Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

24 February 2021 *

(Action for annulment – State aid – Aid for the precautionary restructuring of Banca Monte dei Paschi di Siena – Preliminary examination stage – Decision declaring the aid compatible with the internal market – Plea of inadmissibility – Status as an interested party – Interest in bringing proceedings – *Locus standi* – Admissibility)

In Case T-161/18,

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 M. Siragusa, A. Champsaur, G. Faella and L. Prosperetti, lawyers,

applicants,

v

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

defendant,

APPLICATION pursuant to Article 263 TFEU for 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 GENERAL COURT (Third Chamber, Extended Composition),

composed of A.M. Collins, President, V. Kreuschitz, Z. Csehi, G. De Baere (Rapporteur) and G. Steinfatt, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 9 July 2020,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 The first-named applicant, 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 DAC, Bybrook Capital Master Fund LP, Bybrook Capital Hazelton Master Fund LP and Bybrook Capital Badminton Fund LP, are holders of such bonds.

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 the applicants 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 European Commission approved restructuring aid granted by the Italian Republic to the Italian bank BMPS on the basis of a restructuring plan and certain commitments. In June 2015, BMPS repaid the aid in its entirety.

4 On 29 July 2016, the European Banking Authority (EBA) published the results of the 2016 Europe-wide stress test, which revealed that BMPS had a capital shortfall in the adverse scenario.

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.

6 By decision of 29 December 2016, following a statement on 23 December 2016 by the European Central Bank (ECB) that BMPS was solvent, the Commission temporarily approved EUR 15 billion of individual liquidity aid to BMPS, on the basis of the 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 aid was repaid within that period.

7 On 30 December 2016, following an unsuccessful attempt by BMPS to raise new private capital, it requested extraordinary public financial support in the form of a precautionary recapitalisation under Decree-Law 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 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 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 contested decision'), 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 above. 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 above.

11 After finding that measures 1 and 2 constituted State aid, the Commission stated that the legal basis on which their compatibility 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 Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (OJ 2009 C 195, p. 9), the Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ 2011 C 356, p. 7) and 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).

12 As regards the compatibility of the aid measures in the light of the 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/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). 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 contested decision, 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.

Procedure and forms of order sought

15 By application lodged at the Court Registry on 5 March 2018, the applicants brought the present action.

16 By separate document lodged at the Court Registry on 16 May 2018, the Commission raised a plea of inadmissibility under Article 130 of the Rules of Procedure of the General Court. On 10 July 2018 the applicants submitted their observations on that plea.

17 By decision of 8 October 2018, the President of the Eighth Chamber of the General Court decided, pursuant to Article 69(d) of the Rules of Procedure, to stay the proceedings in the present case pending the final decision of the Court of Justice in Case C-544/17 P, *BPC Lux 2 and Others* v *Commission*.

18 On 30 January 2019, by way of a measure of organisation of procedure under Article 89 of the Rules of Procedure, the General Court invited the parties to submit observations on the consequences to be drawn in the present case from the judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission* (C-544/17 P, EU:C:2018:880), and to answer questions and asked the Commission to produce a non-confidential version of the BMPS restructuring plan. The Commission and the applicants lodged their responses on 7 and 8 March 2019, respectively.

19 Following a change in the composition of the Chambers of the General Court pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Third Chamber, to which the present case was accordingly allocated.

20 Acting on a proposal from the Third Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

21 On 3 February 2020, by way of a measure of organisation of procedure under Article 89 of the Rules of Procedure, the Court directed the parties to answer questions. The Commission and the applicants lodged their responses on 14 and 19 February 2020, respectively.

22 Acting on a proposal from the Judge-Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure under Article 89 of the Rules of Procedure, put written questions to the parties, requesting them to answer those questions at the hearing.

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

24 The applicants claim that the Court should:

– annul the contested decision;

– in the alternative, annul the contested decision in so far as it concerns the treatment of the FRESH instruments;

– order the Commission to pay the costs;

– take any other measures it considers appropriate, including measures of organisation of procedure under Article 89(3) and/or measures of inquiry under Article 91(b) of the Rules of Procedure.

