content of the measures at issue); or, fourthly, the power of the special administrator to initiate the procedure which could lead to the adoption of intervention measures such as those at issue (since the request by the special administrator for the FITD to intervene imposed no obligation on the FITD to do so).

25. Thirdly, the General Court found that the Commission failed to establish sufficiently that the measures at issue were granted through State resources.

26. In support of that finding, the General Court noted, in the first place, that the public mandate conferred on the FITD did not require that consortium to intervene before one of its members failed, by requesting the necessary resources from such members. In the second place, the General Court took the view that the public authorities did not have control over the resources used to finance the measures at issue, given that, first, those measures were adopted not on the initiative of the special administrator, but on account of a private initiative, that of BPB, and, secondly, the authorisation of the measures at issue by the

Bank of Italy did not give rise to anything other than a formal check of their legality. In the third place, the General Court emphasised, first, that the mandatory nature of the contribution used to finance the measures at issue stemmed not from a regulatory provision, but from the statutes of the FITD, and, secondly, that those measures were in the interests of the FITD's members and had been adopted unanimously by the FITD's governing bodies.

27. Since the first condition relating to the classification of a national measure as State aid was not satisfied, the General Court annulled the decision at issue, without examining the other pleas and arguments put forward by the Italian Government, BPB, the FITD or the Bank of Italy.

IV. Proceedings before the Court of Justice and forms of order sought

28. By the present appeal, the Commission requests the Court of Justice to set aside the judgment under appeal, dismiss the actions brought at first instance for the annulment of the decision at issue to the extent that they challenge (i) the imputability to the State of the measures at issue and (ii) the State origin of the resources, refer the case back to the General Court for it to rule on the other pleas raised before it, and order the costs to be reserved.

29. The Italian Government, BPB and the Bank of Italy contend that the Court should dismiss the appeal and order the Commission to pay the costs. The FITD contends that the Court should dismiss the appeal as inadmissible, ineffective and unfounded, uphold the judgment under appeal and order the Commission to pay the costs.

V. Analysis

30. The Commission relies on two grounds of appeal. By its first ground of appeal, it submits that the General Court infringed Article 107(1) TFEU for two reasons, both of which relate to the burden of proof to be discharged by the Commission in order to establish that an aid measure is attributable to the State and is granted through State resources. By its second ground of appeal, the Commission submits that the General Court distorted the facts and misinterpreted the relevant provisions of Italian law, those serious material inaccuracies being clearly apparent from the case-file.

A. The first ground of appeal, alleging that the General Court infringed Article 107(1) TFEU in respect of the burden of proof to be discharged by the Commission in order to establish that an aid measure is imputable to the State and is granted through State resources

1. Arguments of the parties

31. The first ground of appeal is divided into two parts, both of which allege, for different reasons, an infringement of Article 107(1) TFEU.

32. In the first part of its first ground of appeal, the Commission submits that, in paragraphs 69, 89, 90, 91, 114, 116, 117, 127, 128 and 131 of the judgment under appeal, the General Court erred as regards the burden of proof to be discharged by the Commission for establishing that the measures at issue were imputable to the State and were granted through State resources; this is because it required the Commission to demonstrate not only that the State was able to exercise a dominant influence over the entity granting the aid, but also that it was in a position to exercise that control *in the circumstances of the particular case*, solely on account of the fact that that entity was a private undertaking. In the Commission's view, there is no reason to make a distinction according to the public or private nature of the entity granting the aid, with the result that, even where the aid is granted by a private entity, the Commission is not required to demonstrate that in the particular case the public authorities specifically incited or instructed that entity to take the aid measure in question. There is no support in the case-law for that distinction. The Commission further submits that, in any event, the FITD must be regarded not as a private entity, but as an emanation of

the State since it was entrusted with specific tasks in accordance with Directive 94/19. Therefore, should the Court consider that the Commission bears a heavier burden of proof where the aid is granted by a private entity, it would not, in the present case, bear such a heavier burden. Lastly, the Commission emphasises that should the Court consider that the Commission bears a heavier burden of proof where the aid is granted by a private entity, it would be almost impossible for it to demonstrate that measures taken by deposit guarantee schemes consisting in public and private banks, such as the measures at issue, constitute State aid. As a result, those schemes could use their available financial means for adopting 'alternative measures in order to prevent the failure of a credit institution' within the meaning of Article 11(3) of Directive 2014/49/EU (8) without that institution having been placed under resolution pursuant to Article 32 of Directive 2014/59/EU. (9)

33. In the second part of its first ground of appeal, the Commission submits that the General Court erred as regards the burden of proof to be discharged by the Commission for establishing that the measures at issue were imputable to the State and were granted through State resources, by examining and assessing in a piecemeal manner the various pieces of evidence produced by the Commission in the decision at issue, without considering that evidence as a whole and without taking into account its broader context. The Commission challenges, for that reason, paragraphs 96, 100 to 106, 114, 115, 116 and 125 of the judgment under appeal, as well as the General Court's assessment of the sub-condition that the aid measure must be granted through State resources.

34. The Italian Government contends that the first ground of appeal is inadmissible and, at all events, unfounded.

35. In any event, the Italian Government raises the inadmissibility of the first ground of appeal (or, at least, of the first part thereof) as it raises a question of fact, and of the second part of the first ground of appeal as it raises a question of fact and the appeal does not indicate that it challenges paragraphs 125 to 132 of the judgment under appeal.

36. The first part of the first ground of appeal is, in the Italian Government's view, unfounded since the Commission, which, in order to establish that an aid measure taken by a public undertaking is imputable to the State, is required under the case-law to show an actual involvement of the public authorities in the adoption of that measure, is required to provide that proof all the more so in the case of an aid measure taken by a private entity with full decision-making autonomy. The probative value of the evidence from which, in the latter case, it may be inferred that the aid measure is imputable to the State must be all the greater, given the impossibility of relying on any organic links between the private entity and the State. The second part of the first ground of appeal is, according to the Italian Government, equally unfounded since, in assessing the various pieces of evidence, the General Court took account of the 'context' identified in paragraph 125 of the judgment under appeal and of the fact that the measures at issue were an alternative to the reimbursement of depositors in the event of the liquidation of Tercas, which fell within the scope of the public mandate conferred on the FITD.

37. BPB contends that the first ground of appeal is inadmissible and, in any event, unfounded (first and second parts of that ground of appeal) and ineffective (first part of that ground).

38. BPB raises the inadmissibility, first, of the first part of the first ground of appeal (as it raises a question of fact), secondly, of the Commission's contention that the FITD must be regarded as an emanation of the State (as it raises a question of fact, and was not raised at first instance), and, thirdly, of the second part of the first ground of appeal (as it raises a question of fact).

39. In any event, the first part of the first ground of appeal is, according to BPB, unfounded as, rather than imposing on the Commission a heavier burden of proof for establishing the imputability of an aid measure to the State where the aid is granted by a private entity, the General Court merely applied, in paragraphs 67, 69, and 87 to 91 of the judgment under appeal, the case-law that follows from the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), while taking into account the private nature of the FITD. Moreover, the first part of the first ground of appeal is, in any event, ineffective to the

extent that it challenges paragraphs 69, 89 and 90 of the judgment under appeal, given that paragraphs 94 to 132 of that judgment provide a sufficient legal basis for the General Court's finding that the measures at issue were not imputable to the State. The first part of the first ground of appeal is also unfounded and, in any event, ineffective in so far as it challenges the heavier burden of proof allegedly imposed on the Commission for showing that the measures at issue were granted through State resources. Lastly, according to BPB, the second part of the first ground of appeal is unfounded.

40. The FITD contends that the first ground of appeal is inadmissible and, in any event, unfounded (first and second parts of that ground of appeal) and ineffective (first part of that ground).

41. The FITD raises the same pleas of inadmissibility as BPB.

42. In any event, according to the FITD, the first part of the first ground of appeal is ineffective since, first, the Court of Justice would not have jurisdiction to conduct a new assessment of the facts in the light of a lower standard of proof, and, secondly, the appeal does not challenge the General Court's finding that the measures at issue were not granted through State resources, with the result that, since those conditions are cumulative, an error of the General Court in respect of the standard of proof for establishing that those measures are imputable to the State would have no impact on the operative part of the judgment under appeal. The FITD further contends that the first part of the first ground of appeal is unfounded as, first, the standard of proof set by the General Court for establishing the imputability to the State of an aid measure taken by a private entity is not higher than the standard set in the judgment of 16 May 2002, *France* v *Commission* (C−482/99, EU:C:2002:294), and, secondly, the Commission does not put forward any specific complaint in respect of the standard of proof set by the General Court for proving that an aid measure taken by a private entity is granted through State resources (and, in any event, the test described in paragraph 134 of the judgment under appeal is not more stringent than that provided for under the case-law). Lastly, the second part of the first ground of appeal is, in the FITD's view, unfounded as it is clear from paragraphs 105, 106, 114, 120, 125, 132, 144, 147, 149, 157 and 161 of the judgment under appeal that the General Court considered the evidence as a whole and took account of the context of the measures at issue.

43. The Bank of Italy contends that the first ground of appeal is inadmissible in part (first part of the first ground of appeal to the extent that it challenges the General Court's finding that the measures at issue were not imputable to the State), unfounded in part (first part of the first ground of appeal to the extent that it challenges the General Court's finding that the measures at issue were not imputable to the State, and second part of the first ground of appeal), and ineffective in part (first part of the first ground of appeal).

44. The Bank of Italy raises the inadmissibility of the first part of the first ground of appeal and of the Commission's contention that the FITD must be regarded as an emanation of the State, as they raise questions of fact.

45. According to the Bank of Italy, the first part of the first ground of appeal is unfounded to the extent that it challenges the General Court's finding that the measures at issue were not imputable to the State, given that, in the absence of indicators with a high probative value such as the existence of organic links between the entity granting the aid and the State, it is not sufficient that the Commission provides 'negative' or 'indirect' proof, and it must adduce 'positive' proof that the State was involved in the adoption of the aid measure. In any event, the first part of the first ground of appeal is ineffective to the extent that it challenges the General Court's finding that the measures at issue were not imputable to the State, since the General Court examined each indicator produced by the Commission and found them to be without any probative value. Similarly, the first part of the first ground of appeal is ineffective to the extent that it challenges the General Court's finding that the measures at issue were not granted through State resources, given that, in the judgment under appeal, the General Court did not set a higher standard of proof in that regard. Lastly, the second part of the first ground of appeal is unfounded as the General Court, first, held that every piece of evidence, taken individually, was devoid of probative value, and, secondly, it took account of the context of the measures at issue.

2. Assessment

46. By its first ground of appeal, the Commission submits that the General Court erred in respect of the burden of proof to be discharged by the Commission for establishing that an aid measure is imputable to the State and is granted through State resources, and thereby infringed Article 107(1) TFEU. In the first part of its first ground of appeal, the Commission submits that the General Court erred in requiring it to demonstrate the existence of a dominant influence on the part of the public authorities, at every step of the procedure which led to the adoption of that measure, over the entity granting the aid, solely on account of the fact that the latter is a private entity. In the second part of its first ground of appeal, the Commission submits that the General Court erred in examining in a piecemeal manner the various pieces of evidence produced by the Commission, without considering that evidence as a whole and without taking into account its broader context.

(a) Admissibility

47. First, the Italian Government, BPB, the FITD and the Bank of Italy challenge the admissibility of the first part of the first ground of appeal on the ground that it raises a question of fact. In their view, contrary to what the Commission contends, the General Court did not, in the judgment under appeal, require it to discharge a heavier burden of proof where the entity granting the aid is not a public undertaking but a private entity. Rather, the General Court simply applied to the measures at issue – which were taken by a private entity, namely the FITD, and were financed through funds administered by that entity – the case-law that applies where the aid is granted by a public undertaking. According to the Italian Government, BPB, the FITD and the Bank of Italy, it follows that by the first part of its first ground of appeal the Commission does not invoke an error in law on the part of the General Court. It challenges the General Court's assessment of the facts and evidence. Given that such assessment is not amenable to review by the Court of Justice, the first part of the first ground of appeal is, in the view of the Italian Government, BPB, the FITD and the Bank of Italy, inadmissible.

