Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

10 December 2020*

(Appeal – State aid – Air transport sector – Ground handling services at Milan-Linate and Milan-Malpensa airports (Italy) – Injections of capital by the company managing those airports into its wholly owned subsidiary providing those services – Public ownership of the managing company – Decision declaring those State aid measures unlawful and incompatible with the internal market – Article 107(1) TFEU – Concepts of 'State resources', 'measure imputable to the State' and 'economic advantage' – Private operator principle – Private investor test – Burden of proof – Complex economic assessments – Intensity of judicial review – Distortion of evidence)

In Case C-160/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 22 February 2019,

Comune di Milano (Italy), represented by A. Mandarano, E. Barbagiovanni, S. Grassani and L. Picciano, avvocati,

appellant,

the other party to the proceedings being:

European Commission, represented by D. Recchia, G. Conte and D. Grespan, acting as Agents,

defendant at first instance,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as a judge of the Second Chamber, M. Ilešič, A. Kumin and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 4 June 2020,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,

* Language of the case: Italian.

gives the following

Judgment

1 By its appeal, the Comune di Milano (City of Milan, Italy) seeks to have set aside the judgment of the General Court of the European Union of 13 December 2018, *Comune di Milano* v *Commission* (T-167/13,, EU:T:2018:940; 'the judgment under appeal'), by which the General Court dismissed its action seeking annulment of Commission Decision (EU) 2015/1225 of 19 December 2012 regarding injections of capital by SEA SpA into SEA Handling SpA (Case SA.21420 (C 14/10) (ex NN 25/10) (ex CP 175/06)) (OJ 2015 L 201, p. 1; 'the decision at issue').

Background to the dispute

2 SEA SpA is the company which manages Milan-Linate and Milan-Malpensa airports (Italy). Between 2002 and 2010 ('the period at issue'), its capital was held almost exclusively by public authorities, that is to say 84.56% by the City of Milan, 14.56% by the Provincia di Milano (Province of Milan, Italy) and 0.88% by other public and private shareholders. In December 2011, F2i – Fondi Italiani per le infrastrutture SGR SpA acquired, on behalf of two funds managed by it, 44.31% of SEA's capital, consisting of part of the capital held by the City of Milan (29.75%) and all of the capital held by the Province of Milan (14.56%).

3 Until 1 June 2002, SEA itself provided the ground handling services at Milan-Linate and Milan-Malpensa airports. Following the entry into force of the decreto legislativo n. 18 – Attuazione della direttiva 96/67/CE relativa al libero accesso al mercato dei servizi di assistenza a terra negli aeroporti della Comunità (Legislative Decree No 18 implementing Directive 96/67/EC on access to the groundhandling market at Community airports) of 13 January 1999 (Ordinary Supplement to GURI No 28 of 4 February 1999), in accordance with the obligation laid down in Article 4(1) of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36), SEA separated, in accounting and legal terms, its ground handling activities from its other activities. To that end, it set up a new company, wholly controlled by it and named SEA Handling SpA, which was charged with providing ground handling services at Milan-Linate and Milan-Malpensa airports from 1 June 2002.

4 On 26 March 2002, the administration of the City of Milan, SEA and trade union organisations concluded an agreement ('the trade union agreement of 26 March 2002') which stipulated as follows:

'The administration of the City of Milan … confirms …

– that SEA will continue to hold a majority share in the ground handling services company for at least five years,

– that SEA is obliged to inform the trade union organisations about any partners and to submit the business plan and the structure of the company for their consideration … The agreement which SEA concludes with the trade union organisations will enter into force after the presentation and negotiation with the trade unions of the abovementioned plan,

– that the mobility plan agreed must lay down a solution for workers who may be surplus to requirements, by ruling out any collective redundancy procedures and obliging SEA to make provision for refresher training, retraining, a severance package or retirement support measures for the personnel concerned,

– that, in connection with the transfer to the new company, employees will have their acquired rights preserved and be guaranteed employment for the next five years,

– that the cost/revenue balance and the general economic framework will be maintained by SEA and any partners, by maintaining management capabilities and significantly improving the ability to operate on national and international markets,

– that it will put the case to the competent ministries and the airport authorities for the adoption of directives to guarantee employment in the event that ground handling activities are transferred to the competitive market, inter alia to meet the commitments made by airport management in relation to security and reliability, commitments which must also concern personnel charged with ground handling activities.

Finally, the municipal administration and the trade union organisations will monitor the present agreement by periodically evaluating the stages of its implementation at meetings planned for that purpose.'

5 Those commitments were confirmed by agreements concluded between SEA and the trade unions, inter alia on 4 April 2002 and 19 June 2003, which expressly restated the content of the agreement of 26 March 2002.