25 The Commission contends that the Court should:

– dismiss the action as inadmissible;

– order the applicants to pay the costs.

26 In their observations on the plea of inadmissibility, the applicants claim that the Court should reject the plea of inadmissibility raised by the Commission.

Law

27 In support of their action, the applicants raise five pleas in law.

28 By their first plea, the applicants claim that the Commission unlawfully endorsed burden-sharing measures in the context of the precautionary recapitalisation. They allege infringement of Articles 18 and 21 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) and a failure to state reasons.

29 By their second plea, the applicants claim that the Commission unlawfully required the cancellation of the FRESH contracts. In this regard, they maintain that the Commission approved burden-sharing measures that went beyond and were incompatible with the banking communication, and thus infringed the fundamental principles of protection of legitimate expectations and equal treatment. They also argue that the contested decision is vitiated by a failure to state reasons, as the Commission did not provide any reasons or explanation for the cancellation of the FRESH contracts.

30 By their third plea, the applicants claim that the contested decision discriminates against the FRESH bondholders. They submit that the contested decision is unlawful in so far as it endorses burden-sharing measures provided for by the restructuring plan in breach of the principle of equal treatment protected under Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, and Article 14 and Protocol No 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, in that they treat FRESH bondholders in a discriminatory way as compared to other creditors of BMPS.

31 By their fourth plea, the applicants claim that by endorsing the application of burden-sharing measures to the FRESH instruments, the Commission infringed the property rights of the FRESH bondholders, as enshrined in Article 17 of the Charter of Fundamental Rights and Article 1 of Protocol No 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

32 By their fifth plea, the applicants argue that the Commission infringed Article 108(2) and (3) TFEU, Article 4(3) and (4) 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), and their procedural rights, in failing to open the formal investigation procedure notwithstanding that there were ‘serious doubts’ about the compatibility of the burden-sharing measures with EU law.

33 Under Article 130(1) and (7) of the Rules of Procedure, on the application of the defendant, the Court may decide on inadmissibility or lack of competence without going to the substance of the case. In the present case, in its plea of inadmissibility, the Commission submits that the action is inadmissible on the grounds that, first, the applicants do not have an interest in bringing proceedings and, second, they do not have standing to bring proceedings for the purposes of Article 263 TFEU.

34 The Court considers it necessary to assess at the outset whether the applicants are ‘parties concerned’ within the meaning of Article 108(2) TFEU or ‘interested parties’ within the meaning of Article 1(h) of Regulation 2015/1589, given that, in the present case, that status determines whether they have an interest in bringing, and standing to bring, an action for annulment of the contested decision as a decision not to raise objections pursuant to Article 4(3) of that regulation.

The status of the applicants as interested parties

35 Article 1(h) of Regulation 2015/1589 defines 'interested party', synonymous with that of 'party concerned' within the meaning of Article 108(2) TFEU, as, inter alia, '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'. The use of the expression 'in particular' establishes that that provision contains merely a non-exhaustive list of persons that could be categorised as 'interested parties', with the result that that term covers an indeterminate group of persons (see, to that effect, judgments of 14 November 1984, *Intermills* v *Commission*, 323/82, EU:C:1984:345, paragraph 16; of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 63, and of 13 June 2019, *Copebi*, C-505/18, EU:C:2019:500, paragraph 34).

36 Having regard to that definition, the EU Courts have interpreted 'interested party' broadly. Thus, it is apparent from the case-law that Article 1(h) of Regulation 2015/1589 does not rule out that an undertaking, which is not a direct competitor of the beneficiary of the aid, can be considered to be an interested party, provided that it demonstrates that its interests could be adversely affected by the grant of the aid, and that, for that purpose, it is sufficient that that undertaking establishes, to the requisite legal standard, that the aid is likely to have a specific effect on its situation (see, to that effect, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 63 to 65 and the case-law cited). Similarly, a trade union can be categorised as 'concerned' within the meaning of Article 108(2) TFEU if it shows that its interests or those of its members might be affected by the granting of aid, provided that that trade union shows, to the requisite legal standard, that the aid is likely to have a specific effect on its situation or that of the members it represents (see, to that effect, judgment of 9 July 2009, *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraph 33).