48. In my opinion, that plea of inadmissibility cannot succeed.

49. By the first part of its first ground of appeal, the Commission challenges the heavier burden of proof which, in the Commission's view, the General Court requires it to discharge where the aid is granted by a private entity. According to case-law, the jurisdiction of the Court of Justice to review the findings of fact by the General Court extends, inter alia, to the question whether the rules relating to the burden of proof and the taking of evidence have been observed. In particular, the question whether the General Court has taken the right legal criteria as the basis for its appraisal of the facts and evidence is a question of law, which is amenable to review by the Court of Justice in an appeal. (10) The first part of the first ground of appeal thus raises a point of law.

50. I would stress that the question whether or not, in the judgment under appeal, the General Court required the Commission to discharge a heavier burden of proof where the aid is granted by a private entity, is a question concerning the interpretation of the judgment under appeal and, therefore, the substance of the case. That question cannot, in my view, have a bearing on the admissibility of the first part of the first ground of appeal.

51. Secondly, BPB, the FITD and the Bank of Italy challenge the admissibility of the Commission's contention that, should the Court consider that the Commission must discharge a heavier burden of proof where the entity granting the aid is a private entity, such a burden would not apply to the present case because the FITD is not a typical private entity, but an emanation of the State. (11) In the view of BPB, the FITD and the Bank of Italy, this is a question of fact.

52. I disagree with that plea of inadmissibility. In my opinion, the question whether the FITD must be regarded as an emanation of the State because it has been required by a public body to perform a task in the public interest and has been given, for that purpose, special powers beyond those which result from the normal rules applicable to relations between individuals, (12) concerns the legal characterisation of the

facts of the case, which, according to case-law, the Court of Justice has jurisdiction to review. (13) Moreover, the question whether, if the FITD were to be regarded as an emanation of the State, that circumstance would set it apart from other private entities and whether, for that reason, the heavier burden of proof imposed by the General Court where the aid is granted by a private entity should not apply to aid granted by the FITD, is also a question of law.

53. Thirdly, the FITD and BPB argue that the Commission's contention summarised in point 51 above is inadmissible because it was not raised at first instance.

54. I disagree with that plea of inadmissibility. According to case-law, an argument which was not raised at first instance does not constitute a new plea that is inadmissible at the appeal stage if it is simply an amplification of an argument already developed in the context of a plea set out in the application before the General Court. (14) In contending that the FITD must be regarded as an emanation of the State, the Commission seeks to demonstrate that, for that reason, the heavier burden of proof imposed by the General Court where the aid is granted by a private entity does not apply to aid granted by the FITD. Therefore, the Commission's contention that the FITD is an emanation of the State is not a plea in law, but simply an argument in support of the plea, put forward by the Commission at first instance, that the measures at issue are imputable to the State and are granted through State resources. It follows that that contention is admissible.

55. Fourthly, the Italian Government contends that the Commission's argument that the General Court assessed the evidence without taking account of the context of the negotiations between the FITD on the one hand and BPB and the special administrator on the other is inadmissible, on the ground that the appeal does not specify that it challenges paragraphs 125 to 132 of the judgment under appeal, in which the General Court addressed that matter.

56. That plea of inadmissibility cannot succeed, as the appeal specifies that it challenges paragraph 126 of the judgment under appeal.

57. Fifthly, the Italian Government, BPB and the FITD contend that the second part of the first ground of appeal is inadmissible on the basis that the Commission thereby challenges the General Court's assessment of the facts and evidence.

58. That plea of inadmissibility must also be rejected. By the second part of the first ground of appeal, the Commission submits that the General Court failed to assess the evidence as a whole and to take account of the broader context in which the measures at issue were taken. It is true that, according to case-law, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. (15) However, the Commission does not challenge the value attached by the General Court to each piece of evidence produced before it. It complains that the General Court failed to assess those pieces of evidence as a whole and in their broader context, whereas, according to settled case-law, imputability may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken. (16) That is a question of law.

59. I conclude that the first ground of appeal is wholly admissible.

(b) Substance

(1) Preliminary observations

60. According to settled case-law, classification of a measure as State aid within the meaning of Article 107(1) TFEU requires all the conditions mentioned in that provision to be fulfilled. First, there must be intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer a selective advantage on the recipient. Fourthly, it must distort or threaten to distort competition. (17)

61. As mentioned in point 21 above, by the judgment under appeal, the General Court annulled the decision at issue on the ground that the first condition referred to in the preceding point was not satisfied.

62. In respect of that condition, it must be borne in mind that, in order for it to be possible to categorise advantages as 'aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be imputable to the State. (18) Those two sub-conditions are cumulative. (19)

63. In the first place, in order to assess whether a measure is imputable to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure. (20)

64. Where the aid measure is provided for by law or by an administrative measure, it is beyond question that that measure is imputable to the State. (21) The question of imputability arises where the measure is adopted by a body which is distinct from the State, such as a public undertaking. (22)

65. In the latter case, it follows from the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294) ('the judgment in *Stardust*') and from subsequent case-law that the imputability to the State of an aid measure taken by a public undertaking cannot be inferred solely from the fact that that undertaking is under State control, given that a public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State, and that, therefore, actual exercise of that control in a particular case cannot be automatically presumed. However, it cannot be demanded either that it be demonstrated that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question, or that those measures were in fact adopted on the instructions of the public authorities, given that, because of the close relations existing between the State and public undertakings, it will be very difficult for the Commission to provide that proof. Therefore, according to the judgment in *Stardust*, the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken. Such indicators include, in particular: the fact that the body in question had to take account of the requirements or the directives of the public authorities; its integration into the structures of the public administration; the nature of the undertaking's activities and the exercise of the latter on the market in normal conditions of competition with private operators; the legal status of the undertaking (public law or ordinary company law); and the intensity of the supervision exercised by the public authorities over the management of the undertaking. Again according to the judgment in *Stardust*, those indicators must show, in the particular case, an involvement of the public authorities in the adoption of a measure, or the unlikelihood of their not being involved. (23)

66. In the present case, the measures at issue were taken not by a public undertaking, as was the case in the judgment in *Stardust*, but by a private entity, namely the FITD, a consortium of banks governed by private law whose management bodies – the Executive Committee and the Board – were appointed by general meetings of the FITD and were made up solely of representatives of the consortium's member banks. (24)

67. In paragraph 69 of the judgment under appeal, the General Court considered that the obligation on the Commission to demonstrate, on the basis of a set of indicators, an actual exercise of the State's control in the particular case, which, according to the judgment in *Stardust*, applies in the case of an aid measure taken by a public undertaking, applies 'all the more' in the case of an aid measure taken by a private entity, because, unlike a public undertaking, a private entity has no 'link[s] of a capital nature' with the State and it cannot, therefore, be *assumed* to be under State control. Therefore, in paragraphs 89 and 90 of the judgment under appeal, the General Court held that, 'unlike a situation in which a measure taken by a public undertaking is imputed to the State, in respect of a measure taken by a private undertaking, the Commission cannot merely establish … that the absence of actual influence and control by the public authorities over that private entity is unlikely'. Rather, in that case, it must be demonstrated that '[the] measure [in question] ha[s] been adopted under the actual influence and control of the public authorities'.

68. The General Court then examined the evidence put forward by the Commission, and, as mentioned in points 23 and 24 above, it concluded, in paragraph 132 of the judgment under appeal, that the

Commission had not proved to the requisite legal standard that the measures at issue were imputable to the State.

69. In the second place, it is beyond question that an advantage is granted through State resources when the funds used to finance that advantage come from the State budget (or when, by granting that advantage, the State foregoes revenues). (25)

70. The question whether State resources are used arises when the funds originate not from the State budget, but from private parties, that is, when they have their origin in a charge or a contribution paid by private parties. In that case, for those funds to constitute State resources, they must constantly remain under public control and therefore be available to the public authorities, even if they are administered by an entity separate from the State. In other words, the State must have a power of disposal over those funds and be able to direct their use in order to finance the advantage. (26) Furthermore, there must be a sufficiently direct link between the advantage and a reduction of the State budget, or a sufficiently concrete economic risk of burdens on that budget. (27)

71. In the present case, the funds used to finance the measures at issue came not from the State budget, but from contributions by the FITD's member banks. Their origin was thus private. (28) Furthermore, those funds were paid to, and administered by, a private entity distinct from the State, namely the FITD, which implemented the measures at issue following authorisation by the Bank of Italy.

72. In paragraphs 135 and 136 of the judgment under appeal, the General Court noted that, in a situation concerning public undertakings, (29) it had been held that those undertakings' resources constituted State resources as the State was capable, by exercising its dominant influence over such undertakings, of directing their use of their resources, and that it was of no significance, in that regard, that the resources were administered by entities distinct from the State, or that the source of those resources was private. The General Court then examined the evidence on which the Commission had relied in order to find that the funds used to finance the measures at issue were State resources, and, as mentioned in points 25 and 26 above, it concluded, in paragraph 161 of the judgment under appeal, that the Commission had failed to establish that State resources were used.

73. Consequently, the General Court annulled the decision at issue on the ground that the Commission had not demonstrated that the measures at issue were imputable to the State, or that they were granted through State resources.

74. By its first ground of appeal, the Commission essentially submits that the General Court infringed Article 107(1) TFEU, first, in finding that where the aid is granted by a private entity such as the FITD rather than by a public undertaking, the Commission must discharge a heavier burden of proof for establishing that an aid measure is imputable to the State and is granted through State resources (first part of the first ground of appeal), and, secondly, in assessing in a piecemeal manner the evidence produced in that regard, without considering it as a whole and taking account of its broader context (second part of the first ground of appeal).

(2) The first part of the first ground of appeal

75. The first part of the first ground of appeal is divided into two complaints. By the first complaint, the Commission submits that the General Court erred in respect of the burden of proof imposed on the Commission for establishing that an aid measure is imputable to the State, where that measure is taken by a private entity rather than by a public undertaking ('the complaint relating to the proof of the imputability of an aid measure to the State'). By the second complaint, the Commission submits the General Court erred in respect of the burden of proof imposed on the Commission for showing that an aid measure is granted through State resources, where the funds used to finance that measure are administered by a private entity rather than by a public undertaking ('the complaint relating to the proof that an aid measure is granted through State resources'). I will examine each complaint in turn.

(i) The complaint relating to the proof of the imputability of an aid measure to the State

76. In support of that complaint, the Commission submits that, in paragraphs 69, 89, 90, 91, 114, 116, 117, 127, 128 and 131 of the judgment under appeal, the General Court held that, in the case of an aid measure taken by a private entity, the Commission must provide *positive proof* that the public authorities had a dominant influence or control over the adoption of the aid measure. In particular, according to the Commission, the General Court found that it must establish that those authorities exercised their influence at every step of the procedure which led to the adoption of that measure; that they issued binding instructions to that entity; and that the involvement of the public authorities had an impact on the aid measure. In the Commission's view, the General Court's findings in that regard are inconsistent with the case-law, which requires the Commission to demonstrate not that the public authorities are involved in the adoption of the aid measure, but only that their involvement in the adoption of that measure is likely, or that their non-involvement is unlikely. While that case-law was developed in the case of aid measures taken by public undertakings, there is no reason, the Commission submits, to make a distinction between public undertakings and private entities and to apply the above mentioned case-law only in the case of an aid measure taken by a public undertaking, while developing a new and more stringent test in the case of an aid measure taken by a private entity.

77. The Italian Government, BPB, the FITD and the Bank of Italy contend that the complaint relating to the proof of the imputability of an aid measure to the State must be dismissed.

