Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 July 2020[1]

Case C-160/19 P

Comune di Milano
v

European Commission

(Appeal — State aid — Aid in the form of injections of capital by the parent company — Ground handling services at Milan Linate and Milan Malpensa airports — Proof of imputation of State resources — Indicator test — Assessment of successive interventions as a single intervention — Scope of review of the European Union Courts in respect of Commission decisions on State aid — Private investor in a market economy test — Allocation of the burden of proof — Relevant information)

I. Introduction

1. Injections of capital to cover losses incurred by a subsidiary may satisfy the definition of State aid under Article 107(1) TFEU if the parent company making them is owned by the State. The existence of State aid is ruled out, however, if a hypothetical private investor in a market economy would also have taken the measure in question.

2. In the present case, the Member State did not submit sufficient documents to the Commission, in the administrative procedure, relating to the parent company's decision-making process before the injections of capital into its subsidiary at that time were made. The General Court therefore considers that the private investor in a market economy test is not satisfied. The subject matter of the appeal brought by the Comune di Milano (Municipality of Milan, Italy) includes whether the General Court applied the correct standard of proof and, in particular, allocated the burden of proof correctly.

II. Legal framework

3. The General Court refers not only to Article 107(1) TFEU, but also to Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.[2] Article 2(b) of the directive lays down the following rule of presumption for public undertakings:

'For the purpose of this Directive: …

1 Original language: German.

2 Commission Directive of 16 November 2006 (OJ 2006 L 318, p. 17).

(b) "public undertakings" means 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.

A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:

…

(ii) control the majority of the votes attaching to shares issued by the undertakings …'

III. Facts and procedure

A. Background to the dispute

4. SEA SpA (SEA) is the management company for Milan Linate and Milan Malpensa airports (Italy). From 2002 to 2010 it was owned almost exclusively by public authorities, namely 84.56% by the appellant, the Municipality of Milan, 14.56% by the Provincia di Milano (Province of Milan, Italy) and 0.88% by other public and private shareholders.

5. Until 1 June 2002 SEA itself provided ground handling services at Milan Linate and Milan Malpensa airports. Because of new requirements in EU law, SEA then founded SEA Handling SpA ('SEA Handling'), a company wholly controlled by it which has provided ground handling services at Milan Linate and Milan Malpensa airports since 1 June 2002.

6. On 26 March 2002, the Municipality of Milan, SEA and various trade unions concluded an agreement ('the 2002 trade union agreement') in which, among other things, the Municipality of Milan confirmed that SEA would retain the majority share in SEA Handling for at least five more years and that SEA would support the balancing of costs/revenues for its subsidiary by 'maintaining its managerial capacities unchanged while making substantial further improvements in its ability to compete properly on domestic and international markets'.

7. Between 2002 and 2010 SEA made injections of capital into SEA Handling totalling EUR 359 644 000. In the same period SEA Handling recorded total losses of EUR 339 784 000.

B. The contested decision

8. After the Commission had investigated the injections of capital following a complaint, on 19 December 2012 it adopted Decision (EU) 2015/1225 regarding injections of capital by SEA into SEA Handling, notified under document C(2012) 9448 [3] ('the contested decision').

9. In the operative part of the contested decision, the Commission found inter alia that the injections of capital made by SEA into its subsidiary SEA Handling in the period 2002 to 2010 constitute State aid within the meaning of Article 107 TFEU which is incompatible with the internal market and must therefore be recovered.

3 Commission Decision (EU) 2015/1225 of 19 December 2012 regarding injections of capital by SEA SpA into SEA Handling SpA (Case SA.21420 (C 14/10) (ex NN 25/10) (ex CP 175/06)) (OJ 2015 L 201, p. 1).

C. Procedure before the General Court

10. The appellant challenged the contested decision by an action for annulment brought on 18 March 2013 pursuant to the fourth paragraph of Article 263 TFEU. An application for interim measures which had been initially lodged was subsequently withdrawn by the appellant.

11. By judgment of 13 December 2018, *Comune di Milano* v *Commission* (T-167/13, EU:T:2018:940) ('the judgment under appeal'), the General Court confirmed the Commission's decision, accordingly dismissed the action and ordered the Municipality of Milan to pay the costs.

D. Appeal proceedings before the Court of Justice

12. By the present appeal of 22 February 2019, the Municipality of Milan is challenging the judgment of the General Court.

13. The Municipality of Milan claims that the Court should:

– set aside the judgment of the General Court of 13 December 2018 in Case T-167/13, *Comune di Milano* v *Commission*;

– annul European Commission Decision (EU) 2015/1225 of 19 December 2012 regarding injections of capital by SEA SpA into SEA Handling SpA (Case SA.21420 (C 14/10) (ex NN 25/10));

– order the Commission to pay the costs of the proceedings, including those relating to the proceedings for interim measures in Case T-167/13 R.

14. The Commission contends that the Court should:

– dismiss the appeal in its entirety as manifestly inadmissible and/or unfounded;

– order the Municipality of Milan to pay the costs of the present proceedings, those relating to the proceedings at first instance and the costs of the proceedings for interim measures.

15. The parties submitted written observations on the appeal and presented oral argument on 4 June 2020.

IV. Legal assessment

16. The Municipality of Milan bases its appeal on four grounds of appeal by which it claims, all in all, that the General Court infringed Article 107(1) TFEU because there is no State aid in the present case.

17. State aid is to be taken to exist under Article 107(1) TFEU where four cumulative conditions are satisfied. There must, first, be intervention by the State or through State resources, that intervention must, second, be liable to affect trade between Member States, it must, third, confer an advantage and, fourth, distort or threaten to distort competition.

18. The first three grounds of appeal concern the aspect of State resources and the imputation of the resources to the State (see under A, B and C). The fourth ground of appeal relates to the private investor in a market economy test, which is important in determining whether an advantage is conferred on the recipient of aid (see under D).