37 In the present case, the applicants have shown, to the requisite legal standard, that the grant of the aid measures at issue and, therefore, the adoption of the contested decision, are likely to have 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.

38 The applicants submit that the annulment of the contested decision and the opening of the formal investigation procedure would enable them to submit their observations as interested parties, exercising their procedural rights under Article 108(2) TFEU, in order to ensure that the Commission carries out a more in-depth examination of the burden-sharing measures provided for in the restructuring plan and the commitments offered by the Italian authorities in that regard. According to the applicants, the opening of the formal investigation procedure is likely to lead to different burden-sharing methods that are compatible with EU law.

39 More specifically, the applicants submit that the part of the contested decision 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. At the hearing, the applicants specified in that regard, in essence, 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, even amounting to several hundred million euro.

40 It follows that the applicants have shown that all the aid measures at issue, as notified and declared compatible with the internal market in the contested decision, are likely to have a specific effect on their situation within the meaning of the case-law cited in paragraph 36 above. In that regard, it is irrelevant that the applicants do not challenge the compatibility per se of those measures with the internal market, as recognised in that decision. The commitments of the Italian authorities relating to the restructuring plan and burden sharing form an integral part of the aid measures notified, so that that decision concerns those measures and those commitments taken as a whole (see, to that effect and by analogy, order of 1 December 2015, *Banco Espírito Santo* v *Commission*, T-814/14, not

published, EU:T:2015:936, paragraph 31 and the case-law cited, and judgment of 19 September 2019, *FIH Holding and FIH* v *Commission*, T-386/14 RENV, not published, EU:T:2019:623, paragraph 52). As 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, and the contested decision authorised the implementation of those aid measures and made those commitments binding, the applicants' situation is inevitably affected by all those factors and they can defend their interests only by seeking the annulment of that decision in its entirety.

41 It follows that the aid measures at issue, as notified and declared compatible with the internal market in the contested decision, are likely to have a specific effect on the applicants' situation, which justifies their categorisation as 'interested parties'.

42 It is in the light of those considerations that it must be assessed whether the applicants have an interest in bringing, and standing to bring, proceedings for the purposes of the fourth paragraph of Article 263 TFEU.

Interest in bringing proceedings

43 The Commission submits that the applicants do not have an interest in bringing an action for annulment of the contested decision, adopted pursuant to Article 4(3) of Regulation 2015/1589, declaring compatible the State aid granted to BMPS on the basis of commitments given voluntarily by the Italian authorities. In its response to a written question put by the Court concerning the inferences to be drawn from the judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission* (C-544/17 P, EU:C:2018:880), the Commission stated, in essence, that the applicants must show that they have an interest in bringing proceedings on the basis of national litigation brought against the burden-sharing measures implemented by the Italian authorities and BMPS in the context of the State aid granted to the latter. However, the applicants have not explained how annulment of the contested decision would have 'evident positive implications' for the proceedings they have brought before the Luxembourg courts, and thus have not established that they have an interest in bringing the present proceedings.

44 The applicants dispute the Commission's arguments.

45 An action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. Such an interest requires that the annulment of that measure must be capable, in itself, of having legal consequences and that the action, if successful, may procure an advantage for the party which has brought that action. Moreover, that interest must be vested and present and is to be assessed as at the date on which the action is brought (see judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraphs 28 and 29 and the case-law cited).

46 It is for an applicant to prove its interest in bringing proceedings, which is an essential and fundamental prerequisite for any legal proceedings. In particular, in order for an action seeking annulment of a measure, submitted by a natural or legal person, to be admissible, the applicant must justify in a relevant manner its interest in the annulment of that measure (see judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraphs 33 and 34 and the case-law cited).

