Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

31 January 2023 *

(Appeal – State aid – Articles 107 and 108 TFEU – Restructuring aid – Banking sector – Preliminary examination stage – Decision declaring the aid compatible with the internal market – Restructuring plan – Commitments given by the Member State concerned – Burden-sharing measures – Conversion of subordinated debts into equity – Bondholders – Action for annulment – Admissibility – Fourth paragraph of Article 263 TFEU – *Locus standi* – Natural or legal person directly and individually concerned – Breach of the procedural rights of interested parties – Failure to initiate the formal investigation procedure – Article 108(2) TFEU – Concept of 'parties concerned' – Regulation (EU) 2015/1589 – Article 1(h) – Concept of 'interested party' – National measures taken into account by the European Commission – Inadmissibility of the action)

In Case C-284/21 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 May 2021,

European Commission, represented by K. Blanck and A. Bouchagiar, acting as Agents,

appellant,

the other parties to the proceedings being:

Anthony Braesch, residing in Luxembourg (Luxembourg),

Trinity Investments DAC, established in Dublin (Ireland),

Bybrook Capital Master Fund LP, established in Grand Cayman (Cayman Islands),

Bybrook Capital Hazelton Master Fund LP, established in Grand Cayman,

Bybrook Capital Badminton Fund LP, established in Grand Cayman,

represented by A. Champsaur, avocate, and by G. Faella, L. Prosperetti and M. Siragusa, avvocati,

applicants at first instance,

THE COURT (Grand Chamber),

* Language of the case: English.

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, E. Regan (Rapporteur), M. Safjan, P.G. Xuereb, D. Gratsias and M.L. Arastey Sahún, Presidents of Chambers, F. Biltgen, I. Jarukaitis, N. Jääskinen, N. Wahl, I. Ziemele, J. Passer and M. Gavalec, Judges,

Advocate General: A. Rantos,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 4 April 2022,

after hearing the Opinion of the Advocate General at the sitting on 21 June 2022,

gives the following

Judgment

1 By its appeal, the European Commission requests that the Court set aside the judgment of the General Court of the European Union of 24 February 2021, *Braesch and Others* v *Commission* (T-161/18, 'the judgment under appeal', EU:T:2021:102), by which the General Court rejected the plea of inadmissibility raised in the context of the action brought under Article 263 TFEU by Mr Anthony Braesch, Trinity Investments DAC, Bybrook Capital Master Fund LP, Bybrook Capital Hazelton Master Fund LP and Bybrook Capital Badminton Fund LP ('Braesch and Others'), seeking the annulment of Commission Decision C(2017) 4690 final of 4 July 2017 on State Aid SA.47677 (2017/N) – Italy – New aid and amended restructuring plan of Banca Monte dei Paschi di Siena ('the decision at issue').

Legal context

Regulation (EU) 2015/1589

2 Under the heading 'Definitions', Article 1 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9) is worded as follows:

'For the purpose of this Regulation:

…

(b) "existing aid" means:

…

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council [of the European Union];

…

(c) “new aid” means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

…

(f) “unlawful aid” means new aid put into effect in contravention of Article 108(3) TFEU;

(g) “misuse of aid” means aid used by the beneficiary in contravention of a decision taken pursuant to … Article 4(3) … of this Regulation;

(h) “interested party” means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.’

3 Article 4 of that regulation, entitled ‘Preliminary examination of the notification and decisions of the Commission’, provides in paragraphs 3 and 4:

‘3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article 107(1) TFEU, it shall decide that the measure is compatible with the internal market (“decision not to raise objections”). The decision shall specify which exception under the TFEU has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the internal market of a notified measure, it shall decide to initiate proceedings pursuant to Article 108(2) TFEU (“decision to initiate the formal investigation procedure”).’

4 Under the heading ‘Formal investigation procedure’, Article 6 of that regulation provides, in paragraph 1:

The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the internal market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend this period.’

5 Article 9 of Regulation 2015/1589, entitled ‘Decisions of the Commission to close the formal investigation procedure’, provides, in paragraph 4:

‘The Commission may attach to a positive decision conditions subject to which aid may be considered compatible with the internal market and may lay down obligations to enable compliance with the decision to be monitored (“conditional decision”).’

6 Article 16 of that regulation, entitled ‘Recovery of aid’, provides in paragraph 1:

‘Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary … The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.’

7 Article 20 of that regulation, entitled 'Misuse of aid', states:

Without prejudice to Article 28, the Commission may, in cases of misuse of aid, initiate the formal investigation procedure pursuant to Article 4(4). Articles 6 to 9, 11 and 12, Article 13(1) and Articles 14 to 17 shall apply *mutatis mutandis*.'

Directive 2014/59/EU

8 Under the heading 'Conditions for resolution', Article 32 of Directive 2014/59/EU 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), provides, in paragraph 4:

'For the purposes of point (a) of paragraph 1, an institution shall be deemed to be failing or likely to fail in one or more of the following circumstances:

…

(d) extraordinary public financial support is required except when, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, the extraordinary public financial support takes any of the following forms:

…

(iii) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the institution, where neither the circumstances referred to in point (a), (b) or (c) of this paragraph nor the circumstances referred to in Article 59(3) are present at the time the public support is granted.

In each of the cases mentioned in points (d)(i), (ii) and (iii) of the first subparagraph, the guarantee or equivalent measures referred to therein shall be confined to solvent institutions and shall be conditional on final approval under the [European] Union State aid framework. Those measures shall be of a precautionary and temporary nature and shall be proportionate to remedy the consequences of the serious disturbance and shall not be used to offset losses that the institution has incurred or is likely to incur in the near future.

Support measures under point (d)(iii) of the first subparagraph shall be limited to injections necessary to address capital shortfall established in the national, Union or [Single Supervisory Mechanism (SSM)]-wide stress tests, asset quality reviews or equivalent exercises conducted by the European Central Bank [(ECB)], [the European Banking Authority (EBA)] or national authorities, where applicable, confirmed by the competent authority.

…'

Regulation (EU) No 806/2014

9 Under the heading 'Resolution procedure', Article 18 of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1), provides, in paragraph 4:

'For the purposes of point (a) of paragraph 1, the entity shall be deemed to be failing or to be likely to fail in one or more of the following circumstances:

…

(d) extraordinary public financial support is required except where, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, that extraordinary public financial support takes any of the following forms:

…

(iii) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the entity, where neither the circumstances referred to in points (a), (b) and (c) of this paragraph nor the circumstances referred to in Article 21(1) are present at the time the public support is granted.

In each of the cases referred to in points (i), (ii) and (iii) of point (d) of the first subparagraph, the guarantee or equivalent measures referred to therein shall be confined to solvent entities and shall be conditional on final approval under the Union State aid framework. Those measures shall be of a precautionary and temporary nature and shall be proportionate to remedy the consequences of the serious disturbance and shall not be used to offset losses that the entity has incurred or is likely to incur in the near future.

Support measures under point (d)(iii) of the first subparagraph shall be limited to injections necessary to address capital shortfall established in the national, Union or SSM-wide stress tests, asset quality reviews or equivalent exercises conducted by the ECB, EBA or national authorities, where applicable, confirmed by the competent authority.

…'

The Banking Communication

10 Point 15 of the Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ 2013 C 216, p. 1; 'the Banking Communication') reads as follows:

'The Crisis Communications clearly spell out that even during the crisis the general principles of State aid control remain applicable. In particular, in order to limit distortions of competition between banks and across Member States in the single market and address moral hazard, aid should be limited to the minimum necessary and an appropriate own contribution to restructuring costs should be provided by the aid beneficiary. The bank and its capital holders should contribute to the restructuring as much as possible with their own resources. State support should be granted on terms which represent an adequate burden-sharing by those who invested in the bank.'

11 Part 3 of the Banking Communication relates to recapitalisation and impaired asset measures. Section 3.1.2. of Part 3, headed 'Burden-sharing by the shareholders and the subordinated creditors' contains points 40 to 46 of that communication, which are worded as follows:

'40. State support can create moral hazard and undermine market discipline. To reduce moral hazard, aid should only be granted on terms which involve adequate burden-sharing by existing investors.

41. Adequate burden-sharing will normally entail, after losses are first absorbed by equity, contributions by hybrid capital holders and subordinated debt holders. Hybrid capital and subordinated debt holders must contribute to reducing the capital shortfall to the maximum extent. Such contributions can take the form of either a conversion into Common Equity Tier 1 … or a write-down of the principal of the instruments. In any case, cash outflows from the beneficiary to the holders of such securities must be prevented to the extent legally possible.