A. First ground of appeal — State resources

19. State aid within the meaning of Article 107(1) TFEU is granted by the State or through State resources where the advantage conferred comes from State resources and the decision from which the advantage stems is imputable to a State actor. [4]

20. By the first ground of appeal, the appellant disputes that State resources were used in the purported aid measures (first part of the first ground of appeal) and challenges the method applied by the General Court in determining whether the measures in question are imputable to the appellant (second part of the first ground of appeal).

1. The first part of the first ground of appeal

(a) Admissibility of the first part of the first ground of appeal

21. The Commission questions whether the appellant's submissions regarding the first part of the first ground of appeal are admissible because the Municipality of Milan contested the State nature of the resources used for the first time in the appeal. The fact that the General Court nevertheless ruled on this point in the judgment under appeal results in a decision *ultra petita*, which, on the other hand, cannot allow the appellant to dispute for the first time in the appeal proceedings that these criteria under Article 107(1) TFEU were satisfied.

22. Under the second sentence of Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. [5] Seen in isolation, the first part of the first ground of appeal could therefore be inadmissible because it expressly calls into question the interpretation of the existing case-law on the concept of State resources adopted by the Commission and confirmed by the General Court for the first time.

23. However, the Commission misunderstands the appellant's submissions before the General Court.

24. It is true that in that phase of the proceedings the appellant did not submit arguments focusing on the State character of the resources, but primarily addressed the fact that the Commission imputed the measures to the Italian authorities.

25. Nevertheless, in its application [6] at first instance, it did make clear that it did not share the Commission's view regarding the State nature of the resources used. It is clear from the arguments themselves, but above all from the description of the plea in law and the reproduction of the — purportedly incorrect — Commission decision that not only the imputation of the measures, but also their origin from State resources is being challenged.

26. Accordingly, the General Court's findings concerning the State character of the resources used still fall within the subject matter of the proceedings. The appellant is therefore able to challenge that reasoning. It is free to expand on its arguments in this way. The first part of the first ground of appeal is thus admissible.

4 Judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 24 and the case-law cited), and of 19 December 2013, *Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 16).

5 Judgments of 1 June 1994, *Commission* v *Brazzelli Lualdi and Others* (C-136/92 P, EU:C:1994:211, paragraph 59); of 1 February 2007, *Sison* v *Council* (C-266/05 P, EU:C:2007:75, paragraph 95); and of 16 November 2017, *Ludwig-Bölkow-Systemtechnik* v *Commission* (C-250/16 P, EU:C:2017:871, paragraph 29).

6 In paragraph 11 et seq. thereof.

(b) Substance of the first part of the first ground of appeal — State resources for the purposes of Article 107(1) TFEU

27. The appellant's objections to the State nature of the resources used for the injections of capital are directed at paragraphs 63 and 65 to 67 of the judgment under appeal.

28. In paragraph 63 of the judgment under appeal, the General Court held that public authorities held more than 99% of the shares in SEA in characterising the financial contributions to SEA Handling as State resources. In paragraph 65 of the judgment under appeal, it examined the organisational structure of SEA in substantiating the State control of the resources used. Lastly, in paragraphs 65 and 66 of the judgment under appeal, the General Court stated that, on account of the organisational structure and the associated rights and obligations of the Italian authorities as majority shareholder, there was dominant State influence and the financial resources transferred to SEA Handling by SEA were under permanent State control. In doing so, the General Court also applied the presumption established in the second subparagraph of Article 2(b) of Directive 2006/111 in order to make the link between the majority shareholding of the Italian State and the dominant influence on SEA.

29. The appellant takes the view, *first*, that a State majority shareholding in an undertaking is not sufficient to substantiate the State character of the resources at the disposal of that undertaking; *second*, that State resources, in order to be classified as such, must be kept under constant State control; and, *third*, that the General Court wrongly based its reasoning in the context of Article 107(1) TFEU on Directive 2006/111 in justifying its view that the State exercises dominant influence on an undertaking. That directive relates solely to the rules on public undertakings under Article 106 TFEU.

30. The ground of appeal will be well-founded if the General Court's reasoning is deficient and it forms the basis for the judgment. However, the reasoning of the General Court at issue is essentially correct. In so far as the reference to the presumption in the second subparagraph of Article 2(b) of Directive 2006/111 might be incorrect, it does not form the basis for the judgment.

31. Article 107(1) TFEU covers all the financial means by which the State may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector.[7] That is the case in particular where the State exercises dominant influence over the undertaking granting the resources in question and thus directs the use of the resources.[8] The dominant influence can in turn be seen in the shareholdings of the State actor in the undertaking in question.[9]

32. The appellant, relying on *ENEA*,[10] challenges this inference of the State nature of the injections of capital from the State control over SEA.

33. It is true that in that case such an inference could not be drawn from any existing powers of State control over the undertaking which took the measures. However, that was because the advantage conferred had no connection with that control, but was the consequence of a law. There was a mechanism which required electricity suppliers to sell a quota accounting for at least 15% of their annual electricity sales to end users from electricity produced by cogeneration. Although some of

7 Judgments of 16 May 2000, *France* v *Ladbroke Racing and Commission* (C-83/98 P, EU:C:2000:248, paragraph 50); of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 37); of 17 July 2008, *Essent Netwerk Noord and Others* (C-206/06, EU:C:2008:413, paragraph 70); of 19 December 2013, *Vent De Colère! and Others* (C-262/12, EU:C:2013:851, paragraph 21); and of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 25).

8 Judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 38); of 18 May 2017, *Fondul Proprietatea* (C-150/16, EU:C:2017:388, paragraph 17); of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 31); and of 9 November 2017, *Commission* v *TV2/Danmark* (C-656/15 P, EU:C:2017:836, paragraph 47).

9 Judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 38), and of 18 May 2017, *Fondul Proprietatea* (C-150/16, EU:C:2017:388, paragraph 33).