47 Moreover, an interest in bringing proceedings could arise from any action before the national courts in the context of which the possible annulment of the contested measure before the EU Courts is capable of benefiting the applicant (see judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraph 44 and the case-law cited).

48 Last, it is not for the EU Courts, for the purposes of determining an interest in bringing proceedings before them, to assess the likelihood that an action brought before national courts under national law is well founded and, therefore, to substitute themselves for those courts in making such an assessment. It is, by contrast, necessary, but sufficient, that, by its outcome, the action for annulment brought before the EU Courts would be capable of benefiting the party which brought it (see judgment of 7 November 2018, *BPC Lux 2 and Others* v *Commission*, C-544/17 P, EU:C:2018:880, paragraph 56 and the case-law cited).

49 In support of their interest in bringing proceedings, the applicants submit, in essence, that, first, the annulment of the contested decision would remove the obligation of the Italian authorities to ensure compliance with the burden-sharing measures. Second, the restructuring plan, on the basis of which that decision was adopted, would cease to be binding on BMPS, which would allow the applicants, as FRESH bondholders, to obtain reinstatement of their rights or compensation. Third, the annulment of the contested decision would lead to the opening of the formal investigation procedure during which it would be possible for them to exercise their procedural rights by submitting observations; the Italian authorities or BMPS would then be able to amend the burden-sharing measures in order to ensure their compliance with EU law, and the Commission would be able to impose different and less onerous conditions and obligations than the burden-sharing measures which it took into account. Last, according to the applicants, if the Court were to recognise that BMPS has unlawfully deprived them of their rights, it would strengthen their position in the civil proceedings against BMPS before the tribunal d'arrondissement de Luxembourg (District Court of Luxembourg) brought by Mr Braesch, as representative of the FRESH bondholders, against BMPS, MUFJ, JPM and the company governed by American law JP Morgan Chase Bank, seeking a declaration that the termination of the FRESH contracts and, in particular, the company swap agreement, is unlawful.

50 In that regard, the applicants submit, in particular, that the decision of BMPS to terminate the FRESH contracts, challenged before the Luxembourg court, is inextricably linked to the contested decision. BMPS allegedly maintains that the restructuring plan is based on the principle that the FRESH contracts must be terminated and the Commission's assessment in the contested decision that the burden sharing is sufficient is based on the termination by BMPS of the FRESH contracts. They infer that, if the contested decision were annulled, the Luxembourg court would be in a position to reinstate the FRESH contracts.

51 It is clear that, as interested parties within the meaning of Article 1(h) of Regulation 2015/1589, the applicants have an interest in bringing an action for annulment of the contested decision, the content of which cannot be separated from the commitments of the Italian authorities relating to the BMPS restructuring plan, including the burden-sharing measures (see paragraphs 37 to 41 above). That interest in bringing proceedings stems, inter alia, from the fact that, following such annulment, the Commission would be led to open the formal investigation procedure, in the context of which they could exercise their procedural rights under Article 108(2) TFEU in order to affect that institution's assessment pursuant to Article 107(3)(b) TFEU and therefore the content of its decision. The applicants, in the context of their fifth plea, rely on an infringement of those procedural safeguards, observance of which they can obtain only if it is possible for them to bring a challenge before the EU Courts against the contested decision (see, to that effect and by analogy, judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 47 and the case-law cited, and of 20 June 2019, *a&o hostel and hotel Berlin* v *Commission*, T-578/17, not published, EU:T:2019:437, paragraph 41). That is all the more so since, in the present case, the Commission, after a long pre-notification phase including many exchanges with the Italian authorities and the notification of the measures at issue, limited itself on 28 June 2017 to a preliminary examination of only six days before adopting the contested decision on 4 July 2017, without the interested parties having had the opportunity to submit their comments.