78. In my opinion, that complaint cannot succeed for the following reasons. First, contrary to what the Commission argues, and as the Italian Government, BPB and the FITD contend, the General Court did *not*, in the judgment under appeal, impose a heavier burden of proof on the Commission in the case of an aid measure taken by a private entity rather than by a public undertaking. Secondly, should the Court of Justice consider that the General Court applied such a heavier burden of proof in the judgment under appeal, the complaint relating to the proof of the imputability of an aid measure to the State would nonetheless have to be dismissed because, although well founded, it is ineffective.

79. Before I examine those reasons, I would like to make two preliminary remarks.

80. First, I should note, for the sake of clarity, that, according to paragraph 67 of the judgment under appeal, 'private entity' means an entity which 'is governed by private law or is autonomous, including, as regards the management of its funds, by comparison with intervention by public authorities and public funds'. A 'private entity' is not a public undertaking, the latter being defined by Article 2(b) of Commission Directive 2006/111/EC (30) as 'any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it', as the General Court recalled in paragraph 88 of the judgment under appeal. In other words, a private entity is an entity that is not under State control.

81. Secondly, I should mention that the question whether, in order to establish that an aid measure taken by a private entity is imputable to the State, the Commission must provide positive proof that the public authorities had a dominant influence or control over the adoption of that measure, or whether it is sufficient that it demonstrates that the absence of actual influence and control by the public authorities is unlikely, (31) has – despite the Commission's contention that the General Court erred in respect of the burden of proof (32) – more to do with the standard of proof (which determines the level of confidence or persuasion necessary to demonstrate a fact) than the burden of proof (which determines which party must prove the facts, and bears the risk of facts remaining unproven). (33)

– *The General Court did not, in the judgment under appeal, set a higher standard of proof in the case of an aid measure taken by a private entity rather than by a public undertaking*

82. As mentioned in point 67 above, it follows from paragraphs 69, 89 and 90 of the judgment under appeal that, in the case of an aid measure taken by a private entity, the General Court requires the proof of an *actual influence or control* by the public authorities – in the Commission's words 'positive proof' –

whereas, in the case of an aid measure taken by a public undertaking, it is sufficient that the Commission demonstrates the *likelihood* of an actual influence and control by the public authorities (or, rather the unlikelihood of the absence of their actual influence and control).

83. However, I am inclined to believe that, contrary to what might appear to be the case, the General Court did not thereby set a higher standard of proof for establishing that an aid measure is imputable to the State where that measure is taken by a private entity rather than a public undertaking.

84. I will examine below each of the three arguments put forward by the Commission in support of its view that the General Court set such a higher standard of proof in the judgment under appeal. According to the Commission, in that judgment, the General Court required it to show, first, that the measures at issue were adopted on the instructions of the public authorities, which compelled the FITD to adopt those measures, secondly, that the involvement of those authorities had an impact on the content of those measures, and, thirdly, that the public authorities had an actual influence or impact at every step of the procedure which led to the adoption of the measures. None of these arguments is, in my view, convincing.

85. In the first place, I note that, contrary to what the Commission argues, the General Court did not, in the judgment under appeal, hold that, in order to establish that an aid measure taken by a private entity is imputable to the State, the Commission must show that that measure was adopted on the *binding instruction* of the public authorities, which *compelled* that entity to adopt those measures.

86. Had the General Court required such proof, it would indeed have set a higher standard of proof than is the case where the aid measure is taken by a public undertaking. I note that it follows from paragraph 54 of the judgment in *Stardust*, which concerned an aid measure taken by a public undertaking, that the Commission is not required to demonstrate that that measure was adopted on the instructions of the public authorities. (34) However, the General Court did not, in the judgment under appeal, require the Commission to provide the proof described in point 85 above.

87. This is because, in the judgment under appeal, the General Court accepts that, in the case of an aid measure taken by a private entity, the proof of an actual influence or control by the public authorities over the adoption of the aid measure may be adduced 'in the form of indicators', (35) as is the case where the entity granting the aid is a public undertaking. (36) This means that the Commission is permitted to *infer* the imputability of an aid measure to the State from the circumstances of the case and the context in which that measure was taken, rather than provide the *direct proof* that the measure was adopted under the influence or control of the public authorities, that is to say, rather than prove that the measure was adopted *on the instructions of the public authorities*.

88. This is also because it does not follow from paragraphs 117, 127, 128 and 131 of the judgment under appeal, to which the Commission refers, that it is required to provide the proof described in point 85 above.

89. It is true that, in paragraphs 117 and 130 of the judgment under appeal, the General Court found, first, that the Bank of Italy did not, through the authorisation procedure to which the measures at issue are subject, have the power to '*requir[e]* the FITD to intervene in support of a bank in difficulty', (37) and, secondly, that the submission by the special administrator of Tercas of a request for the FITD to intervene '*impose[d] no obligation* on the FITD to grant that request'. (38)

90. However, I note that, in order to conclude that the measures at issue were not imputable to the State, the General Court did not rely solely on the fact that neither the Bank of Italy nor the special administrator had compelled the FITD to intervene in support of Tercas, or issued binding instructions to that consortium.

91. Indeed, in paragraphs 122 to 124 of the judgment under appeal, the General Court relied also on the 'purely passive role' played by the representatives of the Bank of Italy at the meetings of the FITD's governing bodies. Had those representatives played a more active role at those meetings (for instance, by

'voic[ing] [their] concerns' about the planned intervention), this would have been regarded by the General Court as an element supporting the imputability of the measures at issue to the State. (39) Moreover, in paragraph 126 of the judgment under appeal, the General Court relied also on the fact that the informal meetings between, on the one hand, the Bank of Italy, and, on the other, BPB, the FITD and the special administrator ('the informal meetings'), 'simply allowed the Bank of Italy to be informed' of the negotiations between the FITD of the one part and BPB and the special administrator of the other. Therefore, had the Bank of Italy used the informal meetings 'in order decisively to influence the content of the … measures at issue', this would have been regarded by the General Court as an indicator that those measures were imputable to the State.

92. As for the General Court's finding, in paragraph 127 of the judgment under appeal, that the 'invit[ation]' by the Bank of Italy 'to reach a "balanced agreement" with BPB with regard to covering Tercas' negative equity' was 'in no way binding on the FITD', I note that, in order to find that that invitation was not an indicator that the Bank of Italy had an influence on the adoption of the measures at issue, the General Court relied not only on the non-binding nature of that invitation, but also on the fact that the FITD's decision to adopt those measures was prompted not by that invitation, but by economic considerations (that is, by the conclusion of the report submitted by an auditing and reporting company, according to which the cost of the measures at issue was lower than the cost of compensation under the deposit guarantee scheme in the event of Tercas' liquidation).

93. Furthermore, as regards the fact, mentioned in point 89 above, that the special administrator's request to intervene was not binding on the FITD, I note that in order to find that the procedure which led to the adoption of the measures at issue was not initiated by a public authority, the General Court also in paragraph 131 of the judgment under appeal relied on the fact that, in practice, 'the initiative to call upon the FITD stem[med] from the requirements imposed by BPB, which had made its subscription to a capital increase in Tercas conditional upon that bank's negative equity being covered by the FITD'.

94. Consequently, contrary to what the Commission argues, the General Court did not, in the judgment under appeal, require that, in the case of an aid measure taken by a private entity, the Commission demonstrate that that measure was adopted on the binding instructions of the public authorities, which compelled that private entity to adopt it.

95. In the second place, I note that, contrary to what the Commission argues, the General Court did not, in the judgment under appeal, hold that, in order to establish that an aid measure taken by a private entity is imputable to the State, the Commission must show that the involvement of the public authorities had an effect on the content of that measure.

96. Had the General Court required such proof, it would indeed have set a higher standard of proof than is the case where the aid measure is taken by a public undertaking. This is because, according to paragraph 48 of the judgment of 25 June 2015, *SACE and Sace BT* v *Commission* (T-305/13, EU:T:2015:435), which concerned an aid measure taken by a public undertaking, it is not necessary for the Commission 'to examine the effect of [the public authorities'] involvement on the content of the measure' in order to establish that that measure is imputable to the State. However, the General Court did not, in the judgment under appeal, require the Commission to provide the proof described in the preceding point.

97. In paragraph 116 of the judgment under appeal, the General Court did not examine whether, *in practice*, the intervention of the Bank of Italy had an impact on the content of the measures at issue. Rather, it found that the Italian legislation did not confer on the Bank of Italy, in the context of the authorisation of the measures at issue, the *power* to amend the content of those measures (and that, therefore, the Bank of Italy could not, in that context, have any influence on the content of the measures at issue). Similarly, in order to conclude, in paragraph 126 of the judgment under appeal, that the Bank of Italy had not used the informal meetings 'in order decisively to influence the content of the … measures at issue', the General Court did not examine whether, *in practice*, the Bank of Italy's participation in the informal meetings had an impact on the content of the measures at issue. Rather, the General Court appears simply to note, in that paragraph, that the Bank of Italy's participation was purely passive as it was for

information purposes only. The same is true of paragraph 127 of the judgment under appeal, in which the General Court noted that the Bank of Italy's invitation to the FITD to reach a balanced agreement with BPB with regard to covering Tercas' negative equity did not have 'the slightest impact' on the FITD's decision to adopt the measures at issue, as that decision was prompted not by that invitation, but by the conditions imposed by BPB.

98. In the third place, there is no basis for the Commission's contention that, in paragraph 114 of the judgment under appeal, the General Court requires proof that the public authorities were able to influence 'every step' of the procedure which led to the adoption of the measures at issue. In my view, the reason why the General Court, in paragraphs 115 to 131 of the judgment under appeal, (40) examines every step of the procedure, one after the other, is that, having found no evidence that the public authorities had an actual influence or control during the first step, it verifies whether they had such an influence during the second step, and so on. There is no indication that had the General Court considered, for instance, that the Bank of Italy had had an actual influence on the adoption of the measures at issue in the context of their authorisation, it would have found it necessary to examine whether the Bank of Italy had a similar influence during the other steps of the procedure.

99. I conclude that the General Court did not, in the judgment under appeal, set a higher standard of proof in the case of an aid measure taken by a private entity, and that the complaint relating to the proof of the imputability of an aid measure to the State must be rejected.

100. However, should the Court consider, in particular on the basis of the considerations set out in point 89 above, that the General Court set such a higher standard of proof in the judgment under appeal, I will examine whether the General Court erred in law in so doing.

– *Should the Court consider that, in the judgment under appeal, the General Court set a higher standard of proof in the case of an aid measure taken by a private entity, it would have to find that the General Court erred in law in so doing*

101. As mentioned in point 78 above, I consider that the General Court would have erred in law in setting such a higher standard of proof (but the complaint relating to the proof of the imputability of an aid measure to the State should nonetheless be dismissed as ineffective).

102. Even though I agree that, in order to establish that an aid measure taken by a private entity is imputable to the State, the Commission must show an actual influence or control by the public authorities over the adoption of that measure, it is, in my view, questionable whether, in the case of an aid measure taken by a public undertaking, it is sufficient for the Commission to show that the absence of actual influence and control by the public authorities over that undertaking is unlikely, as the General Court held, in essence, in paragraph 89 of the judgment under appeal.