10 Judgment of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671).

those electricity suppliers were controlled by the State, their payments to the producers of electricity produced by cogeneration did not thereby become State resources, as the State did not make use of its control of those undertakings under company law to induce the payment, but its legislative powers, with the result that the purchase obligation applied to all electricity suppliers regardless of a State shareholding. Electricity prices, on the other hand, were based on market conditions. [11]

34. That is not the situation here, however. The decisions on the injections of capital into SEA Handling were not based on a law, but on decisions by SEA which, on account of its shareholding structure, was under the control of Italian State authorities. The General Court did not therefore err in law in the judgment under appeal when it made a link between the power of control and the resulting dominant influence, on the one hand, and the State character of the resources, on the other. It had sufficient regard to the context of the present case and, against this background, took the applicable case-law into consideration.

35. Accordingly, there is no need to determine whether the General Court's reference to the second subparagraph of Article 2(b) of Directive 2006/111 in paragraph 65 of the judgment under appeal was vitiated by an error in law. It is unclear whether the Court still considers the assessments of that directive also to be a standard for the criteria under Article 107 TFEU since, as far as can be seen, it relied on the precursor provision [12] only once. [13] However, this argument of the General Court represents only a superfluous ground such that an error in law on this point would not call into question the judgment under appeal. [14]

2. The second part of the first ground of appeal — method of assessment for the imputation of a measure to the State

36. In the second part of the first ground of appeal, the appellant asserts, first and foremost, that the General Court wrongly concurred with the Commission's finding that the injections of capital were imputable to the Italian authorities. The Commission based the imputation of the measures on the mere presumption that State authorities were involved in the decisions on the injections of capital and did not adduce any factual evidence for imputation.

37. It is correct that the imputation of measures implemented by a publicly controlled undertaking requires the involvement of State authorities in the decision in question. Such involvement does not, however, need to be demonstrated in the particular case, on the basis of a precise inquiry for example. [15] The finding of imputation may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken. It may even be sufficient if, according to those indicators, it is only unlikely that the State was not involved in the adoption of the measures at issue. [16]

11 Judgment of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraphs 27 and 31 to 35).

12 Second indent of Article 2(1) 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), as amended by Commission Directive 93/84/EEC of 30 September 1993 (OJ 1993 L 254, p. 16).

13 Judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 34).

14 See judgment of 11 December 2008, *Commission* v *Département du Loiret* (C-295/07 P, EU:C:2008:707, paragraph 74).

15 Judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraphs 52 and 53), and of 17 September 2014, *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraph 31 et seq.).

16 Judgments of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraphs 55 and 56), and of 17 September 2014, *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraphs 32 and 33).

38. However, contrary to the assertion made by the appellant, the General Court did not rely on this assessment alone. In so far as it alleges that the General Court inferred the imputation of the injections of capital to the Italian State merely from the presumed unlikelihood of a measure without State involvement, this is based on a misunderstanding of the judgment under appeal. The General Court has recourse to this presumption only in respect of the temporal link between individual indicators and the different measures.

39. On the other hand, the appellant's argument in which, going beyond the allegation mentioned in point 38, it complains of an incorrect examination of the imputation of the measures, is ineffective. Rather, in imputing the measures, the General Court evaluated a whole set of indicators which can militate for or against the imputation of the injections of capital to the Italian State and thus satisfied the requirements stemming from case-law for proof of this element of 'State resources' for the purposes of Article 107(1) TFEU.

40. The indicators examined include the agreement between trade unions, SEA and the Municipality of Milan, and the abovementioned 2002 trade union agreement, in which SEA undertook to support the balancing of costs/revenues for its subsidiary (paragraphs 77 to 83 of the judgment under appeal).

41. Furthermore, in order to corroborate the impression gained, the General Court cited minutes of meetings of the board of directors of SEA Handling after a critical appraisal of their probative value. These show, among other things, that the appellant approved the business development plan for SEA Handling for the period from 2007 (paragraph 85 of the judgment under appeal).

42. Other aspects examined by the General Court are the role of the mayor of Milan in the resignation of the chairman of the board of directors of SEA in 2006 (paragraph 86 of the judgment under appeal) and the fact that the mayor received blank resignations from the SEA directors (paragraph 87 of the judgment under appeal). Against this background, the General Court was then able, in paragraph 88 of the judgment under appeal, to confirm the Commission's conclusion regarding the importance of the decisions taken in connection with the overall strategy of the SEA group as an indicator for the imputation of the injections of capital to the State.

43. The General Court went on to find that the indicators which the appellant cited independently and autonomously of the arguments made by the Commission are not capable to rebutting the evidence of influence and thus of preventing the imputation of the measures. In doing so, the General Court considers individually each of the indicators put forward, but also evaluates their persuasive value taken together. The General Court addresses the fact that a municipal councillor was denied access to certain documents on grounds of confidentiality (paragraph 90 of the judgment under appeal) and the related correspondence between the appellant and SEA, which highlights differences between the two (paragraph 91 of the judgment under appeal). The General Court also examines correspondence between SEA and a municipal councillor (paragraph 92 of the judgment under appeal) and the fact that the deputy mayor was not informed of certain elements of trade union negotiations (paragraph 93 of the judgment under appeal).

44. Furthermore, for the same reasons, the appellant's fear of an extension of the scope of Article 107(1) TFEU in respect of all State-controlled private undertakings in the present case is unjustified. As has been explained, the General Court imputed the measures to the Italian authorities not only on the basis of the organisational structure of the group of undertakings, but after an analysis of the specific circumstances.

45. Since, against this background, the second part of the first ground of appeal is also unfounded, the first ground of appeal should be rejected in its entirety.

B. Second ground of appeal — proof of imputation

46. By the second ground of appeal, the Municipality of Milan asserts that the General Court infringed the principles stemming from case-law governing proof of imputability in two ways, namely, first, it made positive proof of imputation subject to less stringent requirements than proof to the contrary (first part of the second ground of appeal) and, second, it did not require complete proof of the imputation of each individual injection of capital (second part of the second ground of appeal).