52 Moreover, it cannot be ruled out that the annulment of the contested decision is capable of affecting the ongoing litigation before, in particular, the Luxembourg court. In that context, by way of a measure of organisation of procedure, the Court requested the parties to state whether the cancellation of the FRESH contracts arose from BMPS's restructuring plan. In its response, the Commission submitted that the cancellation of those contracts arose from the restructuring plan in conjunction with Decree-Law 237/2016 and that the Italian authorities and BMPS worked closely together when drafting that plan, which formed part of the commitments offered by the Italian authorities during the examination of the aid measures by the Commission. By contrast, in their response to that question, the applicants stated that that restructuring plan assumed expressly that the FRESH contracts were ineffective and unenforceable.

53 In that regard, it is sufficient to note that the Commission's assessment in the contested decision is based on an examination of the compatibility of the restructuring aid to BMPS on the basis of the restructuring plan, the content and implementation of which are closely connected to the commitments offered by the Italian authorities in their entirety, as annexed to that decision (see paragraphs 39 to 41 above). In those circumstances, it is not for the EU Courts to substitute their assessment for that of the national courts, or to rule whether the action brought before them is well founded in the light of the national legislation applicable, having regard to the cessation of the legal effects of the contested decision if it is annulled (see the case-law cited in paragraph 48 above).

54 Therefore, the applicants have shown to the requisite legal standard that the potential annulment of the contested decision is capable of benefiting them.

55 Consequently, the Commission is incorrect in submitting that the applicants have not demonstrated an interest in bringing an action, for the purposes of the fourth paragraph of Article 263 TFEU, for annulment of the contested decision.

Standing to bring proceedings

56 The Commission submits that the applicants do not have standing to bring proceedings. It argues, inter alia, that, by their fifth plea, the applicants challenge the contested decision in so far as the formal investigation procedure was not opened, and that they must show that they are 'interested parties' within the meaning of Article 1(h) of Regulation 2015/1589. It maintains, however, that the applicants are not the beneficiaries of the aid measures at issue, that their status as bondholders is not sufficient to categorise them as interested parties, and that there is no indication that they could be competitors of the beneficiary.

57 The applicants dispute the Commission's arguments.

58 It is sufficient to recall the findings set out in paragraphs 35 to 41 above in order to reject the Commission's main argument that the applicants have not shown that they are 'interested parties'. The Commission therefore argued unsuccessfully, at the hearing, in the light of the judgment of 19 December 2019, *BPC Lux and Others* v *Commission* (T-812/14 RENV, not published, EU:T:2019:885), that the contested decision produced only effects on the applicants' economic situation and indirect effects on their legal situation, on the ground, inter alia, that JPM alone had a contractual relationship with BMPS, was its creditor and had concluded a separate contract with MUFJ, which concluded another contract with the applicants that are FRESH bondholders. The same applies to its argument that the cancellation of the FRESH contracts arose from Decree-Law 237/2016 and was provided for by the restructuring plan. In any event, it follows from the findings set out in paragraphs 37 to 41 above that the applicants correctly submit that the aid measures at issue have a specific effect on their situation, which justifies their categorisation as 'interested parties'.

59 In addition, in the present case, it is clear that the contested decision constitutes a decision not to raise objections, adopted on the basis of Article 4(3) of Regulation 2015/1589, the lawfulness of which depends on whether there are doubts as to the compatibility of the aid with the internal market. Since such doubts must trigger the opening of a formal investigation procedure in which the interested parties referred to in Article 1(h) of Regulation 2015/1589 can participate, it must be held that any interested party within the meaning of the latter provision is directly and individually concerned by such a decision. If the beneficiaries of the procedural safeguards provided for in Article 108(2) TFEU and Article 6(1) of Regulation 2015/1589 are to be able to ensure that those safeguards are observed, it must be possible for them to bring a challenge before the EU Courts against the decision not to raise objections. Consequently, the specific status of 'interested party' within the meaning of Article 1(h) of Regulation 2015/1589, in conjunction with the specific subject matter of the action, is sufficient to distinguish individually, for the purposes of the fourth paragraph of Article 263 TFEU, the applicant contesting a decision not to raise objections (see, to that effect, judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 47 and 48 and the case-law cited; of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraphs 43 and 44 and the case-law cited, and of 20 June 2019, *a&o hostel and hotel Berlin* v *Commission*, T-578/17, not published, EU:T:2019:437, paragraph 41).