103. I note that, in most judgments which concern an aid measure taken by a public undertaking, the applicable standard of proof is not identified. (41) However, a standard was identified in the judgments of 25 June 2015, *SACE and Sace BT* v *Commission* (T−305/13, EU:T:2015:435), of 28 January 2016, *Slovenia* v *Commission*, (T−507/12, not published, EU:T:2016:35), and of 13 December 2018, *Comune di Milano* v *Commission* (T−167/13, EU:T:2018:940), which concerned an aid measure taken by a public undertaking. In those judgments, the General Court held that 'it is unlikely that the public authorities were not involved in the adoption of the measures at issue', (42) and that 'the demonstration, by the Commission, of such an involvement of the public authorities in the granting of aid does not require the provision of positive proof, but it is sufficient to demonstrate the unlikelihood of an absence of involvement of those authorities in the adoption of the measure'. (43) Therefore, it seems that, in the case of an aid measure taken by a public undertaking, it is sufficient to prove the likelihood of the involvement of the public authorities (or the unlikelihood of their non-involvement), rather than their actual involvement. (44)

104. By contrast, in the judgment of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission* (T−53/16, EU:T:2018:943, paragraph 132), which concerned an aid measure taken by a private undertaking, (45) it seems that the standard of proof applied goes beyond the mere likelihood of an involvement of the public authorities as, in the General Court's words, the Commission had proved 'that … [the three indicators examined in the contested decision] *had* a sufficiently decisive influence on [the] conduct [of the entity granting the aid] towards [the beneficiary] that the agreemen[t] in question [could] be regarded as imputable to the State'.

105. That said, I would stress that, in my opinion, the key issue with respect to the proof of the imputability of an aid measure to the State is not whether the Commission must establish an *actual exercise* of the public authorities' influence or control, or whether it is sufficient that it demonstrate the *likelihood* of such influence or control (or the unlikelihood of the absence of an actual influence and control by the public authorities). Rather, the key issue is that of the indicators from which the imputability of an aid measure to the State may be inferred, and, in particular, the question whether those indicators must relate to the adoption of the aid measure, or whether it is sufficient that they relate to the entity granting the aid. In other words, in my view, the key issue is whether the Commission must show an actual influence or control by the public authorities *over that entity*, or whether it is sufficient that it demonstrate an actual influence or control of those authorities *over the adoption of the aid measure*.

106. In that regard, I note that, in all the judgments cited in points 103 and 104 above in which the applicable standard of proof is identified, the actual influence or control by the public authorities, or the unlikelihood of the absence of such influence and control, must concern the adoption of the aid measure, not simply the entity granting the aid, irrespective of whether that entity is a public undertaking (46) or a private entity. (47) However, before drawing any conclusions, account should be taken also of the other judgments cited in point 103 above, in respect of which the question whether the actual influence or control by the public authorities must concern the adoption of the aid measure, or simply the entity granting the aid, may be answered by examining the indicators from which the imputability of the aid measure to the State was inferred. (48) In that regard, it seems that although in some cases the finding that the aid measure is imputable to the State is inferred solely from indicators that relate to the public undertaking that took the aid measure, in most cases it is inferred also from indicators that relate to the adoption of that measure.

107. For instance, in the judgment of 17 September 2014, *Commerz Nederland* (C−242/13, EU:C:2014:2224, paragraphs 35 to 39), the imputability to the State of the guarantees provided by the port authority of Rotterdam, an entity wholly owned by the municipality, followed, 'in principle' (and subject to verification by the referring court), from the 'organisational links' between the port authority and the municipality. (49) The circumstances that the sole director of the port authority had kept the provision of the guarantees secret and that there were 'grounds for presuming' that the municipality would have opposed the provision of those guarantees, had it been informed of it, 'could not, … in themselves, exclude such imputability'. In that case, the indicators from which the imputability of the aid measure to the State was inferred related solely to the entity granting the aid, while little attention was paid to the indicators that related to the adoption of the aid measure and militated against the finding of imputability. In that judgment, the Court thus came very close to establishing a (rebuttable) presumption, which is, in my view, hardly in line with paragraph 52 of the judgment in *Stardust*, according to which 'the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking … to be imputed to the State'.

108. Similarly, in the judgment of 27 February 2013, *Nitrogénművek Vegyipari* v *Commission* (T−387/11, not published, EU:T:2013:98, paragraphs 63 to 66), the finding that the loans granted by a credit institution wholly owned by the State, Magyar Fejlesztési Bank Zrt. ('MFB'), were imputable to the Hungarian State, is inferred solely from indicators related to MFB, that is, the fact that MFB's activities were those of a public development bank, that it had a different legal status from that of a commercial bank, and that it was subject to intense supervision by the public authorities (as, in particular, the competent minister exercised the State's ownership rights in MFB and appointed and revoked the members of its governing bodies). I

note that that supervision was exercised over the operations of MFB, not over the adoption of the loans in question.

109. However, in the judgment of 13 December 2018, *Comune di Milano* v *Commission* (T−167/13, EU:T:2018:940, paragraphs 75 to 96), the imputability to the Italian State of the injections of capital made by SEA SpA, the publicly owned operator of Milan's airports, into its subsidiary Sea Handling SpA, was inferred not solely from the organic links between SEA and the Municipality of Milan (which held the majority of the shares and voting rights in SEA, and appointed the members of SEA's governing bodies), but also from an indicator related to the adoption of the aid measure. That indicator consisted of the trade union agreement entered into by the Municipality of Milan, SEA and various trade unions, whereby SEA committed to support the losses incurred by Sea Handling – a support which then took the form of the capital injections in question, that is, of the aid measures. As the General Court noted in paragraph 81 of that judgment, the Municipality of Milan took an active part in the negotiations of that trade union agreement and, by signing that agreement, approved, in its capacity as SEA's majority shareholder, that company's commitment to support the losses of its subsidiary as well as SEA's subsequent implementation of that commitment.

110. Similarly, in the judgment of 13 May 2020, *easyJet Airline* v *Commission* (T−8/18, EU:T:2020:182, paragraphs 117 to 140), the imputability to the Autonomous Region of Sardinia (Italy) ('the Autonomous Region') of the payments made by the operators of Sardinia's airports to airlines, in return for the provision by those airlines of point-to-point connections between Sardinia and certain European airports, was inferred from indicators related to the adoption of the aid measure. Those indicators were as follows: first, the fact that the funds used by the airport operators to remunerate the airlines were made available by the Autonomous Region upon its approval of the detailed plans of activities of those operators, which had to be drafted in accordance with the guidelines adopted by Autonomous Region's executive; and, secondly, the fact that the mechanism for reimbursement of the costs paid by the airport operators enabled the Autonomous Region to monitor the implementation of the airport operators' plans of activities (since the costs arising from the agreements between the airport operators and the airlines could be reimbursed only if the content and the scope of those agreements was consistent with the guidelines mentioned above). I note that the influence and control of the Autonomous Region was exercised over the content and the implementation of the airport operators' plans of activities, and that such implementation consisted precisely of the aid measure (namely, the remuneration paid by the airport operators to airlines).

111. Consequently, as mentioned in points 102 and 106 above, where the entity granting the aid is a public undertaking, it is not, *in all cases*, sufficient for the Commission to show an actual influence or control by the public authorities (or the unlikelihood of the absence of such influence and control) *over that undertaking*. It must show an actual influence or control (or the unlikelihood of the absence thereof) *over the adoption of the aid measure*. The reason why the standard of proof varies might be found in the circumstance that, as the Court held in paragraph 52 of the judgment in *Stardust*, 'a public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State'.

112. It follows that the standard of proof applied in the case of an aid measure taken by a public undertaking is, in some cases, close, if not identical, to that which applies where the aid measure is taken by a private entity.

113. Indeed, in the judgment of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission* (T−53/16, EU:T:2018:943, paragraphs 125 to 141), the imputability to a State body, namely the Syndicat mixte pour l'aménagement et le développement de l'aéroport de Nîmes ('the SMAN'), of the airport services agreement between Ryanair and the private entity operating the airport of Nîmes (France), namely Veolia Transport Aéroport de Nîmes ('VTAN'), was inferred from indicators related to the adoption of that agreement. Those indicators were: first, the fact that public service delegation agreement concluded between the SMAN and VTAN charged the latter not only with the operation of Nîmes airport, but also with a development of air traffic task, which could be incompatible with a private airport operator's goal of maximising its profitability; secondly, various statements of VTAN made before the conclusion of the

airport services agreement in question, which showed that VTAN was aware of the fact that the relationship with Ryanair was likely to harm the profitability of the operation of Nîmes airport, and that it was willing to enter into a relationship with that airline only in the light of the flat-rate contribution offered by the SMAN; and, thirdly, the fact that the profitability of VTAN's concession relied on that flat-rate contribution, which had been calculated based on the costs and revenues associated with the agreement with Ryanair.

114. I should also note that, in the judgment of 13 May 2020, *easyJet Airline* v *Commission* (T−8/18, EU:T:2020:182, paragraphs 2 and 79), mentioned in point 110 above, the General Court, having noted that one airport operator was privately owned, did not so much as mention the private nature of that entity when it assessed imputability, let alone draw a distinction with the measures taken by the other, publicly owned, airport operators.

115. Consequently, while it follows from the case-law that, in the case of an aid measure taken by a private undertaking, the Commission must demonstrate an actual influence or control by the public authorities *over the adoption of that measure*, that standard has been applied by the Courts of the European Union also in cases where the aid measure was taken by a public undertaking.

116. I should also point out that, in the judgment of 13 December 2018, *Ryanair and Airport Marketing Services* v *Commission* (T−53/16, EU:T:2018:943, paragraph 135), mentioned in point 113 above, the General Court did not require the proof that the aid measure was adopted by the private undertaking on the instructions of the public authorities. This follows from the fact that Ryanair's argument that the SMAN systematically refrained from exercising its power to influence the conduct of VTAN in the negotiations with Ryanair was considered to be ineffective, on the ground that the SMAN had discretion to intervene in the negotiations between VTAN and Ryanair, and it '*could have intervened* if VTAN had tried to impose conditions on Ryanair which would have prompted the latter to reduce its traffic at Nîmes airport'. (50)

117. I conclude that it does not follow from the case-law that a heavier standard of proof applies in the case of an aid measure taken by a private entity rather than a public undertaking.

118. I should also note that while one indicator listed in paragraph 56 of the judgment in *Stardust*, namely, the existence of organic links with the State (or, in the Court's words, the 'integration [of the entity granting the aid] into the structures of the public administration'), cannot obviously enable a measure taken by a private entity to be imputed to the State, the other indicators listed in that judgment may be, and have been, (51) relied on for establishing the imputability of such a measure to the State. The fact that, in the case of an aid measure taken by a private entity, one indicator is lacking implies that the other indicators must be all the more convincing. This does not, however, mean that, in that case, the standard of proof is higher. It simply means that the same standard must be met by relying on indicators other than the existence of organic links with the State.

119. I conclude that, should the Court of Justice consider that, in the judgment under appeal, the General Court applied a higher standard of proof solely on account of the private nature of the entity granting the aid, and, in particular, that it required the proof that the aid measure was adopted on the instructions of the public authorities, it would have to find that the General Court erred in so doing.

120. Before I explain why I consider that, as mentioned in point 78 above, the complaint relating to the proof of the imputability of an aid measure to the State would nonetheless have to be dismissed because it is ineffective, I would like to point out that, contrary to what the Commission argues, first, the dismissal of the present appeal would not jeopardise the premiss on which Directives 2014/49 and 2014/59 are based, and, secondly, it is irrelevant whether or not the FITD may be regarded as an 'emanation of the State' within the meaning of the judgment of 12 July 1990, *Foster and Others* (C−188/89, EU:C:1990:313).

121. In the first place, I do not concur with the Commission's argument that should the Court consider that the measures at issue are not imputable to the State and that, therefore, they do not constitute State aid, no measure taken by a deposit guarantee scheme would ever constitute State aid, with the result that those

schemes could use their available financial means for intervention measures in order to prevent the failure of a credit institution *without the latter having been placed under resolution*. In the Commission's view, this would jeopardise the premiss on which Directives 2014/49 and 2014/59 are based, that is, that all measures taken by deposit guarantee schemes constitute State aid.

122. I should explain that deposit guarantee schemes, (52) whose key task is to protect depositors against the consequences of the insolvency of a credit institution, may nonetheless go beyond that function (53) and use their available financial means for 'alternative measures in order to prevent the failure of a credit institution', pursuant to Article 11(3) of Directive 2014/49. However, such use of a deposit guarantee scheme's available funds is subject to the condition that no resolution action has been taken in relation to the credit institution concerned. Under Article 32(4)(d) of Directive 2014/59, resolution action may be taken where 'extraordinary public financial support' is needed, the latter being defined by Article 2(28) of the same directive as 'State aid within the meaning of Article 107(1) TFEU … that is provided in order to preserve or restore the viability, liquidity or solvency of [a credit] institution'.