47. Specifically, by the first part of the second ground of appeal, the appellant criticises the General Court for requiring actual indicators from the appellant in order to refute the imputation of the measures to the Italian authorities while, to prove this, the Commission was able to rely on a presumption, and it claims unequal treatment in this regard.

48. This argument cannot be accepted, however. As I explained in point 38, the appellant misunderstands paragraphs 75 and 80 of the judgment under appeal. It assumes that the General Court accepted that the Commission bases the imputation solely on the presumption that it was unlikely that the Italian authorities had not been involved in the adoption of the measures in question. In fact, in that passage, the General Court understands that presumption as one of several indicators which, taken together, suggest that the injections of capital are imputable to the Italian authorities. In addition, it applies that presumption only to the imputation of injections of capital that were not made immediately after the 2002 trade union agreement. Furthermore, in the light of the principles developed in case-law, the General Court dealt with the indicators militating in favour of the measures being imputed to the Italian State in the same way as with those militating against imputation.

49. The appellant's assertion that it was simply impossible for it to refute that presumption also cannot be accepted. First of all, as has been explained, it is not the presumption as such that must be refuted, but the overall impression given by the indicators. Second, the important factor is not specific proof to the contrary, but the presentation of sufficient indicators to the contrary. The Commission and the General Court were not convinced by the indicators presented in the light of the substantive assessment of the indicators, not the standard of proof applied.

50. The first part of the second ground of appeal is therefore unfounded.

51. The same holds for the second part of the second ground of appeal. In this regard, the appellant considers that the General Court erred in law because it did not examine the imputation of each individual injection of capital and, in this connection, misapplied the case-law. While it is true that in its previous case-law the Court has in some circumstances regarded successive interventions as a single intervention, that was in a different context and therefore cannot necessarily be applied to the imputation of measures to a State. The General Court thus distorted the case-law.

52. This argument is probably based on the appellant's assumption that if the interventions were examined separately, some or perhaps even all the injections of capital would not be imputed to the Italian State. As this cannot be dismissed out of hand, the question arises whether the Commission and the General Court were able to assess the individual injections of capital for the purposes of imputation as a single intervention.

53. As the Municipality of Milan also acknowledges, several consecutive aid measures can be regarded as a single intervention where consecutive interventions, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely linked to each other that they are inseparable from one another. [17]

54. This case-law was developed in cases where the analysis from the point of view of the rules on State aid focused on the concept of State resources, [18] the selectivity of the intervention [19] or the application of the private investor in a market economy test. [20] Contrary to the submission made by the appellant, however, it does not follow that this case-law also applies only in relation to these elements of Article 107(1) TFEU. It expressly refers to the purposes of the application of Article 107(1) TFEU as a whole [21] and does not distinguish, in its specific statements, between the individual elements of that rule. In addition, the imputation of a measure, as one aspect of the concept of 'State resources', is an element of Article 107(1) TFEU. The line of argument followed in that case-law can also therefore be applied in reviewing whether successive interventions can be regarded as a single intervention for the purposes of their imputation to a State.

55. Against this background, there is also no discernible error in law on the part of the General Court in this regard. In paragraphs 72 and 73 of the judgment under appeal, it examines the Commission's findings in the light of the abovementioned criteria and explains the temporal links with the adoption of a multiannual strategy [22] to cover losses, on the basis of which the individual injections of capital were made. Such a strategy is likely to link the individual interventions to each other such that they are inseparable from one another.

56. Consequently, the second part of the ground of appeal is also unfounded. The further submission by which the appellant challenges inter alia the inference of a strategy as a distortion of the facts will be discussed in connection with the third ground of appeal.

C. Third ground of appeal — distortion of evidence in respect of proof of imputation

57. By the third ground of appeal, the appellant claims a distortion of evidence by the General Court in the assessment of the indicators presented by the Commission in support of the purported imputation of the measures to the Municipality of Milan. Consideration should also be given in this connection to the distortion of evidence which the appellant attributes to the General Court in the second ground of appeal.

58. Under Article 256 TFEU in conjunction with the first paragraph of Article 58 of its Statute, the Court has jurisdiction only to review the legal characterisation of facts established or assessed by the General Court and the legal conclusions drawn from them. The appraisal of the facts therefore does not, save where the clear sense of the evidence produced before the General Court is distorted, constitute a question of law which is subject, as such, to review by the Court of Justice. [23]

17 Judgments of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraphs 103 and 104); of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 97); and of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 33).

18 Judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 89 et seq.).

19 Judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362, paragraph 88 et seq.).

20 Judgment of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraphs 27 to 34).

21 See the judgments cited in footnote 18.

22 The adoption of this strategy is the subject of the statements made in points 61 and 64 et seq. of this Opinion.

23 Judgment of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 25 and the case-law cited).

59. Such distortion exists where the assessment of the existing evidence is manifestly incorrect.[24] Such a 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 evidence.[25] Given the exceptional nature of a complaint of distortion under Article 256 TFEU, Article 58(1) of the Statute of the Court of Justice and Article 168(1)(1)(d) of the Rules of Procedure of the Court of Justice, an appellant must, in particular, indicate precisely the elements alleged to have been distorted by the General Court and show the errors of appraisal which, in its view, led to that distortion.[26]

60. In the second ground of appeal, the appellant maintains, first, that the General Court distorted its submissions in the judicial proceedings. It is apparently referring to the finding made in paragraph 72 of the judgment under appeal according to which the appellant, without giving an explanation, simply claimed that the Commission did not prove the logical link and the coherence between the different indicators which it had invoked in order to impute to the Italian State all the measures taken during the period in question. However, the appellant fails to explain the submissions alleged to have been distorted by the General Court. This claim is therefore inadmissible.