42. The Commission will not require contribution from senior debt holders (in particular from insured deposits, uninsured deposits, bonds and all other senior debt) as a mandatory component of burden-sharing under State aid rules whether by conversion into capital or by write-down of the instruments.

43. Where the capital ratio of the bank that has the identified capital shortfall remains above the [European Union] regulatory minimum, the bank should normally be able to restore the capital position on its own, in particular through capital raising measures as set out in point 35. If there are no other possibilities, including any other supervisory action such as early intervention measures or other remedial actions to overcome the shortfall as confirmed by the competent supervisory or resolution authority, then subordinated debt must be converted into equity, in principle before State aid is granted.

44. In cases where the bank no longer meets the minimum regulatory capital requirements, subordinated debt must be converted or written down, in principle before State aid is granted. State aid must not be granted before equity, hybrid capital and subordinated debt have fully contributed to offset any losses.

45. An exception to the requirements in points 43 and 44 can be made where implementing such measures would endanger financial stability or lead to disproportionate results. This exception could cover cases where the aid amount to be received is small in comparison to the bank's risk weighted assets and the capital shortfall has been reduced significantly in particular through capital raising measures as set out in point 35. Disproportionate results or a risk to financial stability could also be addressed by reconsidering the sequencing of measures to address the capital shortfall.

46. In the context of implementing points 43 and 44, the "no creditor worse off principle" … should be adhered to. Thus, subordinated creditors should not receive less in economic terms than what their instrument would have been worth if no State aid were to be granted.'

Background to the dispute and the decision at issue

12 The background to the dispute is set out in paragraphs 1 to 14 of the judgment under appeal as follows:

> ‘1 … Mr Anthony Braesch, is a representative of the holders of “Floating Rate Equity-Linked Subordinated Hybrid-FRESH” 2008 bonds (“FRESH bonds”). The remaining applicants, Trinity Investments …, Bybrook Capital Master Fund …, Bybrook Capital Hazelton Master Fund … and Bybrook Capital Badminton Fund …, are holders of such bonds.
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> 2 In April 2008, Banca Monte dei Paschi di Siena (“BMPS”) carried out a capital increase of EUR 950 million reserved to J.P. Morgan Securities Ltd (“JPM”), which subscribed to BMPS shares (“the FRESH shares”). At the same time, on 16 April 2008, JPM concluded with BMPS a usufruct agreement, under which JPM retains bare ownership of the shares while BMPS is entitled to usufruct, and a company swap agreement (“the FRESH contracts”). JPM obtained the necessary funds to subscribe to the FRESH shares from Bank of New-York Mellon (Luxembourg), replaced by Mitsubishi UFJ Investor Services & Banking (Luxembourg) SA (“MUFJ”), which issued the FRESH bonds on 16 April 2008, under Luxembourg law, for an amount of EUR 1 billion. JPM entered into a swap agreement, governed by Luxembourg law, with MUFJ, and MUFJ entered into a fiduciary contract, also governed by Luxembourg law, with the FRESH bondholders. Under those various contracts, described by [Braesch and Others] as “the FRESH instruments”, the fees received by JPM from BMPS under the FRESH contracts are passed on to MUFJ and then to the FRESH bondholders in the form of coupons.
>
> 3 By decision of 27 November 2013, the … Commission approved restructuring aid granted by the Italian Republic to … BMPS on the basis of a restructuring plan and certain commitments. In June 2015, BMPS repaid the aid in its entirety.
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> 4 On 29 July 2016, the [EBA] published the results of the 2016 EU-wide stress test, which revealed that BMPS had a capital shortfall in the adverse scenario.
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> 5 On 23 December 2016, the Italian authorities approved decreto-legge n. 237 – Disposizioni urgenti per la tutela del risparmio nel settore creditizio (Decree-Law No 237 – Urgent provisions for the protection of savings in the credit sector) (GURI No 299, of 23 December 2016), which was amended and converted into a law by the legge di conversione (Conversion Law) of 17 February 2017 (GURI No 43, of 21 February 2017) (‘Decree-Law 237/2016’), setting out the legal framework for liquidity aid and precautionary recapitalisations.
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> 6 By decision of 29 December 2016, following a statement on 23 December 2016 by the [ECB] that BMPS was solvent, the Commission temporarily approved EUR 15 billion of individual liquidity aid to the BMPS, on the basis of commitments offered by the Italian authorities. The Italian authorities committed to presenting a restructuring plan within two months of the granting of the guarantees, unless the liquidity support was repaid within that period.
>
> 7 On 30 December 2016, following an unsuccessful attempt by BMPS to raise private capital, it requested extraordinary public financial support in the form of a precautionary recapitalisation under Law-Decree 237/2016.

8 On 28 June 2017, the Italian authorities notified the Commission of aid for the recapitalisation of BMPS in the sum of EUR 5.4 billion, accompanied by a new restructuring plan [("the restructuring plan")] and new commitments.

9 On the same day, the ECB sent the Commission a letter indicating that BMPS was solvent as at that date.

10 In [the decision at issue], which was adopted at the conclusion of the preliminary examination stage, the Commission assessed two aid measures. The first of these ("measure 1") consisted of liquidity aid in the sum of EUR 15 billion, in the form of State guarantees on senior liabilities as referred to in paragraph 6 [of the judgment under appeal]. The second measure ("measure 2") consisted of precautionary recapitalisation of BMPS in the sum of EUR 5.4 billion, as referred to in paragraph 8 [of the judgment under appeal].

11 After finding that measures 1 and 2 constituted State aid, the Commission stated that the legal basis on which their compatibility [with the internal market] was to be assessed was Article 107(3)(b) TFEU, concerning aid intended to remedy a serious disturbance in the economy of a Member State. It determined that measures 1 and 2 were restructuring aid to BMPS and examined their compatibility on the basis of the restructuring plan, with regard to the six global financial crisis communications – in particular … [the Banking Communication].

12 As regards the compatibility of the aid measures in the light of the [six financial] crisis communications, first, the Commission found that the restructuring plan was apt to restore the long-term viability of BMPS. Secondly, it found that burden sharing by holders of existing shares and subordinated debt was adequate, limiting the restructuring costs and amount of aid to a minimum in line with the requirements of the Banking Communication, and concluded that the restructuring plan contained sufficient burden-sharing measures. Thirdly, it found that the restructuring plan contained sufficient safeguards to limit undue distortions of competition. It also observed that proper monitoring of the implementation of the restructuring plan had been ensured. Accordingly, it concluded that the aid measures were proportionate to remedy the consequences of the serious disturbance in the Italian economy.

13 The Commission went on to consider whether the aid measures complied with the provisions of Directive [2014/59]. It concluded that the conditions under which the aid measures (measure 1 and measure 2) had been granted were in line with the exemption provided for in Article 32(4)(d) of Directive 2014/59.

14 In the operative part of the [decision at issue], the Commission concluded, first, that measures 1 and 2 constituted State aid within the meaning of Article 107(1) TFEU, and secondly that those measures fulfilled the requirements of Article 107(3)(b) TFEU and were compatible with the internal market for reasons of financial stability.'

The procedure before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 5 March 2018, Braesch and Others brought an action under Article 263 TFEU for annulment of the decision at issue or, in the alternative, for annulment of that decision in so far as it concerns the treatment of the FRESH instruments.

14 In support of that action, Braesch and Others relied on five pleas in law, alleging (i) infringement of Articles 18 and 21 of Regulation No 806/2014 and of the obligation to state reasons, in that the Commission unlawfully endorsed burden-sharing measures, (ii) infringement of the Banking Communication, the principles of protection of legitimate expectations and equal treatment, and the obligation to state reasons, in that the Commission required the cancellation of the FRESH contracts, (iii) infringement of the right to equal treatment, enshrined, inter alia, in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('the Charter'), in that the decision at issue endorses burden-sharing measures which discriminate against FRESH bondholders, (iv) infringement of the property rights of the FRESH bondholders, as enshrined, inter alia, in Article 17 of the Charter, in that the Commission endorsed the application of burden-sharing measures to the FRESH instruments and, (v) infringement of Article 108(2) and (3) TFEU, Article 4(3) and (4) of Regulation 2015/1589 and their procedural rights, in that the Commission failed to initiate the formal investigation procedure notwithstanding that there were serious doubts about the compatibility of the burden-sharing measures endorsed by the decision at issue with EU law.

15 By separate document lodged at the Court Registry on 16 May 2018, the Commission raised a plea of inadmissibility under Article 130(1) and (7) of the Rules of Procedure of the General Court, in which it claimed that the action brought by Braesch and Others was inadmissible on the ground that they had neither an interest in bringing proceedings nor standing to bring proceedings for the purposes of the fourth paragraph of Article 263 TFEU. On 10 July 2018 Braesch and Others submitted their observations on that plea.