123. Therefore, in the present case, should the measures at issue be regarded as State aid, resolution action could be taken in respect of their beneficiary (Tercas), which would preclude the FITD, as a recognised deposit guarantee scheme, (54) from using its available financial means for 'alternative measures' intended to prevent the failure of Tercas under Article 11(3) of Directive 2014/49, such as the measures at issue. (55) Conversely, should the Court consider that the measures at issue do not constitute State aid, no resolution action could be taken in respect of Tercas, and, therefore, the FITD could use the available funds for taking measures such as those at issue without infringing Article 11(3) of Directive 2014/49.

124. For the following reasons, I do not concur with the argument put forward by the Commission as summarised in point 121 above.

125. First, should the Court consider that the measures at issue are not imputable to the State and do not constitute State aid, it would not follow that no measure taken by a deposit guarantee scheme could constitute State aid. That would depend on the features of the deposit guarantee scheme and of the particular measure. I note, in that regard, that, on several occasions, measures taken by deposit guarantee schemes have been found to constitute State aid. (56)

126. Secondly, I recall that Article 11(3) of Directive 2014/49 expressly allows deposit guarantee schemes to use available financial means in order to prevent the failure of a credit institution, provided that that institution has not been placed under resolution. Should, as the Commission suggests, any measure taken by a deposit guarantee scheme be regarded as State aid, this could, in practice, prevent deposit guarantee schemes from adopting alternative measures under that provision, given that one condition would be missing. This could thus deprive that provision of its substance.

127. In the second place, I do not concur with the argument put forward by the Commission to the effect that the FITD is not a typical private entity, but an 'emanation of the State' within the meaning of the judgment of 12 July 1990, *Foster and Others* (C−188/89, EU:C:1990:313, paragraph 18), with the result that, should the Court find that a higher standard of proof applies in the case of an aid measure taken by a private entity, that standard would not apply to the measures adopted by the FITD.

128. I note that the concept of an emanation of the State was developed in relation to the doctrine of the direct effect of directives in 'vertical' disputes between the individual and the State. According to settled case-law, provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals against organisations or bodies which are subject to the authority or control of the State or which possess special powers beyond those which result from the normal rules applicable to relations between individuals. Organisations or bodies that are required, by a public body, to perform a task in the public interest and have been given, for that purpose, special powers may also be treated as comparable to the State. (57)

129. I fail to see how the question whether an organisation or body may be regarded as an emanation of the State and whether it may, as such, be treated as comparable to the State with regard to the 'vertical' effect of directives bears any relation to the classification as State aid of the measures adopted by that organisation or body. The concept of emanation of the State was not developed for that purpose, and I see no reason why it should be used to identify the applicable standard for proving that an aid measure is imputable to the State.

130. In any event, the FITD would not, in my view, be considered an emanation of the State within the meaning of the case-law cited in point 128 above. This is because, unlike the Motor Insurers Bureau of Ireland, which was regarded as an emanation of the State in the judgment of 10 October 2017, *Farrell* (C−413/15, EU:C:2017:745, paragraphs 38 and 40), on which the Commission relies, the FITD is not acting under a public mandate when, as is the case here, it intervenes in the absence of the compulsory liquidation of one of its members, and it does not possess special powers beyond those which result from the normal rules applicable to relations between individuals since it does not have the power to require its members to make a contribution.

131. I conclude that, should the Court consider that, in the judgment under appeal, the General Court applied a higher standard of proof in the case of an aid measure taken by a private entity, it would have to find that the General Court erred in so doing. However, it would nonetheless have to dismiss the complaint relating to the proof of the imputability of an aid measure to the State because, as I will show below, that complaint is ineffective.

– *Should the Court consider that the complaint relating to the proof of the imputability of an aid measure to the State is well founded, it would nonetheless have to dismiss that complaint as ineffective*

132. This is because the indicators listed in paragraphs 96 to 132 of the judgment under appeal do not enable the measures at issue to be imputed to the State even if it is considered that the same standard of proof applies where the entity granting the aid is a private entity and where it is a public undertaking (and that, consequently, the Commission is not required, in order to establish the imputability to the State of an aid measure taken by a private entity, to show that the public authorities compelled that entity to adopt that measure, that their involvement had an impact on the content of the measure, and that they had an influence at every step of the procedure).

133. First, I agree with the General Court that the public mandate conferred on the FITD by Article 96-*ter*(1) of the Italian Banking Act is not an indicator which enables the measures at issue to be imputed to the State, given that, as the General Court found in paragraph 101 of the judgment under appeal, that mandate consists solely in reimbursing depositors, with the result that where, as is the case here, the FITD takes intervention measures in support of a member bank, it does not act under a public mandate.

134. Secondly, the imputability of the measures at issue to the Italian State cannot be inferred from the fact that those measures are subject to authorisation by the Bank of Italy. It is apparent from paragraphs 116 and 118 of the judgment under appeal that, in the context of the authorisation procedure, the Bank of Italy could not have any influence either on the adoption of the measures at issue or on their content, as the sole purpose of that procedure was the verification of the measures' compliance with the prudential rules governing the banking sector.

135. Thirdly, it follows from paragraphs 123 and 126 of the judgment under appeal that there is no evidence that the Bank of Italy exercised any influence or control *informally*. Its role in the meetings of the FITD's governing bodies was 'purely passive' as its representatives either merely expressed their satisfaction with the way in which the Tercas crisis had been handled, or did not speak at all. Moreover, the Bank of Italy's participation in the informal meetings simply allowed it to be informed of the progress of the negotiations between the FITD on the one hand and BPB and the special administrator on the other. The only relevant piece of evidence is the Bank of Italy's invitation to reach a balanced agreement with regard to covering Tercas' negative equity, mentioned in paragraph 127 of the judgment under appeal. However, that piece of evidence has, in my view, little probative value, given that it is the protection of the

interests of its members (58) that prompted the FITD to adopt the measures at issue, rather than the invitation by the Bank of Italy.

136. Fourthly, it is to no effect that the special administrator requested the FITD to adopt the measures at issue, given that, as the General Court noted in paragraph 131 of the judgment under appeal, the initiative to call upon the FITD stemmed not in fact from the special administrator but from BPB (as BPB had made its subscription to a capital increase in Tercas conditional upon that bank's negative equity being covered by the FITD).

137. I conclude that should the Court consider that the imputability to the State of an aid measure taken by a private entity must be assessed according to the same standard as that of an aid measure taken by a public undertaking, the Commission could not be considered to have shown that the measures at issue are imputable to the State.

138. Consequently, the complaint relating to the proof of the imputability of an aid measure to the State must be dismissed, either for the reason set out in point 99 above, or, in any event (should the Court consider that, in the judgment under appeal, the General Court set a higher standard of proof in the case of an aid measure taken by a private entity), for the reason explained in point 137 above.

(ii) The complaint relating to the proof that an aid measure is granted through State resources

139. I am of the opinion that, in the judgment under appeal, the General Court did not impose on the Commission a heavier burden of proof, or, rather, that it did not require the Commission to meet a higher standard of proof for establishing that an aid measure is granted through State resources where, as is the case here, the resources used to finance that measure are administered by a private entity rather than a public undertaking.

140. This is because there is no statement of principle in the judgment under appeal to the effect that the Commission must meet a higher standard of proof where the resources used to finance the aid measure are administered by a private entity rather than a public undertaking. Therefore, the judgment under appeal does not identify the allegedly higher standard of proof which the Commission should, in that case, meet. It is clear from the wording of paragraphs 88 to 90 of that judgment, and from the fact they are part of the section entitled 'Whether the measures at issue are imputable to the State', that those paragraphs relate only to the imputability of an aid measure to the State. Moreover, there is no statement of principle in paragraphs 133 to 161 of the judgment under appeal, which address the question whether the measures at issue were financed through State resources, similar to the statement in paragraphs 88 to 90 of that judgment. Rather, in paragraphs 133 to 161 of the judgment under appeal, the General Court refers to the case-law on the concept of intervention through State resources without attempting to draw a distinction between the resources administered by a public undertaking and those administered by a private entity – which is all the more surprising given that, in paragraphs 135 and 136, the General Court, citing the judgment of 9 November 2017, *Commission* v *TV2/Danmark* (C-656/15 P, EU:C:2017:836), notes that it concerns public undertakings. (59)

141. Moreover, it does not seem to me that, in paragraphs 139 to 161 of the judgment under appeal, the General Court relied on elements that are not mentioned in the judgments of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671), of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268), and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407), which concerned aid measures financed through resources administered by public undertakings. In particular, the circumstances that the Bank of Italy did not have the power to direct the use of the FITD's resources (given that the authorisation procedure did not allow the Bank of Italy to carry out an examination of the measures at issue that went beyond a formal check of their legality), and that although the contribution that the FITD used to finance the measures at issue was mandatory, the mandatory nature of that contribution stemmed not from a regulatory provision but from the statutes of the FITD, seem in line with those judgments. (60)

142. I also note that the Commission neither explains what the stricter test allegedly applied by the General Court in the case of resources administered by a private entity consists of, nor identifies the paragraphs of the judgment under appeal in which that stricter test is applied. (61)

143. Therefore, I consider that, in the judgment under appeal, the General Court did not require the Commission to meet a higher standard of proof for establishing that an aid measure is granted through State resources where the resources used to finance that measure are administered by a private entity rather than a public undertaking.

144. For the sake of completeness, I will briefly set out the reasons why, should the Court consider that, in the judgment under appeal, the General Court set a higher standard of proof in the case of resources administered by a private undertaking, the complaint relating to the proof that an aid measure is granted through State resources should nonetheless be dismissed because, although well founded, it is ineffective.

145. In the situation referred to in the previous point, that complaint would be well founded because there is, to my knowledge, no indication in the case-law that a higher standard of proof applies where the entity administering the resources used to finance an aid measure is not a public undertaking but a private entity. In cases where the resources were administered by a private entity, the Court applied the case-law cited in point 70 above, which it developed in respect of resources administered by a public undertaking; (62) in other words, it verified whether the funds were obtained through compulsory charges imposed by the legislation of a Member State and whether the State had a power of disposal over the funds administered by the undertaking.

146. In that regard, I do not concur with the argument put forward by the Commission in its reply to the effect that, should the Court find that the standard of proof that must be applied for establishing the imputability to the State of an aid measure taken by a private entity is lower than the standard applied in the judgment under appeal, a lower standard of proof should also be applied for establishing that that measure was granted through State resources. In the Commission's view, this follows from the fact that the degree of control exercised by the public authorities over the entity granting the aid is crucial not only to establishing that that measure is imputable to the State, but also to determining that it is granted through State resources. Suffice it to note, in that regard, that it follows from the case-law cited in point 70 above that where the funds used to finance an aid measure originate from private resources, the Commission must show also that those funds were obtained through compulsory charges imposed by the legislation of a Member State.

147. However, as mentioned in point 144 above, should the Court find that, in the judgment under appeal, the General Court required the Commission to meet a higher standard of proof in the case of resources administered by a private entity, and that it erred in so doing, it would nonetheless have to dismiss as ineffective the complaint relating to the proof that an aid measure is granted through State resources.