61. Second, in the second ground of appeal the appellant asserts that, contrary to a further finding made in paragraph 72 of the judgment under appeal, the Italian authorities and SEA had not admitted that there had been a 'multiannual strategy to cover losses'. Rather, various documents had mentioned only a reorganisation strategy. The appellant thus acknowledges, however, the crucial element that is in dispute in the second ground of appeal. The annual capital injections form part of an overall strategy and, according to the case-law discussed above,[27] do not have to be examined separately. It is immaterial whether the strategy related specifically to coverage of losses or to reorganisation more abstractly. Accordingly, this assertion does not amount to distortion of evidence which is relevant to the decision.

62. Lastly, in the second ground of appeal the appellant reiterates its submission before the General Court that any capital injection was characterised by its own context. With regard to this submission, it does not allege any distortion on the part of the General Court, but merely objects that the General Court did not follow its reasoning. It therefore seeks a reassessment of that submission, which is, however, inadmissible on appeal.

63. The complaint of a distortion of evidence made in the second ground of appeal must therefore be rejected.

64. By the third ground of appeal, the appellant asserts that the 2002 trade union agreement did not permit the conclusions drawn by the Commission and the General Court with regard to the imputation of the measures to the Italian authorities. The agreement cannot be construed to mean that SEA was in any way obliged by it to compensate for the losses incurred by SEA Handling by means of injections of capital.

65. With this submission too, however, the appellant is seeking a reassessment of the facts, in this case the 2002 trade union agreement.

24 Judgment of 17 June 2010, *Lafarge* v *Commission* (C-413/08 P, EU:C:2010:346, paragraph 17 and the case-law cited).

25 Judgments of 3 April 2014, *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraph 80 and the case-law cited), and of 11 December 2019, *Mytilinaios Anonymos Etairia — Omilos Epicheiriseon* v *Commission* (C-332/18 P, EU:C:2019:1065, paragraph 150).

26 Judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 50); of 20 October 2011, *PepsiCo* v *Grupo Promer Mon Graphic* (C-281/10 P, EU:C:2011:679, paragraph 78); of 9 November 2017, *TV2/Danmark* v *Commission* (C-649/15 P, EU:C:2017:835, paragraph 51); and of 16 January 2019, *Poland* v *Stock Polska and EUIPO* (C-162/17 P, not published, EU:C:2019:27, paragraph 71)

27 See above, points 53 and 54.

66. It asserts, first and foremost, that in its interpretation the General Court failed to take into consideration the temporal and legal context of the trade union agreement. However, in doing so the appellant is entering into the assessment of the evidence as such. For an admissible submission, it should have argued that the trade union agreement *per se* did not permit the conclusions drawn by the General Court.

67. In so far as the appellant argues that there are no references to injections of capital and losses in the 2002 trade union agreement, the appellant's submission can be understood to mean that it satisfies the conditions for admissibility of the ground of appeal concerning the distortion of evidence. This would be the case if the appellant's statement could be taken to imply that without the abovementioned elements it could not be inferred from the trade union agreement that SEA was obliged to compensate for the losses incurred by SEA Handling.

68. The assessment by the General Court is not manifestly incorrect and does not therefore distort the evidence. It cannot be ruled out a priori that an obligation for SEA to compensate for losses incurred by its subsidiary may be inferred, as the Commission and the General Court did, from the passages of the 2002 trade union agreement cited in paragraph 77 of the judgment under appeal, according to which SEA would support the balancing of costs/revenues for SEA Handling for a number of years. In particular, it is not necessary for there to be specific mention of the way in which the balancing of costs/revenues is to be supported. The fact that the trade union agreement does not make any reference to loss compensation by means of injections of capital does not therefore preclude the conclusion reached by the Commission and the General Court. Consequently, there is no distortion of the trade union agreement.

69. The third ground of appeal must therefore also be rejected.

D. Fourth ground of appeal — private investor in a market economy

70. By the fourth ground of appeal, the appellant contests the General Court's statements on the private investor in a market economy test.

71. This test is based on the idea that a measure does not constitute State aid within the meaning of Article 107 TFEU if the recipient undertaking could, in circumstances which correspond to normal market conditions, have obtained the same advantage as that which has been made available to it through State resources.[28] In order to assess this question, regard must be had to an operator in a situation as close as possible to that of the State authorities taking the measure, in the present case a hypothetical private investor.[29]

72. The appellant's main submissions relate to the scope of review applied by the General Court and to the taking of evidence. It splits the fourth ground of appeal into four parts concerning the assessment of the 2002 trade union agreement (see under 1), the assessment by the Commission of the private investor in a market economy test (see under 3), the scope of review of the European Union Courts (see under 2) and the burden of proof (see under 4).

28 Judgments of 21 March 1991, *Italy* v *Commission* (C-303/88, EU:C:1991:136, paragraph 20), and of 5 June 2012, *Commission* v *EDF and Others* (C-124/10 P, EU:C:2012:318, paragraph 78).

29 See judgments of 5 June 2012, *Commission* v *EDF and Others* (C-124/10 P, EU:C:2012:318, paragraphs 78 and 79), and of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 28).

1. First part of the fourth ground of appeal — assessment of the 2002 trade union agreement

73. By the first part of the fourth ground of appeal, the appellant again objects that the Commission and the General Court assumed a multiannual strategy to cover losses. This was not apparent either from the 2002 trade union agreement or from other documents. Accordingly, the Commission and the General Court could not include such a strategy in the assessment of the private investor test.

74. As has already been explained in connection with the third ground of appeal,[30] however, this submission must be rejected because it is directed at the assessment of the evidence by the General Court. It is not manifestly erroneous that the General Court accepted the conclusion drawn by the Commission according to which the 2002 trade union agreement obliged SEA to cover losses incurred by SEA Handling over a number of years.

2. Third part of the fourth ground of appeal — scope of review of the European Union Courts

75. By the third part of the fourth ground of appeal, the appellant asserts that the General Court incorrectly found that it could review the complex economic assessment by the Commission in the context of the private investor in a market economy test only to a limited extent and thus erred in law in requiring proof of a manifest error in the Commission's assessment.