16 The parties presented oral argument and answered written and oral questions put by the General Court at the hearing on 9 July 2020.

17 By the judgment under appeal, the General Court dismissed the plea of inadmissibility raised by the Commission. After finding, in paragraphs 35 to 41 of that judgment, that Braesch and Others had the status of 'parties concerned' and 'interested parties' within the meaning of Article 108(2) TFEU and Article 1(h) of Regulation 2015/1589 respectively, the General Court held, first, in paragraphs 43 to 55 of that judgment, that they had an interest in bringing proceedings, since they had shown to the requisite legal standard that the potential annulment of the decision at issue was capable of benefiting them, and, secondly, in paragraphs 56 to 64 of that judgment, that they had standing to bring proceedings, for the purposes of the fourth paragraph of Article 263 TFEU, since the approval, in that decision, of the aid measures in the light of the restructuring plan is of direct and individual concern to the applicants as 'parties concerned' and 'interested parties'.

Forms of order sought by the parties before the Court of Justice

18 By its appeal, the Commission claims that the Court should:

– set aside the judgment under appeal;

– itself rule on the action at first instance and reject the action as inadmissible; and

– order Braesch and Others to pay the costs.

19 Braesch and Others contend that the Court should:

– dismiss the appeal and

– order the Commission to pay the costs.

The appeal

20 In support of its appeal, the Commission relies on a single ground of appeal, alleging that the General Court misinterpreted, in paragraphs 35 to 41 and 58 of the judgment under appeal, Article 108(2) TFEU and Article 1(h) of Regulation 2015/1589, in that Braesch and Others were categorised as 'parties concerned' and 'interested parties' within the meaning of those provisions.

Arguments of the parties

21 The Commission submits that, although the concept of 'interested party', as defined in Article 1(h) of Regulation 2015/1589, which is synonymous with the concept of 'party concerned', within the meaning of Article 108(2) TFEU, indeed covers an indeterminate group of persons, it can only encompass persons that show that the State aid at issue is likely to have a competition-related specific effect on their situation. Otherwise the requirement that a person must be an 'interested party', within the meaning of Article 1(h) of Regulation 2015/1589, in order to be regarded as directly and individually concerned by a decision adopted on the basis of Article 4(3) of that regulation would be rendered meaningless.

22 First of all, according to the Commission, it is clear from the relevant case-law of the Court that it has accepted as interested parties only persons that showed an effect of that nature, even if those persons were not direct competitors of the beneficiary of the aid. Thus, in the judgments of 9 July 2009, *3F* v *Commission* (C-319/07 P, EU:C:2009:435, paragraph 33), and of 24 May 2011, *Commission* v *Kronoply and Kronotex* (C-83/09 P, EU:C:2011:341, paragraph 63), respectively, a trade union representing workers and buyers of the same raw material as the beneficiary of the aid were regarded as interested parties because of the potential effect of the aid at issue on their competitive position on the market.

23 Next, the Commission submits that that interpretation is supported by Article 1(h) of Regulation 2015/1589. The interested parties indicatively listed in that provision have in common the fact that aid is likely to have a competition-related effect on their situation, which effect might be favourable or adverse, depending on the circumstances.

24 Lastly, it is apparent from the overall system and teleology of State aid control that the Commission is entrusted with that control solely as a competition authority and that, accordingly, in the exercise of that power, that institution is not entitled to impose on Member States policies that are not linked to competition, as the Court pointed out in the judgment of 22 September 2020, *Austria* v *Commission* (C-594/18 P, EU:C:2020:742). Thus, in the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraphs 43, 46 and 47), the Court, after noting that the objective of the EU rules on State aid is to preserve competition, held that, in order to be directly concerned by a decision in that field, applicants must prove that that decision is liable to place them in an unfavourable competitive position.

25 It follows, according to the Commission, that the concept of 'interested parties', which is moreover defined in Article 1(h) of Regulation 2015/1589 as referring to any entity 'whose interests might be affected by the granting of aid', cannot include entities which might present grievances unrelated to the State aid at issue, but rather relating to other aspects of the overall State measure enacting that aid or even to other State measures accompanying the State aid.

26 Many persons are liable to take issue with a State measure enacting or accompanying an aid, expressing solely concerns which are not only unrelated to competition but which are also independent of the aid at issue By contrast, for the competitors of a beneficiary of State aid, the fact that the beneficiary receives State aid is the whole point of their concerns. In order to be categorised as an 'interested party', a person must therefore express concerns that are somehow related to competition in the broad sense, even if that person is not a competitor of the beneficiary of the aid.

27 It follows that, in the judgment under appeal, the General Court erroneously interpreted and applied the concept of 'interested party' by relying on an open-ended definition of that concept that would include any entity able to show any kind of possible effect from the aid, or even from other State measures accompanying the aid. The General Court even relied on indirect and merely economic effects that bore no relation to competition.

28 Thus, the General Court wrongly concluded, in paragraphs 37 and 41 of the judgment under appeal, that the decision at issue was likely to have a specific effect on the situation of Braesch and Others on the ground that BMPS's restructuring plan provided for the possibility of cancelling the FRESH contracts and that, due to the interdependence between the various contractual links underpinning the FRESH instruments, the economic loss that results in the long term, having regard to the loss of coupon payments connected to the FRESH bonds, is substantial.

29 According to the Commission, the cancellation of the FRESH contracts was not the result of the State aid to BMPS, but the result of the Italian authorities' separate decision to impose burden sharing on BMPS's shareholders and subordinated creditors, which was accordingly reflected in BMPS's restructuring plan. Even if the Italian authorities had decided to restructure BMPS without any State aid, they could have still imposed the burden-sharing measures, including the cancellation of the FRESH contracts, in order to reduce the capital shortfall of BMPS. Those measures were therefore independent of the State aid that the Italian authorities decided to grant to BMPS. Moreover, the cancelled FRESH contracts were the usufruct agreement and the company swap agreement between JPM and BMPS, as mentioned in paragraph 2 of the judgment under appeal, whereas the FRESH bondholders were not even parties to those contracts.

30 Consequently, any effect from the burden-sharing measures on Braesch and Others was merely economic and indirect, through the various contractual links underpinning the FRESH instruments.

31 It follows, according to the Commission, that the reasoning in paragraph 40 of the judgment under appeal is vitiated by at least four errors of law.

32 First, the General Court wrongly stated that it is irrelevant that Braesch and Others do not challenge the compatibility of the aid measures at issue with the internal market, whereas that explicitly confirms that the Braesch and Others do not take issue with the State aid granted to

BMPS as such, but with the burden-sharing measures resulting from an independent decision of the Italian authorities, which shows that the State aid could not have any competition-related effect on their situation.

33 Secondly, although the General Court correctly found that the Italian authorities' commitments relating to the restructuring plan and burden sharing form an 'integral part' of the notified aid measures, that finding is irrelevant to the determination of standing. It is true that, as is apparent from the judgment of 15 October 2015, *Iglesias Gutiérrez and Rion Bea* (C-352/14 and C-353/14, EU:C:2015:691, paragraph 28), the authorisation granted by the Commission is based on all the factual assumptions presented by the Member State concerned, whether in its notification or in its commitments, with the result that, if that Member State deviates from those factual assumptions, it implements a factually different measure than the one approved by the Commission, and therefore that measure would not be covered by the Commission's authorisation. However, since the Commission controls State aid as a competition authority, it does not follow that any person who has any concerns about one of those factual assumptions must be regarded as an 'interested party' within the meaning of Article 1(h) of Regulation 2015/1589.

34 Thirdly, the General Court wrongly asserted that the notified aid measures and the commitments offered by the Italian authorities and assessed by the Commission 'are intrinsically linked, in so far as the latter are a precondition for the declaration of compatibility'. That statement runs counter to paragraphs 99 and 100 of the judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570), from which it follows that although the fact that a measure of State aid meets the criteria set out in points 40 to 46 of the Banking Communication is a sufficient ground for the Commission to declare that measure to be compatible with the internal market, it is not strictly necessary to that end. Therefore, the Italian Republic was not obliged to commit to the burden-sharing measures envisaged in the Banking Communication.

35 Fourthly, the General Court wrongly held that, since the decision at issue authorised the implementation of the aid measures 'and made those commitments binding', the situation of Braesch and Others was necessarily affected by all those factors, since they could defend their interests only by seeking annulment of that decision in its entirety. That decision in no way rendered binding the commitments given by the Italian authorities. It was adopted pursuant to Article 4(3) of Regulation 2015/1589, on the basis of the commitments given voluntarily by those authorities, including the burden-sharing measures. Since the decision at issue is not a 'conditional decision' within the meaning of Article 9(4) of that regulation, it did not impose, nor indeed could impose, conditions on the Member State or on third parties.