148. This is because the public authorities do not seem to have exercised *any form* of control over the use of the funds generated by the contribution levied on the FITD's members, given that, according to paragraphs 145 and 147 of the judgment under appeal, first, in the context of the authorisation of the measures at issue, the Bank of Italy did not have the power to direct the use of the FITD's resources, and, secondly, in practice, the intervention of the FITD for the benefit of Tercas was initiated not by the public authorities, but by a private undertaking, namely BPB. This is also because it is beyond doubt that, as the General Court held in paragraph 159 of the judgment under appeal, the mandatory nature of the contribution by the FITD's members does not stem from a regulatory provision, but from a unanimous decision of those members, and that, therefore, it cannot be assimilated to a parafiscal levy. I note, in that regard, that, in the judgment of 28 March 2019, *Germany* v *Commission* (C−405/16 P, EU:C:2019:268, paragraphs 70 and 71), the Court insisted on the fact that the mandatory nature of the contribution used to finance the aid measure stemmed from a regulatory provision, and that the circumstance that, 'in practice', the additional amounts paid by the suppliers of electricity were passed on to the final customers, was considered to be irrelevant.

149. I conclude that the complaint relating to the proof that an aid measure is granted through State resources must be dismissed, either for the reason set out in point 143 above, or, in any event (should the Court of Justice consider that, in the judgment under appeal, the General Court required the Commission to meet a higher standard of proof in the case of resources administered by a private entity), for the reason explained in point 148 above.

150. Consequently, the first part of the first ground of appeal should be dismissed.

(3) The second part of the first ground of appeal

151. By the second part of the first ground of appeal, the Commission contends that the General Court erred in assessing in a piecemeal manner the evidence produced and failed to consider that evidence as a whole and to take account of its broader context in paragraphs 96, 100 to 106, 114, 115, 116 and 125 of the judgment under appeal, and in respect of the proof that the measures at issue were granted through State resources. In that regard, the Commission argues that, according to case-law, the imputability of an aid measure to the State may be inferred from a *set* of indicators arising from the circumstances of the case and the context in which the measure was taken. Although some pieces of evidence may have a relatively low probative value of themselves, they can, when taken together, enable the measure to be imputed to the State.

152. The Italian Government, BPB, the FITD and the Bank of Italy contend that the second part of the first ground of appeal should be dismissed.

153. I consider that the second part of the first ground of appeal must be dismissed.

154. I agree with the Commission that the evidence adduced must be assessed as a whole. This follows from the very fact that the proof of the imputability of an aid measure to the State may be inferred from indicators, which – as the non-exhaustive list of indicators in paragraphs 55 to 57 of the judgment in *Stardust* shows – may be diverse and relate to the measure itself, its context or the entity which took it, and, therefore, have different degrees of probative value.

155. However, contrary to what the Commission argues, the General Court did not, in the judgment under appeal, assess the evidence in a piecemeal manner.

156. First, the Commission contends that while finding, in paragraphs 96 and 100 to 106 of the judgment under appeal (i) that the public mandate conferred on the FITD consisted solely in reimbursing depositors, and (ii) that, in adopting alternative measures in support of a member bank in the absence of the latter's compulsory liquidation, the FITD acted outside the framework of the mandate conferred on it, the General Court failed to take account of the fact that such alternative measures sought precisely to avoid having to reimburse depositors in the event of liquidation. I note that it is true that, under Article 29(1) of the statutes of the FITD, one condition for adopting measures such as those at issue is that a lesser burden is expected compared with that which would be incurred in the case of the compulsory liquidation of the bank concerned, which would trigger the obligation on the FITD to reimburse depositors. However, this takes nothing away from the fact that, in adopting measures such as those at issue, the FITD acted not in the public interest (that is, in the interest of depositors), but in the interests of its member banks, and that the decision to adopt those measures stemmed not from a statutory obligation, but from an autonomous decision of the FITD's member banks, with the result that the public mandate conferred on the FITD was not an indicator which enabled the measures at issue to be imputed to the State.

157. Secondly, the Commission submits that in requiring, in paragraph 114 of the judgment under appeal, the proof of an actual influence or control by the public authorities *at every step* of the procedure which led to the adoption of the measures at issue, the General Court failed to examine whether, when looking at all steps together, the public authorities could be considered to have been sufficiently involved in the adoption of the measures at issue that the latter could be imputed to the State. Again, I disagree with the Commission's reading of the judgment under appeal. As explained in point 98 above, the General Court

did not, in paragraph 114 of the judgment under appeal, require the proof of an actual influence or control by the public authorities at every step of the procedure.

158. Thirdly, the Commission argues, in essence, that the fact that, as mentioned in paragraphs 115 and 116 of the judgment under appeal, the adoption of the measures at issue was subject to authorisation by the Bank of Italy, and that, as the General Court found in paragraph 126 of that judgment, that institution was informed of the progress of the negotiations between the FITD on the one hand and BPB and the special administrator on the other would, *if taken together*, have led the General Court to find that the Bank of Italy had exercised an actual influence or control over the adoption of those measures. However, in my opinion, whether or not those facts are assessed together is irrelevant, given that the Bank of Italy did not exercise *any* actual influence or control either when authorising the measures at issue (as it verified only the compliance of those measures with prudential rules) or when participating in the informal meetings (as those meetings did not allow it to influence the content of those measures).

159. Fourthly, the Commission submits, in essence, that the fact that, according to Article 96(1) of the Italian Banking Act, Italian banks (except for cooperative credit associations) are required to become members of the FITD, (63) and that the same provision of the statutes of the FITD governs the contribution used to finance the measures at issue and the contribution used to reimburse depositors in the event of the compulsory liquidation of one of the member banks should, (64)*if taken together*, have led the General Court to find that the measures at issue were granted through State resources. That is not, in my view, the case. As will be shown in point 177 below, the contribution used to finance the measures at issue and that used to reimburse depositors are *not* governed by the same provision of the statutes of the FITD. In any event, while it is true that membership of the FITD is mandatory for Italian banks that are not cooperative credit associations, the fact remains that the FITD is not obliged to adopt alternative measures for the benefit of a member bank in the absence of the compulsory liquidation of that bank, and that, therefore, the mandatory nature of the membership of the FITD is not sufficient to establish that the measures at issue were granted through State resources.

160. I conclude that the second part of the first ground of appeal must be dismissed.

B. The second ground of appeal, alleging a distortion of national law and of the facts

1. Arguments of the parties

161. By its second ground of appeal, the Commission submits that the General Court distorted the national law and the facts. First, the General Court distorted Article 96-*ter*(1) of the Italian Banking Act in finding, in paragraph 116 of the judgment under appeal, that the authorisation of support measures such as those at issue is given following a simple check that those measures comply with the regulatory framework. According to the Commission, the control exercised by the Bank of Italy goes far beyond a review of legality of the measures at issue since, in examining those measures, the Bank of Italy must 'hav[e] regard to the protection of depositors and the stability of the banking system'. Secondly, the General Court distorted the facts in finding, in paragraphs 153 and 154 of the judgment under appeal, that intervention measures in support of a bank, such as the measures at issue, are financed in a different manner from the reimbursement of depositors. In the view of the Commission, Article 21 of the statutes of the FITD, to which the General Court refers in paragraph 153 of the judgment under appeal in respect of the financing of the measures at issue, applies equally to the measures at issue and to measures taken for the reimbursement of depositors.

162. The Italian Government contends that the second ground of appeal is inadmissible, given that the alleged error of interpretation is not manifest. It further contends that the second ground of appeal is unfounded because, first, Article 96-*ter*(1) of the Italian Banking Act must be regarded as providing for a mere review of legality, although that review may, in some cases, be quite complex, and, secondly, at the material time, the financing for intervention measures in support of a bank such as the measures at issue was provided on a case-by-case basis, upon request by the FITD.

163. BPB submits that the second ground of appeal is inadmissible as the interpretation of national law is a question of fact, and the distortion alleged by the Commission is not apparent from the case file. In any event, the second ground of appeal is, in BPB's view, unfounded. It is also ineffective in so far as it alleges the distortion of Article 21 of the statutes of the FITD.

164. The FITD contends that the second ground of appeal is inadmissible as no distortion is apparent from the documents on the Court's file. In any event, that ground of appeal is, in the FITD's view, ineffective and unfounded.

165. The Bank of Italy submits that the second ground of appeal is inadmissible in so far as it alleges a distortion of Article 96-*ter*(1) of the Italian Banking Act, as such distortion is not manifest, and it is not apparent from the documents on the Court's file. The Bank of Italy further submits that the second ground of appeal is unfounded and, in any event, ineffective.

2. Assessment

(a) Admissibility

166. The Italian Government, BPB, the FITD and the Bank of Italy challenge the admissibility of the second ground of appeal on the ground that the alleged distortion of Italian law and of the facts (65) is not manifest and is not apparent from the case file, with the result that that ground of appeal raises a question of fact.

167. In my opinion, that plea of inadmissibility cannot succeed.

168. As mentioned in point 49 above, according to case-law, provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced before it. That appraisal therefore does not, save where that evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice. There is such distortion where, without recourse to new evidence, the assessment of the existing evidence is clearly incorrect. However, such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence. (66)

169. First, I note that, in paragraph 116 of the judgment under appeal, the General Court interpreted the concept of the 'authorisation' by the Bank of Italy of intervention measures taken by deposit guarantee schemes under Article 96-*ter*(1) of the Italian Banking Act as allowing that institution to review only the legality of such measures (that is, their consistency with the prudential rules for credit institutions). However, should the obligation to 'hav[e] regard to the protection of depositors and the stability of the banking system', imposed on the Bank of Italy by the same provision, call for a review not only of the legality but also of the appropriateness of those measures, the General Court's interpretation in paragraph 116 of the judgment under appeal would clearly be incorrect. It would thus amount to a distortion of evidence within the meaning of the case-law cited in point 168 above. (67)

170. Secondly, the Commission submits that, in paragraph 153 of the judgment under appeal, the General Court found that Article 21 of the statutes of the FITD provides that intervention measures in support of a bank, such as the measures at issue, are financed in a different manner from the reimbursement of depositors, whereas, in the Commission's view, that provision does *not* draw a distinction between the financing of those two types of measures. Should, as the Commission submits, the interpretation of Article 21 of the statutes of the FITD by the General Court be at odds with its content, this would amount to a distortion of that provision.

171. I conclude that the second ground of appeal is wholly admissible.

(b) Substance

172. By its second ground of appeal, the Commission submits that, in paragraphs 116, 153 and 154 of the judgment under appeal, the General Court distorted, first, Article 96-*ter*(1) of the Italian Banking Act, and, secondly, Article 21 of the statutes of the FITD.

173. In my opinion, the second ground of appeal should be dismissed.

174. First, the Commission has not shown that Article 96-*ter*(1) of the Italian Banking Act must be interpreted as allowing the Bank of Italy to verify whether intervention measures taken by a deposit guarantee scheme are appropriate, rather than, as the General Court found in paragraph 116 of the judgment under appeal, simply check that those measures are consistent with the prudential rules for credit institutions.

175. Contrary to what the Commission argues, it does not follow from the fact that, under Article 96-*ter*(1) of the Italian Banking Act, the Bank of Italy must 'hav[e] regard to the protection of depositors and the stability of the banking system', that that bank may go beyond a check of the consistency of the measures with the prudential rules for credit institutions, given that – as alleged by the Italian Government, BPB, the FITD and the Bank of Italy – the protection of depositors and the stability of the banking system are objectives which the Bank of Italy must pursue in its duties as a prudential supervision authority. As noted by the Italian Government, recital 7 of Regulation (EU) No 575/2013 (68) states that the prudential requirements for credit institutions laid down in that regulation 'are meant to ensure the financial stability of the operators on [the banking and financial services] markets [and] a high level of protection of investors and depositors'.