76. This submission must also be rejected.

77. It is true that, under the second paragraph of Article 263 TFEU, in principle, the General Court has unlimited jurisdiction in actions brought against acts of the European Union on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

78. In applying the private investor test, however, it is for the Commission to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the recipient company would manifestly not have obtained comparable facilities from a private operator.

79. The complex economic assessments underlying such an overall assessment also does not fall outside the scope of review of the European Union judicature.[31] This review is limited, however, such that it is not for the Courts of the European Union to substitute their own assessment for that of the Commission and substantively they may examine only whether there has been any manifest error of assessment or misuse of powers.[32] In addition, the European Union Courts may verify whether the rules on procedure and on the statement of reasons have been complied with and whether the facts have been accurately stated.[33]

30 See above, point 64 et seq.

31 Judgments of 22 November 2007, *Spain* v *Lenzing* (C-525/04 P, EU:C:2007:698, paragraphs 56 and 57); of 2 September 2010, *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraphs 64 and 65); and of 24 January 2013, *Frucona Košice* v *Commission* (C-73/11 P, EU:C:2013:32, paragraph 75).

32 Judgments of 22 November 2007, *Spain* v *Lenzing* (C-525/04 P, EU:C:2007:698, paragraphs 59 to 61); of 2 September 2010, *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraphs 64 to 66); of 24 January 2013, *Frucona Košice* v *Commission* (C-73/11 P, EU:C:2013:32, paragraphs 74 to 76); and of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraphs 38 to 41).

33 Judgments of 2 September 2010, *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 66), and of 7 May 2020, *BTB Holding Investments and Duferco Participations Holding* v *Commission* (C-148/19 P, EU:C:2020:354, paragraph 56).

80. This is not called into question by the appellant's reference to the case-law on the review of cartel fines.[34] The European Union Courts have unlimited jurisdiction in that field under Article 261 TFEU and the relevant regulations.[35] For a review of State aid decisions, on the other hand, the standards of review described above are applicable.

81. Consequently, the judgment under appeal does not err in law in that, in paragraphs 107 and 108 of the judgment under appeal, the General Court limited its review of the Commission's assessments to the application of the private investor in a market economy test in this way.

3. Second part of the fourth ground of appeal — private investor in a market economy test

82. In the second part of the fourth ground of appeal, the appellant objects that the General Court accepted the hypothetical private investor against which the Commission compared the conduct of SEA. SEA is not just a parent company which must decide whether to continue to operate a loss-making subsidiary, but the holder of a long-term concession to operate in two airports. Because of the revenue which is thereby secured in the long term, the safeguarding of SEA Handling does not require detailed planning or its short-term profitability.

83. This submission does, however, concern the assessment carried out by the Commission of the complex economic relationships characterising the capital contributions to SEA Handling. The assessment includes establishing a benchmark and, to that end, identifying a hypothetical private investor. As has already been stated, it is not for the Courts of the European Union to substitute their own economic assessment for that of the Commission and they may thus examine only whether there has been any manifest error of assessment.[36]

84. Accordingly, the General Court correctly found in paragraph 120 of the judgment under appeal that the Commission's sophisticated ideas regarding the comparable private investor, which are reproduced in paragraph 97 of the judgment under appeal, are not vitiated by a manifest error of assessment. In fact, the Commission was permitted in particular to take the view that such an investor would not have pursued a similar strategy whereby each year it compensated for substantial losses incurred by a subsidiary, without setting a maximum amount, evaluating the success of previous payments or examining alternative scenarios.

85. The statement made by the General Court in paragraph 97 of the judgment under appeal and, even more clearly, the parts of the grounds of the contested decision underlying that statement are also certainly based on SEA's longstanding operating concession, which the General Court took into consideration, at least implicitly, in paragraph 112. Only against this background does the reference to a multiannual business strategy for SEA Handling, which is explicitly mentioned by both the General Court and the Commission in their analyses, make sense.[37] The fact that the Commission ultimately did not conclude from this situation that a prudent private investor with a longstanding operating concession would have acted like SEA certainly falls within its margin of discretion with the result that the General Court also could not find any fault with this.

86. In so far as the appellant objects that the General Court accepted the hypothetical investor used as a benchmark by the Commission, the second part of the fourth ground of appeal is therefore to be rejected as unfounded.

34 It refers to the judgments of 8 December 2011, *KME and Others* v *Commission* (C-272/09 P, EU:C:2011:810, paragraph 94), and *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 62).

35 Judgments of 8 December 2011, *KME and Others* v *Commission* (C-272/09 P, EU:C:2011:810, paragraph 93), and *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 63). See also my Opinion in *Frucona Košice* v *Commission* (C-73/11 P, EU:C:2012:535, point 80).

36 See above, point 79.

37 Recitals 225, 226 and 229 of the contested decision; paragraphs 97 and 112 of the judgment under appeal.

4. The fourth part of the fourth ground of appeal — burden of proof and consideration of all the relevant factors

87. The second part of the fourth ground of appeal nevertheless contains another objection which, in its fourth part, fully unfolds. The appellant criticises the burden of proof applied by the General Court and, in particular, the fact that the appellant is alleged to have failed to refute certain assumptions made by the Commission. In addition, it argues that a study submitted by it, which was produced only after the contested measures, was not taken into consideration as exonerating evidence.

(a) The scope of review

88. Specifically with regard to the private investor in a market economy test, the Court stresses that it is for the Commission to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the recipient company would manifestly not have obtained comparable facilities from such a private operator.[38]

89. The European Union Courts must review not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.[39] In addition, as has already been mentioned, it must be verified, if necessary, whether the rules on procedure and on the statement of reasons have been complied with.[40]

90. In the light of these considerations, it must be examined whether the General Court adequately reviewed the Commission's findings regarding the private investor in a market economy test.