36 Braesch and Others contend that the Commission has not shown that the General Court's interpretation of Article 1(h) of Regulation 2015/1589 is vitiated by an error of law.

37 First of all, they submit that the claim that categorisation as an 'interested party' in the case-law of the Court of Justice requires that the aid have a competition-related adverse effect on the person concerned is unfounded. In particular, in the judgments of 9 July 2009, *3F* v *Commission* (C-319/07 P, EU:C:2009:435), and of 24 May 2011, *Commission* v *Kronoply and Kronotex* (C-83/09 P, EU:C:2011:341), the Court considered the applicants to be interested parties on the basis of the existence of an adverse effect of the aid on the applicants. Nowhere does the reasoning of the Court mention that that effect must affect their competitive position on the market.

38 Next, according to Braesch and Others, the argument that Article 1(h) of Regulation 2015/1589 limits the concept of 'interested parties' to entities that are in competition with the beneficiary of the aid is also unfounded. First, that provision expressly allows an undertaking that is not in a competitive relationship with the beneficiary of the aid to be categorised as an interested party where its interests could be affected by the grant of the aid. Secondly, according to the settled case-law of the Court, set out, inter alia, in the judgment of 13 June 2019, *Copebi* (C-505/18, EU:C:2019:500, paragraph 34), the list of categories contained in that provision is merely indicative and the concept of 'interested party' goes beyond the beneficiary of the aid or its competitors, since it encompasses an indeterminate group of addressees including all those persons whose interests are affected by the grant of the aid.

39 Lastly, as regards the overall system and teleology of State aid control, Braesch and Others argue that the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraphs 43, 46 and 47), is irrelevant, since it relates to the condition that the person bringing an action against an act must be directly concerned by that act, for the purposes of the fourth paragraph of Article 263 TFEU, and not to the concept of 'interested party' under Article 1(h) of Regulation 2015/1589. The judgment of 22 September 2020, *Austria* v *Commission* (C-594/18 P, EU:C:2020:742), is not relevant either, since the interpretation of the concept of 'interested party' is not addressed in that judgment. In any event, that judgment confirms that the Commission is entrusted with powers to examine not only the competition-related effects of a measure, but its legality as a whole, and may take into account various non-competition related considerations. Thus, in the decision at issue, the Commission assessed the compatibility of the measures at issue with Directive 2014/59.

40 As regards the arguments that they are affected only economically by the decision at issue and rely only on non-competition related concerns, Braesch and Others submit that those arguments are fallacious. Their legal position is specifically affected by the grant of the aid at issue, since that decision makes the cancellation of their FRESH instruments binding on the Italian Republic and BMPS. In addition, Braesch and Others are the specific target of the burden-sharing measures, which are part of the commitments and constitute, as is apparent from recitals 101 to 110 of the decision at issue, a condition of the compatibility of the aid with the internal market pursuant to the Banking Communication.

41 Therefore, according to Braesch and Others, the General Court did not err in law in finding, for the reasons set out in paragraph 40 of the judgment under appeal, that they could be classified as an 'interested parties' or 'parties concerned' for the purposes of Article 1(h) of Regulation 2015/1589 and Article 108(2) TFEU respectively, on the ground that the State aid measures at issue, as notified and declared compatible with the internal market in the decision at issue, are likely to have a specific effect on their situation.

42 Braesch and Others submit that the cancellation of the FRESH instruments did not result from the adoption by the Italian authorities of Decree-Law 237/2016. That decree-law, which specifically lists the capital instruments of BMPS subject to burden sharing, makes no reference to the FRESH instruments. Moreover, an email sent by BMPS to Braesch and Others on 19 September 2017 shows that the Commission requested that the measures taken by the Italian authorities be applied to the FRESH contracts, which demonstrates that those measures did not apply, under Italian law, to those contracts and would not have been applied to them without the intervention of the Commission, which itself considered that those measures had to be applied pursuant to the restructuring plan made binding by the decision at issue.

43 It is irrelevant in that regard that, if the Italian authorities had decided to restructure BMPS without any State aid, they could nevertheless have imposed the burden-sharing measures, including the cancellation of the FRESH contracts, in order to reduce the capital shortfall of BMPS. The fact remains that BMPS was in fact restructured with State aid and that the decrees setting out the burden-sharing measures were adopted under the visa of the Banking Communication, which confirms the inextricable link between the aid and the burden-sharing measures.

44 The Commission does not explain, in Braesch and Others's view, why the conclusion reached by the General Court in paragraph 40 of the judgment under appeal, according to which the aid measures at issue, as notified and declared compatible with the internal market in the decision at issue, were likely to have a specific effect on the situation of Braesch and Others, is inappropriate in view of the reasons given by the General Court in that judgment.

45 First, according to Braesch and Others, the fact that they do not challenge the compatibility of the aid measures at issue with the internal market does not show that those measures could not have any competition-related effect on their situation, but merely reflects the case-law of the Court of Justice, referred to, inter alia, in the judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex* (C-83/09 P, EU:C:2011:341, paragraph 59), according to which persons have the status of interested parties on the basis of a breach of their procedural rights, without their being required also to invoke issues with respect to the compatibility of the aid with the internal market.

46 Secondly, nowhere in the judgment under appeal is it indicated that any person having any kind of concern about any of the factual assumptions in the notification or in the commitments should qualify as an interested party. The General Court stated, in paragraph 41 of that judgment, that it was the fact that the aid measures at issue, as notified and declared compatible with the internal market in the decision at issue, were likely to have a specific effect on the situation of Braesch and Others that justified their categorisation as 'interested parties'.

47 Thirdly, it is incorrect that the Italian authorities were not obliged to commit to taking the burden-sharing measures envisaged in the Banking Communication and that, therefore, the General Court wrongly stated that those commitments were a precondition for the declaration that the aid granted to BMPS was compatible with the internal market. The Commission itself admits the binding nature of those measures by stating that, if the Member State deviates from the factual assumptions presented to the Commission, it will have implemented a factually different measure than the one approved by the Commission, which will not be covered by the Commission's authorisation. That is line with the conclusion of the Court of Justice in paragraph 100 of the judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570), where it held that while the Member State concerned is not required to impose burden-sharing measures pursuant to the Banking Communication, it is however required to impose those measures in order to ensure that the aid is found compatible with the internal market. In any event, in the present case, those measures, which are part of the commitments given by the Italian authorities, were a precondition for the compatibility of the aid with the internal market, as expressed in recitals 101 to 110 of the decision at issue itself.

48 Fourthly, the argument that the Commission is not in a position to convert the commitments offered by the Member States and the beneficiaries into conditions for the approval of aid has already been rejected by the Court in the judgment of 3 April 2014, *Commission* v *Netherlands*

and ING Groep (C-224/12 P, EU:C:2014:213, paragraphs 80 and 81), in which the Court held that the commitments offered by the Member States may essentially be imposed by the Commission as a condition for finding the aid compatible with the internal market.

Findings of the Court

49 By the present appeal, the Commission complains, in essence, that the General Court erred in law by holding, in paragraphs 35 to 41 and 58 of the judgment under appeal, that Braesch and Others had standing to bring proceedings for the annulment, by their action brought under Article 263 TFEU, of the decision at issue, by which the Commission considered that the aid at issue notified by the Italian Republic under Article 108(3) TFEU constitutes 'State aid', for the purposes of Article 107(1) TFEU, which is compatible with the internal market under Article 107(3)(b) TFEU.

50 Since that decision was addressed to that Member State and not to Braesch and Others, it must be recalled that the fourth paragraph of Article 263 TFEU provides for two situations in which natural or legal persons are accorded standing to institute proceedings against an EU act which is not addressed to them. First, such proceedings may be instituted if the act is of direct and individual concern to those persons. Secondly, such persons may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them (judgment of 30 June 2022, *Danske Slagtermestre* v *Commission*, C-99/21 P, EU:C:2022:510, paragraph 41 and the case-law cited).

51 As regards the question whether the decision at issue is of direct and individual concern to Braesch and Others, within the meaning of that provision, which was the only issue examined by the General Court in the judgment under appeal, it is clear from the settled case-law of the Court of Justice that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed by such a decision (see, inter alia, judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 33).