60 Moreover, it should be borne in mind that, by their fifth plea, the applicants submit that the Commission infringed Article 108(2) and (3) TFEU, Article 4(3) and (4) of Regulation 2015/1589 and their procedural rights, notwithstanding that there were 'serious doubts' about the compatibility of the burden-sharing measures with EU law, which should have led the Commission to open a formal investigation procedure, having regard, in particular, to the allegations made by the applicants against the Commission in their first four pleas, namely infringement of Directive 2014/59 by approving the cancellation of the FRESH contracts and making that cancellation binding, infringement of Regulation No 806/2014 and of the banking communication, and breach of the general principles of equal treatment, non-discrimination, proportionality and protection of legitimate expectations.

61 It is settled case-law that, when an applicant seeks annulment of a decision adopted pursuant to Article 4(3) of Regulation 2015/1589, it essentially contests the fact that the decision has been adopted without that institution having opened a formal investigation procedure, alleging that the Commission thereby acted in breach of the applicant's procedural rights. In support of such an action, the applicant may invoke any plea to show that the assessment of the information and evidence which the Commission had or might have had at its disposal during the preliminary examination stage should have given rise to serious difficulties in determining the existence of State aid or raised doubts as to the compatibility of such aid with the internal market, without having the consequence of changing the subject matter of the action or altering the conditions of its admissibility. On the contrary, according to that case-law, the existence of such difficulties is precisely the evidence which must be adduced in order to show that the Commission was required to open the formal investigation procedure under Article 108(2) TFEU and Article 6(1) of Regulation 2015/1589 (see, to that effect and by analogy, judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 59 and the case-law cited, and of 20 June 2019, *a&o hostel and hotel Berlin* v *Commission*, T-578/17, not published, EU:T:2019:437, paragraphs 45 and 46).

62 In that regard, it should be highlighted that, similarly to what has been stated previously in the case-law (see, to that effect, judgments of 10 December 2008, *Kronoply and Kronotex* v *Commission*, T-388/02, not published, EU:T:2008:556, paragraph 85, and of 20 June 2019, *a&o hostel and hotel Berlin* v *Commission*, T-578/17, not published, EU:T:2019:437, paragraph 44), in paragraph 141 of the application the applicants maintain expressly that their first four pleas show that the Commission should at the very least have entertained serious doubts about the compatibility of the burden-sharing measures with EU law. As the present case concerns an action challenging the lawfulness of a decision adopted pursuant to Article 4(3) of Regulation 2015/1589, without the formal procedure having been opened, it will be appropriate to examine, when assessing the substance of the action, all of the complaints and arguments raised by the applicants in the context of their pleas, in order to assess

whether those pleas make it possible to identify serious difficulties concerning the compatibility of the aid measures at issue, on account of which, if present, the Commission should have been required to open that procedure (see, to that effect, judgment of 20 June 2019, *a&o hostel and hotel Berlin* v *Commission*, T-578/17, not published, EU:T:2019:437, paragraphs 45, 46 and 49 and the case-law cited).

63 It must therefore be found that the approval of the aid measures in the light of the restructuring plan in the contested decision is of direct and individual concern to the applicants as 'interested parties' within the meaning of Article 1(h) of Regulation 2015/1589.

64 The applicants therefore have standing to bring proceedings.

65 It follows from all the foregoing that the plea of inadmissibility must be rejected.

Costs

66 Under Article 133 of the Rules of Procedure, a decision as to costs is to be given in the judgment or order which closes the proceedings. As the present judgment does not close the proceedings, the costs must be reserved.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. Rejects the plea of inadmissibility;

2. Reserves the costs.

Collins Kreuschitz Csehi

De Baere Steinfatt

Delivered in open court in Luxembourg on 24 February 2021.

E. Coulon
Registrar

S. Papasavvas
President