(b) Consideration of the special situation of SEA

91. In the light of the requirements for the Commission's assessment, the characteristics of SEA, raised by the appellant in connection with the second part of the fourth ground of appeal,[41] are among the factors to be taken into consideration by the Commission when comparing the conduct of SEA with that of the assumed hypothetical investor.

92. The General Court mentions this argument only implicitly in paragraph 112 of the judgment under appeal, where it refers to strategic considerations raised by the Italian side. This does not, however, constitute an error in law or inadequate reasoning in particular. The obligation to state reasons does not require the General Court to provide an account that follows exhaustively and one by one all the reasoning articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review.[42]

38 Judgments of 5 June 2012, *Commission* v *EDF and Others* (C-124/10 P, EU:C:2012:318, paragraph 86); of 24 January 2013, *Frucona Košice* v *Commission* (C-73/11 P, EU:C:2013:32, paragraph 73); and of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 29).

39 Judgments of 2 September 2010, *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 65), and of 24 January 2013, *Frucona Košice* v *Commission* (C-73/11 P, EU:C:2013:32, paragraph 76).

40 Judgments of 2 September 2010, *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 66), and of 7 May 2020, *BTB Holding Investments and Duferco Participations Holding* v *Commission* (C-148/19 P, EU:C:2020:354, paragraph 56).

41 Point 82 of this Opinion.

42 Judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 372); of 11 September 2014, *MasterCard and Others* v *Commission* (C-382/12 P, EU:C:2014:2201, paragraph 189); and of 19 September 2019, *Poland* v *Commission* (C-358/18 P, not published, EU:C:2019:763, paragraph 75).

93. That is the case here as the statements made by the General Court clearly show which elements would have been necessary, for the Commission, in order for the decision to make the injections of capital also to be plausible for a comparable private investor in a market economy. Thus, in paragraph 113 of the judgment under appeal, the General Court confirms the Commission's appraisal that the risk of a longer-term investment to compensate for losses would have had to have been more clearly defined, both as regards its expected amount and as regards its profit opportunities, to prompt a private investor to make repeated injections of capital.

94. Furthermore, recital 225 of the contested decision shows that the Commission took this factor into consideration.

95. The assertion that the General Court failed to give adequate consideration to SEA's situation must therefore be rejected as unfounded.

(c) Absence of proof

96. The appellant's most significant objection is directed at the at least ambiguous statements made by the General Court in paragraphs 113 to 117 of the judgment under appeal, in which the General Court stresses the absence of certain information on the Italian side, and in paragraphs 121 to 132 of the judgment under appeal, in which it finds that certain arguments could not invalidate the Commission's findings. These statements made by the General Court could be understood to mean that a Member State or the beneficiary of a measure would have to prove a priori that the measure would also have been taken by a comparable private investor.

97. Such an allocation of the burden of proof would be incompatible with the case-law on the private investor in a market economy test. The Court has explicitly declined to understand the private investor in a market economy test as an exception to the concept of State aid.[43]

98. The private investor in a market economy test is one of the factors that the Commission is required to take into account in certain cases for the purposes of establishing the existence of aid.[44] This has recently been expressed by the Court to the effect that the Commission has the burden of proving whether or not the conditions for the application of the private investor in a market economy test have been satisfied.[45] I understand this to mean that the Commission must reach a clear decision whether a private investor would have taken the measures in question. If the Commission does not have the necessary evidence on which to take that decision, that cannot be to the detriment of the Member State.

99. The burden of proof for the fundamental applicability of the test, on the other hand, rests with the Member State concerned. The condition for applicability is that the Member State concerned actually acted as a private operator. In particular, if the Member State concerned exercises its sovereign powers in adopting the measures in question, this is fairly unlikely. In such cases of doubt the Court requires the Member State to establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as a private operator.[46]

43 Judgments of 5 June 2012, *Commission* v *EDF and Others* (C-124/10 P, EU:C:2012:318, paragraph 103); of 20 September 2017, *Commission* v *Frucona Košice* (C-300/16 P, EU:C:2017:706, paragraph 23); and of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 64).

44 Judgments of 5 June 2012, *Commission* v *EDF and Others* (C-124/10 P, EU:C:2012:318, paragraph 86), and of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 64).

45 Judgment of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 65).

46 Judgments of 5 June 2012, *Commission* v *EDF and Others* (C-124/10 P, EU:C:2012:318, paragraph 82), and of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 63).

100. However, even action as such does not necessarily mean that a comparable private investor would have acted in the same way. Furthermore, that examination still rests with the Commission, which bears the burden of proof in this regard on the basis of the criteria described above.

101. In the present case, however, recital 219 et seq. of the contested decision and paragraph 102 et seq. of the judgment under appeal show that neither the Commission nor the General Court had doubts as to the applicability of this criterion. This is logical given that capitalisation of subsidiaries is a kind of measure that is also taken by private investors.

102. Consequently, the Commission had to prove that a comparable private investor would not have made the capital contributions at issue and, to that end, to ask the Member State concerned to provide it with all the relevant information. [47]

103. The General Court was required in particular to examine whether the Commission had taken into consideration all the relevant factors. If an overview is taken of the judgment under appeal, it is apparent that the General Court ultimately did so.

104. In this regard, the facts which, going beyond the abovementioned ambiguous statements, are presented positively by the General Court as part of the Commission's assessment are crucial. It is not disputed that for nine years SEA transferred substantial amounts to SEA Handling, totalling roughly EUR 360 million, whilst losses amounted to around EUR 340 million. [48] As has already been explained, the General Court rightly confirmed the Commission's assessment that the capital injection constituted State resources. [49] In addition, the appellant has unsuccessfully challenged the General Court's finding that the 2002 trade union agreement was the primary basis for those measures. [50]

105. The General Court therefore found that SEA continually compensated for the huge losses incurred by its subsidiary over several years because it was obliged to do so in the public interest. These positively established facts suggest, first of all, that a private investor would not have readily acted in this way. Against this background, probative value must also be attached to the absence of further bases for the decisions because it must be assumed that a private investor would have engaged in thorough reflection before taking similar decisions. As has been shown, in paragraph 113 et seq. of the judgment under appeal the General Court established the absence of precisely this kind of reflection.