52 Since the action at first instance concerned a Commission decision concerning State aid, it must also be recalled that, in the context of the procedure for reviewing State aid provided for in Article 108 TFEU, the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the stage of the review under Article 108(2) TFEU. It is only at the latter stage, which is designed to enable the Commission to be fully informed of all the facts of the case, that the TFEU imposes an obligation on the Commission to give the parties concerned notice to submit their comments (see, inter alia, judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 94, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 35).

53 It follows that, as the General Court rightly pointed out in paragraph 59 of the judgment under appeal, where, without initiating the formal investigation procedure under Article 108(2) TFEU, the Commission finds, by a decision taken on the basis of Article 108(3) TFEU, that aid is compatible with the internal market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision

before the EU judicature. For those reasons, an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 108(2) TFEU is to be declared to be admissible where that person seeks, by instituting proceedings, to safeguard the procedural rights available to him or her under the latter provision (see, inter alia, judgments of 19 May 1993, *Cook* v *Commission*, C-198/91, EU:C:1993:197, paragraphs 23 to 26; of 15 June 1993, *Matra* v *Commission*, C-225/91, EU:C:1993:239, paragraphs 17 to 19; and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 36).

54 On the other hand, if the applicant calls into question the merits of a decision appraising the aid taken on the basis of Article 108(3) TFEU or after the formal investigation procedure, the mere fact that it may be regarded as 'concerned' within the meaning of Article 108(2) TFEU cannot suffice to render the action admissible. It must then demonstrate that it has a particular status within the meaning of the case-law referred to in paragraph 51 above. That is the case in particular where the applicant's position on the market concerned is substantially affected by the aid to which the contested decision relates (see, inter alia, judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 95, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 37).

55 In the present case, it is common ground that the decision at issue was adopted at the conclusion of the preliminary examination stage, provided for in Article 108(3) TFEU and referred to in Article 4(3) of Regulation 2015/1589 and, accordingly, the formal investigation procedure provided for in Article 108(2) TFEU and referred to in Article 4(4) of that regulation was not initiated. As the General Court noted in paragraphs 32 and 60 of the judgment under appeal, it is also not disputed that, by their fifth plea in law raised before the General Court with a view to the annulment of that decision, Braesch and Others claimed that their procedural rights under Article 108(2) TFEU and Article 6(1) of that regulation had been infringed.

56 In those circumstances, the General Court was right, in order to determine whether Braesch and Others are directly and individually concerned by the decision at issue, for the purposes of the fourth paragraph of Article 263 TFEU, to examine whether they have the status of 'parties concerned' within the meaning of Article 108(2) TFEU. As is apparent from the case-law referred to in paragraph 53 above, an applicant who has that status satisfies those criteria and is therefore entitled to bring an action for annulment against such a decision in order to safeguard his or her procedural rights.

57 It must be held, however, that the General Court erred in law in paragraphs 37, 40, 41 and 58 of the judgment under appeal in holding that Braesch and Others had that status in the present case.

58 In that regard, it should be noted that the definition of the concept of 'party concerned', as set out in the case-law of the Court of Justice, was codified by the EU legislature in Article 1(h) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), which was succeeded by Article 1(h) of Regulation 2015/1589. The latter provision defines the analogous concept of 'interested party' as 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations' (see, to that effect, judgment of 2 September 2021, *Ja zum Nürburgring* v *Commission*, C-647/19 P, EU:C:2021:666, paragraph 56 and the case-law cited).

59 Although the concept of 'interested party' defined in Article 1(h) of Regulation 2015/1589 thus includes, in particular, competing undertakings of the beneficiary of that aid (see, to that effect, judgments of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission*, C-817/18 P, EU:C:2020:637, paragraph 50, and of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 36), it is nevertheless the case that, as the General Court rightly pointed out in paragraph 35 of the judgment under appeal, that concept covers an indeterminate group of persons (see, to that effect, judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 63, and of 7 April 2022, *Solar Ileias Bompaina* v *Commission*, C-429/20 P, EU:C:2022:282, paragraph 34).

60 Thus, it follows from the case-law of the Court that an undertaking which is not a direct competitor of the beneficiary of the aid may nevertheless be categorised as an 'interested party', within the meaning of Article 1(h) of Regulation 2015/1589, provided that that undertaking demonstrates that its interests could be adversely affected by the grant of the aid, which requires that that undertaking establish, to the requisite legal standard, that the aid is likely to have a specific effect on its situation (see, to that effect, inter alia, judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 64 and 65, and of 7 April 2022, *Solar Ileias Bompaina* v *Commission*, C-429/20 P, EU:C:2022:282, paragraph 35). Therefore, the status of 'interested party' does not necessarily presuppose a competitive relationship (judgment of 2 September 2021, *Ja zum Nürburgring* v *Commission*, C-647/19 P, EU:C:2021:666, paragraph 58).

61 After noting, in essence, that case-law in paragraph 36 of the judgment under appeal, the General Court held, in paragraphs 37 to 41 and 58 of that judgment, that Braesch and Others had demonstrated to the requisite legal standard that the grant of the aid at issue and, therefore, the adoption of the decision at issue 'are likely to have', in the words of paragraphs 37 and 41 of that judgment, and even that they 'have', according to the wording of paragraph 58 of that judgment, a specific effect on their situation, with the result that they must be categorised as 'interested parties' within the meaning of Article 1(h) of Regulation 2015/1589.

62 In order to reach that conclusion, the General Court noted, in paragraph 39 of the judgment under appeal, that, according to Braesch and Others, the part of the decision at issue relating to burden sharing affects their interests in so far as the restructuring plan, as approved by the Commission, provides for the possibility of cancelling the FRESH contracts, which subsequently took place to their detriment, and that, due to the interdependence of the various contractual links underpinning the FRESH instruments, the economic loss that results in the long term, having regard to the loss of coupon payments connected to the FRESH bonds that they hold, is substantial.

63 In that regard, the General Court stated, in paragraph 40 of the judgment under appeal, that it was irrelevant that Braesch and Others do not challenge the compatibility per se of the State aid at issue with the internal market, for the purposes of Article 107(3)(b) TFEU, since the commitments of the Italian authorities relating to the restructuring plan and burden-sharing measures form an integral part of the aid notified, so that the decision at issue concerns that aid and those commitments taken as a whole. According to the General Court, as that aid and the commitments assessed by the Commission are intrinsically linked, in so far as, first, those commitments are a precondition for the declaration of compatibility of the aid measures at issue, and, secondly, the decision at issue authorised the implementation of those aid measures and

made those commitments binding, the situation of Braesch and Others is inevitably affected by all those factors and they can defend their interests only by seeking the annulment of that decision in its entirety.

64 It should be borne in mind that, in accordance with Article 4(3) of that regulation, where the Commission finds, at the conclusion of the preliminary examination stage established in Article 108(3) TFEU, that the notified measure constitutes 'State aid', for the purposes of Article 107(1) TFEU, which does not raise any doubts as to its compatibility with the internal market, it is to adopt a decision not to raise objections, by which it declares that that measure is compatible with the internal market, under Article 107(3) TFEU.

65 In the present case, as is apparent from the judgment under appeal, in particular from paragraphs 8 to 12 and 14 thereof, since the Commission, in the decision at issue, found, at the conclusion of the preliminary examination stage, that the restructuring plan and the commitments submitted by the Italian Republic were apt to restore the long-term viability of BMPS and that the burden sharing by holders of shares and subordinated debt envisaged therein limited the amount of the aid at issue notified by that Member State to the strict minimum, in accordance with the Banking Communication, it concluded that the aid at issue constituted 'State aid', for the purposes of Article 107(1) TFEU, that could be regarded as compatible with the internal market on grounds of financial stability, pursuant to Article 107(3)(b) TFEU.

66 It should be noted at the outset that, by their action at first instance, Braesch and Others, as they confirmed on many occasions at the hearing before the Court and as is already apparent from paragraph 63 above, do not dispute that the aid at issue constitutes 'State aid' or the fact that it is compatible with the internal market, but merely call into question, as is apparent from paragraphs 28 to 32 of the judgment under appeal, whether some of the burden-sharing measures notified by the Italian Republic – which are contained in the restructuring plan described in the decision at issue and reflected in the commitments annexed thereto – are compatible with EU law, in particular, Regulation No 806/2014, the right to property laid down in Article 17 of the Charter and several general principles of EU law.

67 In that regard, it is common ground that the burden-sharing measures referred to in the decision at issue provide – as is apparent from paragraphs 39 and 58 of the judgment under appeal and which has not been challenged by the Commission – for the possibility of cancelling the FRESH contracts concluded between BMPS and JPM for the purpose of converting BMPS's subordinated debt into equity.