176. Moreover, contrary to what the Commission argues, it does not follow from the fact that the Bank of Italy's authorisation of intervention measures taken by deposit guarantee schemes in support of a member bank under Article 96-*ter*(1) of the Italian Banking Act seeks to ensure the protection of depositors and the stability of the banking system, rather than the 'the sound and prudent management of the credit institution [concerned]' – which is the objective of the legality review conducted by the Bank of Italy for the purposes of authorising an acquisition in the financial sector under Article 19 of the Italian Banking Act – that the Bank of Italy may go beyond a legality review when acting under Article 96-*ter*(1) of the Italian Banking Act. This is because, as the Italian Government, the FITD and the Bank of Italy contend, the sound and prudent management of credit institutions is also an objective of prudential supervision, along with the protection of depositors and the stability of the banking system. In that regard, I note that Article 5(1) of the Italian Banking Act, which the General Court cites in paragraph 116 of the judgment under appeal, lists as objectives of the prudential supervision of credit institutions not only the 'overall stability' of the banking system, but also the 'sound and prudent management of [credit] institutions'.

177. Secondly, contrary to what the Commission argues, the General Court did not find, in paragraph 153 of the judgment under appeal, that Article 21 of the statutes of the FITD provides that intervention measures taken by a deposit guarantee scheme in support of a member bank, such as the measures at issue, are financed in a different manner from the reimbursement of depositors. The Commission misinterprets paragraph 153 of the judgment under appeal. In that paragraph, as argued by BPB and the FITD, the General Court found that the measures at issue are financed in a different manner *from the FITD's operating costs* (in the General Court's words, 'the resources needed for the consortium to *operate efficiently*'), (69) not from the reimbursement of deposits. The difference lies in the fact that the resources used to cover the FITD's operating costs, which are not governed by Article 21 of the statutes of the FITD, contribute to the drawing up of that consortium's budget; by contrast, the resources used for intervention measures in support of a member bank (as well as, according to BPB and the FITD, those used to finance the reimbursement of deposits), which are governed by Article 21 of the statutes of the FITD, are 'advances' paid by the FITD's members, which manages them as their agent, and are provided by the FITD's members banks upon request by that consortium, on a case-by-case basis.

178. Consequently, in my view, the second ground of appeal should be dismissed as unfounded.

179. For the sake of completeness, I should note that that ground of appeal is, in any event, ineffective.

180. First, the second ground of appeal is ineffective in so far as it alleges a distortion of Article 96-*ter*(1) of the Italian Banking Act in paragraph 116 of the judgment under appeal, given that the General Court's conclusion that the measures at issue are not imputable to the State follows also from the findings in paragraphs 96 to 106 and 117 to 131 of the judgment under appeal, in particular from the fact that the Bank of Italy took no active part in the meetings of the FITD's governing bodies or in the informal meetings, and that the initiative for the adoption of the measures at issue came from BPB, a private entity.

181. Secondly, the second ground of appeal is ineffective in so far as it alleges a distortion of Article 21 of the statutes of the FITD, as the General Court's conclusion that the measures at issue are not granted through State resources follows also from the fact that, as mentioned in paragraph 154 of the same judgment, the mandatory nature of that contribution did not stem from a regulatory provision, and from the findings in paragraphs 139 to 149 and 155 to 161 of that judgment.

182. Consequently, the second ground of appeal should be dismissed.

183. I conclude that the appeal should be dismissed.

VI. Costs

184. In accordance with Article 184(2) of the Rules of Procedure, where an appeal is unfounded, the Court is to make a decision as to the costs.

185. Under Article 138(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has been unsuccessful, and as the Italian Government, BPB and the FITD have applied for costs, the Commission should be ordered to pay, in addition to its own costs, the costs incurred by the Italian Republic, BPB and the FITD.

186. Under Article 184(4) of the Rules of Procedure, where an intervener at first instance takes part in the appeal proceedings, the Court may decide that he or she must bear his or her own costs. As the Bank of Italy took part in the appeal, it should bear its own costs.

VII. Conclusion

187. I therefore propose that the Court should:

– dismiss the appeal;

– order the European Commission to bear its own costs and to pay the costs incurred by the Italian Republic, Banca Popolare di Bari SCpA, and Fondo interbancario di tutela dei depositi;

– order Banca d'Italia to bear its own costs.

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1 Original language: English.

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2 T-98/16, T-196/16 and T-198/16, EU:T:2019:167.

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3 Commission Decision of 23 December 2015 on State aid granted by Italy to the bank Tercas (Case SA.39451 (2015/C) (ex 2015/NN)) (notified under document C(2015) 9526) (OJ 2016 L 203, p. 1).

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4 Decreto legislativo n° 385, e successive modifiche e integrazioni, Testo unico delle leggi in materia bancaria e creditizia (Italian Banking Act) of 1 September 1993 (GURI No 230, 30 September 1993, Ordinary Supplement No 92) ('the Italian Banking Act').

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5 Directive of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5).

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6 I should specify that the second measure mentioned in point 16 above, namely the guarantee of EUR 35 million intended to cover Tercas' negative equity, was valued only at EUR 140 000 to take account, inter alia, of the fact that those exposures had been fully repaid by the debtors at maturity and that, therefore, the guarantee had not been triggered. By contrast, as regards the first and the third measures mentioned in point 16 above, the aid was valued at EUR 265 million and EUR 30 million, respectively. The Italian Republic was thus ordered to recover a total amount of EUR 295.14 million (plus interest).

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7 For the sake of completeness, I should also mention that the General Court found the action brought by the FITD to be admissible, that compensation fund being directly and individually concerned by the decision at issue.

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8 Directive of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast) (OJ 2014 L 173, p. 149). Directive 2014/49 repealed and replaced Directive 94/19.

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9 Directive of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

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10 Judgments of 25 January 2007, Sumitomo Metal Industries and Nippon Steel v Commission (C−403/04 P and C−405/04 P, EU:C:2007:52, paragraphs 39 and 40); of 25 October 2011, Solvay v Commission (C−109/10 P, EU:C:2011:686, paragraph 51); of 11 July 2013, Commission v Stichting Administratiekantoor Portielje (C−440/11 P, EU:C:2013:514, paragraph 59); of 16 June 2016, Evonik Degussa and AlzChem v Commission (C−155/14 P, EU:C:2016:446, paragraph 26); and of 18 January 2017, Toshiba v Commission (C−623/15 P, not published, EU:C:2017:21, paragraph 39).

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11 The Commission refers to the case-law according to which a body or organisation which is regarded as an emanation of the State is one against which a directive that has direct effect may be relied upon.

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12 Judgment of 10 October 2017, Farrell (C−413/15, EU:C:2017:745, paragraphs 33 and 34).

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13 Judgment of 25 July 2018, *Commission* v *Spain and Others* (C−128/16 P, EU:C:2018:591, paragraph 31).

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14 Judgment of 30 January 2019, Belgium v Commission (C−587/17 P, EU:C:2019:75, paragraph 40).

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15 Judgment of 28 November 2019, ABB v Commission (C−593/18 P, not published, EU:C:2019:1027, paragraph 31).

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16 Judgment of 16 May 2002, France v Commission (C−482/99, EU:C:2002:294, paragraph 55).

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17 Judgments of 13 September 2017, ENEA (C−329/15, EU:C:2017:671, paragraph 17); of 15 May 2019, *Achema and Others* (C−706/17, EU:C:2019:407, paragraph 46); of 19 December 2019, *Arriva Italia and Others* (C−385/18, EU:C:2019:1121, paragraph 31); and of 7 May 2020, BTB Holding Investments and Duferco Participations Holding v Commission (C−148/19 P, EU:C:2020:354, paragraph 44).

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18 Judgments of 13 September 2017, ENEA (C−329/15, EU:C:2017:671, paragraph 20); of 28 March 2019, Germany v Commission (C−405/16 P, EU:C:2019:268, paragraph 48); of 15 May 2019, *Achema and Others* (C−706/17, EU:C:2019:407, paragraph 47); and of 19 December 2019, *Arriva Italia and Others* (C−385/18, EU:C:2019:1121, paragraph 33).

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19 Judgment of 13 May 2020, easyJet Airline v Commission (T−8/18, EU:T:2020:182, paragraph 78).

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20 Judgments of 16 May 2002, France v Commission (C−482/99, EU:C:2002:294, paragraph 52); of 19 December 2013, Association Vent De Colère! and Others (C−262/12, EU:C:2013:851, paragraph 17); of 13 September 2017, ENEA (C−329/15, EU:C:2017:671, paragraph 21); of 28 March 2019, Germany v Commission (C−405/16 P, EU:C:2019:268, paragraph 49); and of 15 May 2019, *Achema and Others* (C−706/17, EU:C:2019:407, paragraph 48).

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21 See, for instance, judgment of 19 December 2019, *Arriva Italia and Others* (C−385/18, EU:C:2019:1121, paragraphs 34 and 65).

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22 See Opinion of Advocate General Wathelet in Commerz Nederland (C−242/13, EU:C:2014:308, point 65).

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23 Judgment in *Stardust* (paragraphs 52 to 56). See also judgments of 17 September 2014, Commerz Nederland (C−242/13, EU:C:2014:2224, paragraphs 31 to 33); of 18 May 2017, Fondul Proprietatea (C−150/16, EU:C:2017:388, paragraphs 18 to 20); and of 23 November 2017, SACE and Sace BT v Commission (C−472/15 P, not published, EU:C:2017:885, paragraphs 34 to 36).

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24 See point 9 above, paragraph 113 of the judgment under appeal, and recitals 32 to 37 of the decision at issue.

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25 See, for instance, judgment of 9 October 2014, Ministerio de Defensa and Navantia (C−522/13, EU:C:2014:2262, paragraphs 22 and 23).

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26 Judgments of 13 September 2017, ENEA (C−329/15, EU:C:2017:671, paragraphs 25 and 31); of 28 March 2019, Germany v Commission (C−405/16 P, EU:C:2019:268, paragraphs 57, 75 and 80); and of 15 May 2019, *Achema and Others* (C−706/17, EU:C:2019:407, paragraphs 53, 66 and 67). See also Opinion of Advocate General Pitruzzella in Eco TLC (C−556/19, EU:C:2020:399, points 80 and 84 to 102).

27 Judgments of 19 March 2013, Bouygues and Bouygues Télécom v Commission and Others and Commission v France and Others (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 109), and of 28 March 2019, Germany v Commission (C-405/16 P, EU:C:2019:268, paragraphs 60 and 84). See also Opinion of Advocate General Pitruzzella in Eco TLC (C-556/19, EU:C:2020:399, points 60 and 103 to 109).

28 See paragraphs 151 to 153 of the judgment under appeal, and recitals 35 to 37 of the decision at issue.

29 The General Court referred, in paragraphs 134 to 136 of the judgment under appeal, to the judgment of 9 November 2017, Commission v TV2/Danmark (C-656/15 P, EU:C:2017:836), which concerned public undertakings.

30 Directive of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Codified version) (OJ 2006 L 318, p. 17). I note that the Court of Justice relied on that definition – or, rather, on the similar definition of a public undertaking by Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35), which was repealed and replaced by Directive 2006/111 – in the judgment in *Stardust* (paragraph 34), and that Article 2(b) of Directive 2006/111 was relied on in the judgments of 25 June 2015, SACE and Sace BT v Commission (T-305/13, EU:T:2015:435, paragraph 40), of 28 January 2016, Slovenia v Commission (T-507/12, not published, EU:T:2016:35, paragraph 75), and of 13 December 2018, Comune di Milano v Commission (T-167/13, EU:T:2018:940, paragraph 65).

31 See points 67 and 76 above.

32 I note, in that regard, that, although by its first ground of appeal the Commission alleges an error of the General Court in respect of the *burden* of proof ('un errore sull'*onere* della prova'), it refers on three occasions, in the appeal and the reply, to the 'higher *standard* of proof', the 'applicable *standard*' and the '*standard* of proof' ('un *livello* di prova più elevato', 'lo *standard* applicabile', 'uno *standard* probatorio') set by the General Court in the judgment under appeal.