106. There is no need to determine whether the Member State has a *duty* to carry out an appropriate prior evaluation of the profitability of its investment before making that investment, as the General Court assumes in paragraph 110 of the judgment under appeal with reference to the Court of Justice. [51] The absence of such an evaluation does, however, require a satisfactory explanation at least. Otherwise it is an indicator that a comparable private investor would not have made the payments.

107. This conclusion is confirmed by the special situation of the public undertaking. On the one hand, it must be possible for Member States to act as an undertaking and, by virtue of the principle of equal treatment of public and private undertakings, not every public (majority) shareholding in an undertaking can result in the conferral of any advantage by that undertaking satisfying the criteria under Article 107(1) TFEU. On the other hand, that possibility also cannot result in the prohibition of

47 See judgments of 5 June 2012, *Commission* v *EDF and Others* (C-124/10 P, EU:C:2012:318, paragraphs 103 and 104), and of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraph 68).

48 See above, point 7.

49 See above, point 19et seq.

50 See above, points 64 et seq. and 73 and 74.

51 Judgment of 23 November 2017, *SACE and Sace BT* v *Commission* (C-472/15 P, not published, EU:C:2017:885, paragraph 107). The General Court originally developed this wording in the judgment of 25 June 2015, *SACE and Sace BT* v *Commission* (T-305/13, EU:T:2015:435, paragraph 182), and has since adopted it in the judgments of 16 January 2018, *EDF* v *Commission* (T-747/15, EU:T:2018:6), and of 11 December 2018, *BTB Holding Investments and Duferco Participations Holding* v *Commission* (T-100/17, not published, EU:T:2018:900).

State aid under primary law being circumvented.[52] Having due regard to both aspects requires a degree of flexibility, which is provided by the private investor in a market economy test. This means that Member States or undertakings owned by them must, as a rule, document their decisions such that it is possible to determine whether in the situation at issue they acted as a private shareholder in a manner compatible with the market.

108. The references by the General Court to the failure to submit certain information are primarily to be understood in this sense. The General Court was unable to understand on the basis of the available information alone why, contrary to the impression given by the positively established facts, the injection of capital should be consistent with the action of a private investor.

109. Furthermore, together with the statements concerning the failure to invalidate certain findings made by the Commission, they show that the appellant did not present any other factors which the Commission should have additionally taken into consideration in its assessment.

110. Further-reaching requirements for the clarification of the facts by the Commission would render the control of State aid excessively difficult if the Member States utilised forms of action under private law to confer selective advantages. How is the Commission to determine whether conduct is compatible with the market, if not by documentation of the decision-making process from the undertaking which confers the advantage?

111. Nor is this called into question by the appellant's allegation that the Commission did not adequately clarify the conditions on the ground handling services market and, in particular, did not conduct its own study on the subject. Although it cannot be ruled out that in some cases such clarification measures are necessary in order to take into consideration all the relevant evidence, in the present case it does not constitute a manifest error of assessment to conclude that, based on the findings regarding the scope and duration of the capitalisation measures and the losses incurred at the same time, a private investor would not have acted in this way.

112. The General Court was not therefore required to contest the Commission's assessment that a comparable private investor would not have taken the contested measures. Rather, the Commission based its conclusion on sound evidence. The General Court was therefore able to confirm this.

113. It is regrettable that the General Court did not explain this basis for its assessment more clearly than it stressed the absence of certain information. However, it should be borne in mind that the grounds of a judgment can also contain implicit findings and implicit references to the grounds underlying other points of the same judgment.[53]

114. Consequently, this submission made by the appellant must ultimately be rejected as unfounded.

(d) Time when evidence was produced

115. Lastly, the appellant objects that in paragraph 114 of the judgment under appeal the General Court declined to take into consideration a study which was produced after the measures at issue had been adopted.

52 Judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraphs 23 and 68 et seq.).

53 See above, point 92..

116. This finding by the General Court is likewise not vitiated by an error in law, but corresponds to the Commission's verification obligation. According to the Court's case-law, the Commission may even refuse to examine information if the evidence produced has been established after the adoption of the decision to make the investment in question. For the purposes of applying the private investor test, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to make the investment was taken. [54]

117. It is true that this statement made by the Court of Justice goes too far in its absolute form, as it is conceivable that evidence from the period after the measure in question might allow conclusions to be drawn regarding the information available at the time when the decision was taken. One example might be subsequent statements made by the parties regarding the historic decision-making process. However, it is correct that deficiencies in the decision-making process cannot be remedied a posteriori.

118. That is precisely the approach taken by the General Court in paragraphs 114 and 117 of the judgment under appeal. First, it examines the references contained in the study in question to the decision-making process relating to the capital injections and, second, it makes clear that the study cannot substitute for inadequate reflection in the decision-making process.

119. This submission and thus the fourth ground of appeal in its entirety must therefore also be rejected as unfounded.

V. Costs

120. Under Article 184(2) of the Rules of Procedure, the Court is to make a decision as to the costs of the appeal proceedings only where the appeal is unfounded. Under Article 138(1), which applies to the procedure on appeal in accordance with Article 184(1), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

121. Since the appellant has been unsuccessful, it should be ordered to pay the costs of the appeal.

VI. Conclusion

122. I therefore propose that the Court should:

(1) dismiss the appeal brought by the Municipality of Milan;

(2) order the Municipality of Milan to pay the costs of the proceedings.

54 Judgments of 5 June 2012, *Commission* v *EDF and Others* (C-124/10 P, EU:C:2012:318, paragraphs 104 and 105); of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission* (C-357/14 P, EU:C:2015:642, paragraph 103); and of 23 November 2017, *SACE and Sace BT* v *Commission* (C-472/15 P, not published, EU:C:2017:885, paragraph 107).