68 However, by holding, in paragraphs 37, 40, 41 and 58 of the judgment under appeal, that that impact on the interests of BMPS's subordinated creditors results from the State aid at issue and, therefore, from the decision at issue, on the ground that the burden-sharing measures referred to in that decision form an integral part of the notified aid, in the same way as the restructuring plan and the commitments offered by the Italian authorities, with the result that, by that decision, the Commission rendered those measures binding, the General Court misconstrued the rules of EU law governing the scope of that decision and thereby made an error of law rendering that judgment unlawful.

69 The Court of Justice has indeed held, in essence, that where the notified measure incorporates, upon a proposal from the Member State concerned, commitments to which that State has agreed, those commitments must be held – for the purpose of verifying whether the authorisation to implement that aid measure granted by the Commission at the conclusion of the

preliminary examination stage is still valid in a situation where it is alleged that that Member State has not respected those commitments – to form an integral part of the measure that has been authorised, since they were taken into account by the Commission in its assessment of the compatibility of the State aid at issue with the internal market, with the result that that authorisation is valid only to the extent that those commitments are respected (see, to that effect, judgment of 15 October 2015, *Iglesias Gutiérrez and Rion Bea*, C-352/14 and C-353/14, EU:C:2015:691, paragraph 28).

70 However, it does not follow that such commitments must be regarded as being imposed as such by the Commission and that any adverse effects they may have on third parties are therefore attributable to the decision adopted by that institution.

71 By the decision at issue, adopted at the conclusion of the preliminary examination stage under Article 108(3) TFEU and Article 4(3) of Regulation 2015/1589, the Commission, in order to assess whether the State aid at issue raised doubts as to its compatibility with the internal market, did not impose on the Italian Republic the elements set out in the restructuring plan and the commitments submitted by that Member State, which included, inter alia, the burden-sharing measures in respect of holders of shares and subordinated debt.

72 In that regard, it should be noted, as is already apparent from paragraphs 52 to 54 and 64 above, that, by a decision such as the decision at issue, the Commission cannot impose or prohibit any action by the Member State concerned, but is only entitled to approve, by a decision not to raise objections, the planned aid as notified by that Member State, declaring that aid compatible with the internal market. By contrast, where the Commission has doubts as to the compatibility of the notified aid with the internal market, it is required to initiate the formal investigation procedure provided for in Article 108(2) TFEU and referred to in Article 4(4) of Regulation 2015/1589.

73 Thus, in the present case, it must be held that, by the decision at issue, the Commission merely authorised the Italian Republic to implement the State aid at issue while taking note of the factual framework already defined by that Member State in the restructuring plan and the commitments which it notified under Article 108(3) TFEU, in order to dispel any doubt as to the compatibility of that aid with the internal market, for the purposes of Article 107(3)(b) TFEU.

74 It was therefore for the Italian Republic to ensure that it would be able to fulfil the commitments included in the authorisation granted by that decision. In that respect, it was responsible, inter alia, for satisfying itself that those commitments are consistent with its national law and relevant EU law (see, to that effect, judgment of 15 October 2015, *Iglesias Gutiérrez and Rion Bea*, C-352/14 and C-353/14, EU:C:2015:691, paragraph 29).

75 It follows that the decision at issue must be regarded as a decision taking account of commitments voluntarily given by the Member State concerned during the phase of notification of the State aid at issue (see, to that effect, judgment of 13 June 2013, *Ryanair* v *Commission*, C-287/12 P, not published, EU:C:2013:395, paragraph 67). Even if, as Braesch and Others claim, the Commission induced the Italian authorities to include the FRESH contracts in the proposed measures, the fact remains that that inclusion is related, in any event, to commitments given by the Italian Republic, and not imposed by the Commission in the decision at issue.

76 The Commission therefore correctly submitted, in its appeal and at the hearing before the Court, that a decision declaring State aid compatible with the internal market at the conclusion of the preliminary examination stage, such as the decision at issue, by which the Commission does not

raise objections to that aid, must be distinguished from a 'conditional decision', within the meaning of Article 9(4) of Regulation 2015/1589, adopted following the formal investigation procedure, by which the Commission itself attaches to its decision approving State aid conditions subject to which that aid may be considered compatible with the internal market and obligations to enable it to monitor compliance with that decision (see, to that effect, judgment of 13 June 2013, *Ryanair* v *Commission*, C-287/12 P, not published, EU:C:2013:395, paragraph 67).

77 Therefore, it cannot be considered that the burden-sharing measures notified in the present case by the Italian Republic in the context of the preliminary examination procedure were imposed by the decision at issue itself, since those measures result solely from acts adopted by that Member State.

78 Thus, first, nothing prevented that Member State from notifying a restructuring plan and commitments entailing different measures, at the risk that the Commission might be required, in that case, to initiate the formal investigation procedure laid down in Article 108(2) TFEU and referred to in Article 4(4) of Regulation 2015/1589 (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 43 and 44).

79 Secondly, although the decision at issue authorised the Italian Republic to implement the notified aid, without however compelling it to do so (see, inter alia, judgment of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraphs 52 and 53, and order of 30 May 2018, *Yanchev*, C-481/17, not published, EU:C:2018:352, paragraphs 22 and 23), it does not constitute a legal basis on which BMPS could be prohibited from making coupon payments to the FRESH bondholders, that prohibition being based not on that decision but on Italian law.

80 It follows that, contrary to what was held by the General Court, the burden-sharing measures referred to in the decision at issue were not imposed or rendered binding by the Commission in that decision, but constitute purely national measures notified by the Italian Republic, under Article 108(3) TFEU, under its own responsibility, which were taken into account by the Commission as a factual element in assessing whether the State aid in question could, in the absence of any doubt in that regard, be declared compatible with the internal market at the conclusion of the preliminary examination stage.

81 Accordingly, the annulment of the FRESH contracts, which Braesch and Others claim is liable to cause them, as holders of FRESH bonds, substantial economic damage, cannot be regarded as a binding effect of the decision at issue, since it does not result from the implementation of the aid at issue as such. Rather, it results from measures – which are indeed linked de facto, but which are legally distinct – adopted by the Member State that notified that aid to the Commission. The fact that those measures were, inter alia, adopted by that Member State with a view to obtaining from the Commission a decision authorising that aid and that they are the subject of commitments taken into account in such a decision of the Commission is irrelevant in that regard.

82 That conclusion cannot be called into question by the arguments put forward by Braesch and Others in support of their action.

83 In the first place, as regards their arguments concerning the consequences arising from an infringement of the burden-sharing measures referred to in the decision at issue, it is true that, as is apparent from paragraph 69 above, the authorisation to implement the State aid at issue,

granted by the Commission in that decision, is valid only in so far as all the factors taken into consideration by the Commission in that decision for the purposes of assessing the compatibility of that aid with the internal market are respected.

84 Accordingly, any failure by BMPS to comply with the commitments given by the Italian Republic in relation to burden sharing, such as the payment of coupons to holders of financial instruments covered by those commitments, would give rise to misuse of the aid at issue, for the purposes of Article 108(2) TFEU, read in conjunction with Article 1(g) of Regulation 2015/1589. That aid would, in that situation, be used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) of that regulation, within the meaning of Article 1(g) thereof, since the beneficiary would thus be implementing aid measures different from those approved by the Commission in the decision at issue (see, to that effect, judgment of 7 April 2022, *Autonome Provinz Bozen*, C-102/21 and C-103/21, EU:C:2022:272, paragraph 38).

85 Consequently, the Commission could, in accordance with Article 20 of Regulation 2015/1589, initiate in respect of that aid the formal investigation procedure provided for in Article 108(2) TFEU and referred to in Article 4(4) of that regulation, with a view to requiring the Italian Republic to abolish or alter the misused aid and, where appropriate, order the recovery of the unlawfully paid aid, pursuant to Article 16(1) of that regulation, applicable *mutatis mutandis* to that procedure under Article 20 thereof.

86 Moreover, implemented aid which does not correspond to the aid notified and authorised by the Commission in the decision at issue could also be regarded as 'new aid', within the meaning of Article 1(c) of Regulation 2015/1589, read in conjunction with Article 1(b) thereof, which, having been granted in breach of the last sentence of Article 108(3) TFEU, would constitute 'unlawful aid', within the meaning of Article 1(f) of that regulation, with the result that the national courts could also order its recovery (see, by analogy, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 87 to 89).

87 However, although the Italian Republic could thus be required to recover the aid at issue, that is not because the burden-sharing measures set out in the annex to the decision at issue were imposed by that decision, since, as noted in paragraph 72 above, the Commission does not have such a power in the context of the preliminary examination stage, but rather, as is apparent from paragraphs 84 and 86 above, because that aid would no longer be the same as that entailed by the measures notified by that Member State under Article 108(3) TFEU and would therefore no longer be covered by the authorisation to implement aid granted by the Commission in that decision pursuant to Article 107(3)(b) TFEU.