33 See, in that regard, Castillo de la Torre, F., and Gippini Fournier, É., *Evidence, Proof and Judicial Review in EU Competition Law*, Edward Elgar, 2017 (paragraphs 2.002, 2.008 and 2.009); Kalintiri, A., *Evidence Standards in EU Competition Enforcement: The EU Approach*, Hart Publishing, 2019 (pp. 33, 34, 72 and 73); Sibony, A.-L., and Barbier de la Serre, É., 'Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence : pour un changement de perspective', *Revue trimestrielle de droit européen*, 2007, issue 2, pp. 205 to 252 (paragraphs 3 to 12); and Pérez Bernabeu, B., 'Assessing the Standard of Proof in Fiscal State Aid', *European State Aid Law Quarterly*, 2019, issue 4, pp. 447 to 457 (p. 452). See also Opinion of Advocate General Kokott in T-Mobile Netherlands and Others (C-8/08, EU:C:2009:110, footnote 60), and Opinion of Advocate General Jääskinen in France v Commission (C-559/12 P, EU:C:2013:766, point 34).

34 See point 65 above. See also judgments of 17 September 2014, Commerz Nederland (C-242/13, EU:C:2014:2224, paragraph 32); of 26 June 2008, SIC v Commission (T-442/03, EU:T:2008:228, paragraphs 96 and 97); of 10 November 2011, Elliniki Nafpigokataskevastiki and Others v Commission (T-384/08, not published, EU:T:2011:650, paragraphs 52 and 53); of 27 February 2013, Nitrogénművek Vegyipari v Commission (T-387/11, not published, EU:T:2013:98, paragraphs 59 and 60); of 25 June 2015, SACE and Sace BT v Commission (T-305/13, EU:T:2015:435, paragraph 44); of 28 January 2016, Slovenia v

Commission (T−507/12, not published, EU:T:2016:35, paragraphs 67 and 68); and of 13 December 2018, Comune di Milano v Commission (T−167/13, EU:T:2018:940, paragraph 75).

35 See paragraph 88 of the judgment under appeal.

36 See point 65 above.

37 Emphasis added. This was because the authorisation was given following a simple check that the measures at issue were consistent with the regulatory framework, without the Bank of Italy having the power to verify whether it was appropriate to adopt the measures at issue. Consequently, the FITD's governing bodies alone had the power to decide whether to adopt those measures and their eventual content (see paragraphs 116 and 118 of the judgment under appeal).

38 Emphasis added. See also paragraph 128 of that judgment, according to which the request of the special administrator of Tercas is said to be 'non-binding'.

39 The General Court's finding that the presence, 'even only as … observer[s]', of the representatives of the Bank of Italy at the meetings of the FITD's governing bodies could be relevant likely stems from the circumstance that the decision to adopt the measures at issue rested with those bodies, and it must have been taken at one of those meetings.

40 The Commission's argument summarised in point 98 above relates to paragraphs 115 to 131 of the judgment under appeal, rather than paragraph 114 of that judgment, to which the appeal refers. This is because, in paragraph 114 of the judgment under appeal, the General Court simply notes that, in the decision at issue, the Commission found that the Italian public authorities had the authority and the means to influence all the steps in the implementation of the measures at issue. The General Court does not, in that paragraph, hold that it is necessary to prove that the public authorities had an influence on every step of that procedure.

41 See, in particular, judgments of 17 September 2014, Commerz Nederland (C−242/13, EU:C:2014:2224, paragraphs 34 to 39); of 27 February 2013, Nitrogénművek Vegyipari v Commission (T−387/11, not published, EU:T:2013:98, paragraphs 63 to 68); of 30 April 2014, Tisza Erőmű v Commission (T−468/08, not published, EU:T:2014:235, paragraphs 171 to 179); of 12 March 2020, Elche Club de Fútbol v Commission (T−901/16, EU:T:2020:97, paragraphs 52 to 63); and of 13 May 2020, easyJet Airline v Commission (T−8/18, EU:T:2020:182, paragraphs 117 to 140).

42 Judgments of 25 June 2015, SACE and Sace BT v Commission (T−305/13, EU:T:2015:435, paragraph 82), and of 28 January 2016, Slovenia v Commission, T−507/12, not published, EU:T:2016:35, paragraph 186).

43 Judgment of 13 December 2018, Comune di Milano v Commission (T−167/13, EU:T:2018:940, paragraph 80). I should note that an appeal is pending against that judgment, whereby the appellant invokes, in particular, an error of the General Court in respect of the proof of the imputability of the aid measure to the State (*Comune di Milano* v *Commission*, C−160/19 P).

44 I should note, however, that, in the judgment of 10 November 2011, Elliniki Nafpigokataskevastiki and Others v Commission (T−384/08, not published, EU:T:2011:650, paragraph 77), the General Court found that 'the Commission demonstrated … that the State *was involved* in … the grant of [the aid measure]' (emphasis added), which suggests that, in that case, the proof required went beyond the likelihood of the public authorities' involvement.

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45 There is little case-law which addresses the imputability to the State of an aid measure taken by a private entity. Reference may also be made to the judgments of 15 July 2004, Pearle and Others (C−345/02, EU:C:2004:448, paragraphs 36 and 37), and of 30 May 2013, Doux Élevage and Coopérative agricole UKL-ARREE (C−677/11, EU:C:2013:348, paragraph 41). Those judgments, however, are not particularly helpful as it is difficult to clearly distinguish the elements which are relevant in terms of imputability of the aid measure to the State and those considered to demonstrate the existence of State resources.

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46 See paragraph 77 of the judgment of 10 November 2011, Elliniki Nafpigokataskevastiki and Others v Commission (T−384/08, not published, EU:T:2011:650), according to which 'the State was involved *in … the grant of [the aid measure]*' (emphasis added); paragraph 82 of the judgment of 25 June 2015, SACE and Sace BT v Commission (T−305/13, EU:T:2015:435), and paragraph 186 of the judgment of 28 January 2016, Slovenia v Commission, T−507/12, not published, EU:T:2016:35), in which the General Court held that 'it is unlikely that the public authorities were not involved *in the adoption of the measure in question*' (emphasis added); and paragraph 80 of the judgment of 13 December 2018, Comune di Milano v Commission (T−167/13, EU:T:2018:940), which states that 'it is sufficient to demonstrate the unlikelihood of an absence of involvement of those authorities *in the adoption of that measure*' (emphasis added).

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47 See paragraph 134 of the judgment of 13 December 2018, Ryanair and Airport Marketing Services v Commission (T−53/16, EU:T:2018:943), in which the General Court held that the Commission, far from 'limit[ing] itself … to establishing the existence of mere State influence on the conduct of [the entity granting the aid]', had shown that the public authorities 'exerted a decisive influence *over the decisions taken by [the private entity granting the aid] with regard to [the beneficiary of the aid]*' (emphasis added).

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48 This is because, in those judgments, the standard of proof applied is not identified.

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49 The municipality of Rotterdam owned all the shares in the port authority, the members of the port authority's management and supervisory board were nominated by the general meeting of shareholders and thus by the municipality, the municipal councillor in charge of the port chaired the supervisory board, and, according to the port authority's statutes, the approval of the supervisory board was required for the provision of guarantees such as those in question.

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50 Emphasis added.

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51 In inferring the imputability to the State of VTAN's agreement with Ryanair from the fact that, were it not for the flat-rate contribution offered by the SMAN, that agreement would not have been profitable and would not have been entered into by VTAN, the General Court essentially relied on an indicator listed in paragraph 56 of the judgment in *Stardust* in respect of aid measures taken by public undertakings, namely the (failure of the) exercise of activities on the market in normal conditions of competition.

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52 A credit institution authorised in a Member State cannot take deposits unless it is a member of a scheme which is officially recognised in its home Member State as a 'deposit guarantee scheme' (see Article 4(1) and (3) of Directive 2014/49). Deposit guarantee schemes must repay depositors, up to an amount of EUR 100 000, in the event of deposits being unavailable (see Article 6(1), Article 8(1), and point 8 of Article 2(1) of Directive 2014/49). Deposit guarantee schemes must have 'available financial means' so that they can meet that obligation. Those means are raised by contributions made by the members of deposit guarantee schemes (see Article 10(1) of Directive 2014/49).

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53 See recitals 14 and 16 of Directive 2014/49.

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54 See point 9 above.

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55 This would not, however, prevent the FITD from using the available financial means in order to finance the resolution of Tercas, not under Article 11(3) of Directive 2014/49, but under Article 11(2) of that directive and in accordance with Article 109 of Directive 2014/59.

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56 See Commission decision of 1 August 2011, No SA.33001 (2011/N) – Denmark – Part B – Amendment of the Danish Winding-up Scheme for credit institutions (C(2011) 5554 final); Commission decision of 30 May 2012, No SA.34255 (2012/N) – Spain – Restructuring of CAM and Banco CAM (C(2012) 3540); and Commission decision of 18 February 2014, No SA.37425 (2013/N) – Poland – Credit Unions Orderly Liquidation Scheme (C(2014) 1060 final).

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57 Judgments of 12 July 1990, Foster and Others (C−188/89, EU:C:1990:313, paragraph 18); of 4 December 1997, Kampelmann and Others (C−253/96 to C−258/96, EU:C:1997:585, paragraph 46); of 10 October 2017, Farrell (C−413/15, EU:C:2017:745, paragraph 33); of 6 September 2018, Hampshire (C−17/17, EU:C:2018:674, paragraph 54); and of 19 December 2019, Pensions-Sicherungs-Verein (C−168/18, EU:C:2019:1128, paragraph 48).

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58 As the measures at issue sought to avoid the more onerous repercussion of repaying deposits in the event of the compulsory liquidation of Tercas.

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59 The General Court notes, in paragraph 135 of the judgment under appeal, that 'in a situation concerning public undertakings, it has been held that …,' and, in paragraph 136 of that judgment, that 'the three undertakings concerned were public undertakings'.

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60 See judgments of 13 September 2017, ENEA (C−329/15, EU:C:2017:671, paragraphs 30 and 32); of 28 March 2019, Germany v Commission (C−405/16 P, EU:C:2019:268, paragraphs 70 and 75); and of 15 May 2019, *Achema and Others* (C−706/17, EU:C:2019:407, paragraphs 64 and 66).

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61 The Commission only submits, in its reply, that it is sufficient that it demonstrates an *indirect* control of the State over the entity administering the funds. It relies, to that effect, on the Court's finding, in paragraph 59 of the judgment of 15 May 2019, *Achema and Others* (C−706/17, EU:C:2019:407), that the entity administering the funds used to finance the aid measure must be controlled 'directly or indirectly' by the State. I note, however, that that finding is a mere repetition of the terms of the applicable Lithuanian legislation, not a statement of principle.

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62 See judgments of 30 May 2013, Doux Élevage and Coopérative agricole UKL-ARREE (C−677/11, EU:C:2013:348, paragraphs 32 to 36), and of 11 December 2014, Austria v Commission (T−251/11, EU:T:2014:1060, paragraphs 67 to 76). See also Opinion of Advocate General Pitruzzella in Eco TLC (C−556/19, EU:C:2020:399, points 67 and 81 to 84).

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63 See paragraph 150 of the judgment under appeal and recital 33 of the decision at issue.

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64 See paragraph 153 of the judgment under appeal and recital 137 of the decision at issue.

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65 While the Italian Government, BPB and the FITD raise the inadmissibility of the second ground of appeal in its entirety, the Bank of Italy challenges the admissibility of that ground of appeal only in so far as it alleges a distortion of Article 96-*ter*(1) of the Italian Banking Act.

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66 Judgment of 27 February 2020, Lithuania v Commission (C−79/19 P, EU:C:2020:129, paragraphs 70 and 71).

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67 See also judgments of 18 January 2007, PKK and KNK v Council (C−229/05 P, EU:C:2007:32, paragraph 37), and of 9 June 2011, Comitato "Venezia vuole vivere" and Others v Commission (C−71/09 P, C−73/09 P and C−76/09 P, EU:C:2011:368, paragraph 153). See also Opinion of Advocate General Kokott in PKK and KNK v Council (C−229/05 P, EU:C:2006:606, point 42).

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68 Regulation of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1).

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69 Emphasis added.