88 In the second place, as regards the arguments of Braesch and Others based on the Banking Communication, according to which, in essence, that communication makes the compatibility with the internal market of any aid granted to banks in the context of the financial crisis subject to the adoption of burden-sharing measures, it must be noted that, as Braesch and Others rightly observed, and as is apparent from paragraph 12 of the judgment under appeal, the Commission indeed examined, in recitals 101 to 110 of the decision at issue, whether the aid at issue complied with the provisions of that communication, in order to verify that the amount of that aid was limited to the minimum necessary, to reduce distortions of competition in the internal market and to address moral hazard by ensuring that the shareholders and subordinated creditors of BMPS made an appropriate contribution, in compliance with points 40 to 46 of that communication, to the restructuring costs by means of adequate burden-sharing.

89 Since, in the present case, the Italian Republic notified burden-sharing measures with a view to being authorised by the Commission to grant the aid at issue, the Commission was, moreover, required to carry out such an examination.

90 By adopting guidelines, such as those set out in the Banking Communication, in order to establish the criteria on the basis of which it proposes to assess the compatibility, with the internal market, of aid measures envisaged by the Member States and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of the discretion granted to it in that respect by Article 107(3)(b) TFEU and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 39 and 40 and the case-law cited).

91 However, it is nevertheless the case that, as the Court has already held, the fact that State aid provides for a burden-sharing measure which meets the criteria set out in the Banking Communication, in particular point 44 thereof, constitutes a condition that is, as a general rule, sufficient ground for the Commission to declare that aid to be compatible with the internal market, but is not strictly necessary to that end (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 99).

92 By adopting the guidelines contained in the Banking Communication, the Commission only imposed a limit on itself in the exercise of its discretion, meaning that, if a Member State notifies the Commission of proposed State aid which complies with those guidelines, the Commission must, as a general rule, authorise that proposed aid. However, the Member States retain the right to notify the Commission of proposed State aid which does not meet the criteria laid down by that communication and, as set out in point 45 thereof, the Commission may authorise such proposed aid in exceptional circumstances (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 43).

93 The Commission cannot waive, by the adoption of guidelines, the exercise of the discretion that Article 107(3)(b) TFEU confers on it. The adoption of a communication such as the Banking Communication does not therefore relieve the Commission of its obligation to examine the specific exceptional circumstances relied on by a Member State, in a particular case, for the purpose of requesting the direct application of Article 107(3)(b) TFEU, and to provide reasons for its refusal to grant such a request (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 41 and the case-law cited).

94 It follows that the Banking Communication is not capable of imposing independent obligations on the Member States, but does no more than establish conditions, designed to ensure that State aid granted to the banks in the context of the financial crisis is compatible with the internal market, which the Commission must take into account in the exercise of the wide discretion that it enjoys under Article 107(3)(b) TFEU. The Banking Communication is not therefore binding on the Member States and, in particular, cannot require them to adopt burden-sharing measures (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 44, 45 and 70).

95 A Member State is not therefore compelled to impose on banks in distress, prior to the grant of any State aid, an obligation to convert subordinated instruments into equity or to effect a write-down of the principal thereof, or an obligation to ensure that those instruments contribute

fully to the absorption of losses. In such circumstances, it will not however be possible for the State aid envisaged to be regarded as having been limited to the strict minimum necessary, according to point 15 of the Banking Communication, and the Member State, as well as the banks who are to be the recipients of the State aid envisaged, thus run the risk that a Commission decision declaring that aid incompatible with the internal market will be taken against them (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 100).

96 In the third place, as regards Braesch and Others' argument concerning the Commission's obligation to verify that all measures notified by the Italian Republic comply with EU law, it should be borne in mind that, according to settled case-law, the procedure under Article 108 TFEU must never produce a result which is contrary to the specific provisions of the Treaty (judgments of 15 June 1993, *Matra* v *Commission*, C-225/91, EU:C:1993:239, paragraph 41; of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraph 78; and of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 50). Accordingly, State aid which, as such or by reason of some modalities thereof, contravenes provisions or general principles of EU law cannot be declared compatible with the internal market (judgments of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 50, and of 22 September 2020, *Austria* v *Commission*, C-594/18 P, EU:C:2020:742, paragraph 44).

97 Indeed, where the modalities of an aid measure are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately, their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 108 TFEU (see, to that effect, judgments of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraph 14, and of 15 June 1993, *Matra* v *Commission*, C-225/91, EU:C:1993:239, paragraph 41).

98 Thus, the Court has held that State aid for an economic activity in the nuclear energy sector, that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to Article 107(3)(c) TFEU (judgment of 22 September 2020, *Austria* v *Commission*, C-594/18 P, EU:C:2020:742, paragraph 45). The central economic activity at the heart of the project which is financed by aid is indeed inseparable from the object of that aid, meaning that the Commission was required to ensure, in the case which gave rise to that judgment, that the proposed financing of the nuclear power plant at issue did not infringe those rules of EU law.

99 Similarly, in circumstances where, in essence, a Member State had altered the conditions determining the identity of the persons eligible for a pre-existing aid scheme, which had allegedly resulted in a breach of the principle of equal treatment as regards certain economic operators, the Court rejected an argument that such a breach of the principle of equal treatment resulting from that alteration of the scheme could not, in any event, render unlawful the Commission decision approving that scheme, as altered (judgment of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraphs 49 to 52). Indeed, such modalities, which determine the conditions of eligibility for an aid scheme, are also inseparable from the aid as such and are therefore among the factors which the Commission is required to examine and, as the case may be, to approve, with the result that, if such modalities lead to an infringement of general principles of EU law, a decision adopted by the Commission which authorises such a scheme is, in turn, necessarily rendered unlawful.

100 It follows that, in the present case, the Commission could not declare the State aid notified by the Italian Republic to be compatible with the internal market, pursuant to Article 107(3)(b) TFEU, without first ensuring that that aid, and the recapitalisation of BMPS which it was intended to finance, also did not infringe other relevant provisions or general principles of EU law.

101 Thus, it is common ground that, in the decision at issue, as is apparent from recitals 120 to 136 thereof, the Commission verified that the State aid at issue complied with Directive 2014/59 and reached the conclusion, in recital 137 of that decision, that that aid satisfied the conditions set out in Article 32(4)(d) of that directive, including its approval under Articles 107 and 108 TFEU, that must be met in order that the forms of extraordinary public financial support to a credit institution or to an investment firm, that are referred to in that Article 32(4)(d) and which are intended to remedy a serious disturbance in the economy of a Member State and preserve financial stability, should not trigger a resolution procedure.

102 In the context of that analysis, the Commission verified inter alia, in recital 132 of the decision at issue, but also in recitals 101 to 110 thereof, that the burden-sharing measures provided for in the restructuring plan were adequate for the purpose of limiting the amount of aid granted to the strict minimum necessary to achieve the objective of recapitalising BMPS.

103 However, the Commission was not required to verify whether that burden-sharing decided by the Italian Republic itself infringed the rights which Braesch and Others claim to derive from EU law or national law. Such an infringement, even if it were established, would not arise from the aid as such, its object or its indissociable modalities, but rather, as is apparent from paragraph 81 above, from the measures taken by that Member State in order to obtain from the Commission a decision authorising that aid at the conclusion of the preliminary examination stage.

104 In those circumstances, if a third party considers itself to be affected by measures adopted by the authorities of a Member State in the context of the restructuring of an undertaking, the fact that those measures form part of a restructuring plan requiring the payment of State aid and that, consequently, that Member State notifies that aid to the Commission in order to seek the approval of that aid at the conclusion of the preliminary examination stage does not confer on that third party the status of 'interested party' within the meaning of Article 1(h) of Regulation 2015/1589, in the context of the procedure conducted by that institution under Article 108 TFEU. In such a case, if that third party considers that, as a result of the adoption of such measures, the Member State concerned has infringed EU law, it must challenge the legality of those measures before the national court, which has sole jurisdiction in that regard and which has the power, or even the obligation, if it rules at last instance, to make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU, if necessary, in order to question it as to the interpretation or validity of the relevant provisions of EU law.

105 In the present case, as noted in paragraph 66 above, Braesch and Others do not claim to be affected by the aid at issue, nor, moreover, do they dispute that it constitutes 'State aid' within the meaning of Article 107(1) TFEU or that it is compatible with the internal market under Article 107(3)(b) TFEU; rather, they claim to be adversely affected by the burden-sharing measures referred to in the decision at issue, the compliance of which with EU law – which forms the subject matter of the pleas put forward in support of their action at first instance – raises, according to them, serious doubts which should have led the Commission to initiate the formal investigation procedure.

106 However, as is apparent from paragraphs 69 to 80 above, those burden-sharing measures are purely national measures which were notified by the Italian Republic, under its own responsibility, and which were thus not imposed by the Commission and are accordingly legally distinct from the aid at issue, the Commission having taken them into account only as a factual element for the purposes of adopting the decision at issue. It is, therefore, as follows from paragraph 104 above, exclusively for the competent national courts to review the legality of those measures in the light of the relevant national and EU law.

107 In that regard, it should be noted that if a national court, having been called upon to rule on the lawfulness of the burden-sharing measures at issue, were to annul those measures in whole or in part on the ground that they are unlawful, its ruling would not run counter to the decision at issue, since that decision does not impose those measures and did not assess their conformity with EU law.

108 If the referring court were to reach the conclusion, in the light of the interpretation of EU law given by the Court following a possible reference for a preliminary ruling under Article 267 TFEU, that the burden-sharing measures at issue are, in whole or in part, unlawful, it would be for the Italian Republic, if that unlawfulness meant that it was no longer able to fulfil all the commitments undertaken vis-à-vis the Commission by implementing the aid notified in accordance with the authorisation granted by the decision at issue, to notify new measures to the Commission under Article 108(3) TFEU, at the risk of being required, as is clear from paragraphs 84 to 86 above, to recover the aid already granted on the basis of that decision.

109 It follows that, first, contrary to what Braesch and Others submitted at the hearing before the Court of Justice, they are in no way deprived of the right to an effective judicial remedy guaranteed in the first paragraph of Article 47 of the Charter and, secondly, the General Court was wrong to hold, in paragraph 40 of the judgment under appeal, that Braesch and Others could defend their interests only by seeking the annulment of the decision at issue before the EU judicature.

110 It follows from all the foregoing considerations that the judgment under appeal is vitiated by an error of law in that the General Court held, in paragraphs 37, 40, 41 and 58 of that judgment, that Braesch and Others must be categorised as ‘interested parties’ within the meaning of Article 1(h) of Regulation 2015/1589.

111 Accordingly, the single ground raised by the Commission in its appeal must be upheld.

112 Consequently, the judgment under appeal must be set aside.

The action before the General Court

113 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

114 That is the case, in the present case, as regards the plea of inadmissibility raised by the Commission during the proceedings before the General Court, in so far as the Commission claims that Braesch and Others lack standing, for the purposes of the fourth paragraph of Article 263 TFEU, to seek annulment of the decision at issue.

115 As a preliminary point, it should be noted that, as the Commission rightly submits in that plea, the decision at issue, which is addressed to the Italian Republic, does not constitute a regulatory act under the second limb of the fourth paragraph of Article 263 TFEU, since it is not an act of general application (judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 92 and the case-law cited).

116 In those circumstances, it is necessary only to examine, in accordance with the case-law referred to in paragraph 50 above, whether, as the Commission submits in its plea of inadmissibility, Braesch and Others cannot be regarded as being directly and individually concerned by that decision, for the purposes of the first limb of the fourth paragraph of Article 263 TFEU.

117 In the first place, in so far as Braesch and Others seek, by their fifth plea in law, to safeguard their procedural rights under Article 108(2) TFEU and Article 6(1) of Regulation 2015/1589, it should be noted that, for the reasons set out in paragraphs 64 to 110 above, they do not have the status of 'parties concerned' or of 'interested parties' within the meaning of Article 108(2) TFEU and Article 1(h) of that regulation respectively, with the result that they cannot, to that end, be regarded as directly and individually concerned by that decision, within the meaning of the first limb of the fourth paragraph of Article 263 TFEU.

118 It follows that Braesch and Others do not have standing to bring proceedings, for the purposes of the fourth paragraph of Article 263 TFEU, in order to safeguard their procedural rights under Article 108(2) TFEU and Article 6(1) of Regulation 2015/1589.

119 In the second place, in so far as Braesch and Others seek, by their first four pleas in law, to call into question the merits of the decision at issue, it must be borne in mind that, in accordance with the case-law arising from the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17), referred to in paragraphs 51 and 54 above, those parties could, in such a case, claim to be individually concerned by that decision, within the meaning of the first limb of the fourth paragraph of Article 263 TFEU, only if that decision affected them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguished them individually just as in the case of the person addressed by such a decision, which would be the case, inter alia, if their position on the market were substantially affected by the aid which is the subject of the decision at issue.

120 In the present case, however, it is common ground that Braesch and Others do not claim that the decision at issue has any impact on their competitive position on the market, but merely claim, in essence, first, that they sent the Commission a letter setting out their concerns as regards the negative impact of that decision on their situation and, secondly, that that decision refers to the usufruct contract related to the FRESH instruments, as mentioned in paragraph 2 of the judgment under appeal, when it describes, in recital 32 thereof and in footnote 35, which pertains to that recital, the burden-sharing measures provided for in the restructuring plan that concerned the subordinated creditors of BMPS.

121 Those circumstances in no way show that Braesch and Others are in a factual situation which distinguishes them individually just as in the case of the addressee, since they are affected by the burden-sharing measures referred to in the decision at issue in their capacity as holders of financial instruments in the same way as all other holders of instruments affected by those measures. It is irrelevant in that regard, contrary to what Braesch and Others submitted, inter alia, at the hearing before the Court, that, unlike those other financial instruments, the FRESH instruments are not expressly referred to in Decree-Law 237/2016.

122 In addition, it should be emphasised that, in accordance with the Court's case-law, the mere fact, even if it were established, that Braesch and Others played an active role in the preliminary examination stage conducted by the Commission would not be sufficient to justify their categorisation as being individually concerned by the decision at issue in the absence of proof that their position on the market was substantially affected by the aid which is the subject of that decision (see, to that effect, judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 38 and the case-law cited).

123 It follows that Braesch and Others are not individually concerned by the decision at issue within the meaning of the case-law referred to in paragraphs 51 and 54 above.

124 Having regard to the cumulative nature of the conditions laid down in the first limb of the fourth paragraph of Article 263 TFEU, according to which a person must be both directly and individually concerned by the act whose annulment is sought, the consequence, if one of those conditions is not met by an applicant, is that an action brought by that applicant for annulment of that act must be held to be inadmissible (see, to that effect, judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 76, and of 4 December 2019, *Polskie Górnictwo Naftowe i Gazownictwo* v *Commission*, C-342/18 P, not published, EU:C:2019:1043, paragraph 37).

125 It follows that Braesch and Others also have no standing to challenge the merits of the decision at issue.

126 Consequently, the plea of inadmissibility raised by the Commission at first instance must be upheld in so far as the Commission claims that Braesch and Others lack standing, for the purposes of the fourth paragraph of Article 263 TFEU, to seek annulment of the decision at issue.

127 The action at first instance must therefore be dismissed as inadmissible.

Costs

128 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

129 In accordance with Article 138(1) of the Rules of Procedure, applicable to the procedure on appeal pursuant to Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

130 In the present case, since Braesch and Others have been unsuccessful and the Commission has applied for costs, Braesch and Others must be ordered to pay the costs relating to the proceedings before the General Court and the present appeal.

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

1. **Sets aside the judgment of the General Court of the European Union of 24 February 2021, *Braesch and Others* v *Commission* (T-161/18, EU:T:2021:102);**

2. **Dismisses as inadmissible the action brought at first instance by Mr Anthony Braesch, Trinity Investments DAC, Bybrook Capital Master Fund LP, Bybrook Capital Hazelton Master Fund LP and Bybrook Capital Badminton Fund LP seeking the annulment of Commission Decision C(2017) 4690 final of 4 July 2017 on State Aid SA.47677 (2017/N) – Italy – New aid and amended restructuring plan of Banca Monte dei Paschi di Siena;**

3. **Orders Mr Braesch, Trinity Investments DAC, Bybrook Capital Master Fund LP, Bybrook Capital Hazelton Master Fund LP and Bybrook Capital Badminton Fund LP to bear their own costs and to pay those incurred by the European Commission in relation to both the proceedings at first instance and those on appeal.**

Lenaerts	Bay Larsen	Arabadjiev
Regan	Safjan	Xuereb
Gratsias	Arastey Sahún	Biltgen
Jarukaitis	Jääskinen	Wahl
Ziemele	Passer	Gavalec

Delivered in open court in Luxembourg on 31 January 2023.

A. Calot Escobar	K. Lenaerts
Registrar	President