6 In the course of the period at issue, SEA Handling received subsidies from SEA in the form of injections of capital of a total of EUR 359 644 million ('the measures at issue'). Those subsidies were intended to cover SEA Handling's operating losses, which amounted, for that period, to a total of EUR 339 784 million, that is around EUR 43 639 million (2002), EUR 49 489 million (2003), EUR 47 962 million (2004), EUR 42 430 million (2005), EUR 44 150 million (2006), EUR 59 724 million (2007), EUR 52 387 million (2008), EUR 29.7 million (2009) and EUR 13.4 million (2010).

7 Thus, by way of the measures at issue, SEA Handling successively received from SEA EUR 39 965 million (2002), EUR 49 132 million (2003), EUR 55 236 million (2004), EUR 40 229 million (2005), EUR 60 439 million (2006), EUR 41 559 million (2007), EUR 25 271 million (2008) and EUR 47 810 million (2009).

8 By letter of 13 July 2006, the European Commission received a complaint relating to alleged State aid measures granted to SEA Handling.

9 By letter of 23 June 2010, the Commission notified the Italian authorities of its decision to initiate the formal investigation procedure provided for in Article 108(2) TFEU.

10 On 19 December 2012, the Commission adopted the decision at issue. In recital 191 of that decision, it took the view that the resources used to cover SEA Handling's losses were of public origin because they came from SEA, 99.12% of whose capital was held, during the period under investigation, by the City of Milan and the Province of Milan.

11 In recitals 192 to 217 of that decision, the Commission concluded that the measures at issue were imputable to the Italian State, on the basis of a set of five indicators consisting, first, of the trade union agreements mentioned in paragraphs 4 and 5 of the present judgment and other documents, secondly, the particular dependency of SEA's management on the City of Milan, thirdly, the existence of blank resignation letters submitted by SEA's directors to the City of Milan, fourthly, the importance of the operation of Milan-Malpensa and Milan-Linate airports in the City of Milan's policies and, fifthly, the fact that the increases in capital were exceptional measures, which had to be approved by SEA's general meeting. In particular, the Commission deduced from those indicators that there was a single strategy and that the Italian public authorities were continuously involved, the effect of which was, in the Commission's view, that it was not required to analyse individually each of the measures.

12 In recitals 219 to 315 of that decision, the Commission considered the private investor test in the light of the evidence provided by the Italian authorities, SEA and SEA Handling, relating to (1) a multiannual strategy of coverage of losses, (2) the injections of capital which took place in 2002, (3) the context at the time of the adoption of the decisions on those injections of capital, (4) the alternatives to the coverage of losses, (5) the SEA group's choice of the commercial model of itself providing the services offered by SEA Handling, (6) the restructuring of SEA Handling and the objectives pursued in that respect by SEA, (7) the successive economic performances of SEA Handling and (8) the comparison of those performances with those of other operators. At the end of that examination, the Commission concluded that that test was not satisfied in relation to any of the measures at issue.

13 In the operative part of the decision at issue, the Commission found, inter alia, that the injections of capital made by SEA into SEA Handling for each of the financial years in the period at issue constituted State aid, within the meaning of Article 107 TFEU (Article 1), and that that State aid was granted contrary to Article 108(3) TFEU and was incompatible with the internal market (Article 2). Consequently, it ordered the Italian Republic to recover that aid from the beneficiary (Article 3(1)).

Procedure before the General Court and the judgment under appeal

14 By application lodged at the Registry of the General Court on 18 March 2013, the City of Milan brought an action seeking, principally, annulment of the decision at issue and, in the alternative, annulment of Articles 3 to 5 of that decision.

15 In support of the action, the City of Milan raised four pleas in law, the first and second of which alleged infringements of Article 107(1) TFEU inasmuch as the Commission, on the one hand, wrongly found that there was a transfer of State resources and that the measures at issue were imputable to the Italian State and, on the other, misapplied the private investor test.

16 By the judgment under appeal, the General Court dismissed the action and ordered the City of Milan to pay the costs.

Forms of order sought

17 The City of Milan claims that the Court should both set aside the judgment under appeal and annul the decision at issue and order the Commission to pay the costs.

18 The Commission contends that the Court should dismiss the appeal and order the City of Milan to pay the costs.

The appeal

19 The City of Milan puts forward four grounds in support of its appeal, the first and fourth of which allege infringements of Article 107(1) TFEU, inasmuch as the General Court, on the one hand, wrongly found that there was a transfer of State resources and concluded that the measures at issue were imputable to the City of Milan and, on the other, misapplied the private investor test. By the second and third grounds of appeal, also relating to the imputability of the measures at issue to the City of Milan, it argues that the General Court wrongly applied the principles of the burden of proof and distorted facts and evidence.

First ground of appeal, relating to the concept of State aid

First part of the first ground of appeal, relating to the concept of State resources

– Arguments of the parties

20 The City of Milan argues that the General Court erred in law when it relied, in paragraphs 65 and 66 of the judgment under appeal, on its majority shareholding in SEA and the presumption of a dominant influence, within the meaning of Article 2(b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, p. 17), without verifying whether the Commission had proved that that influence in fact existed, or even that SEA's resources were managed to its advantage.

21 First of all, the fact that the members of SEA's board of directors and audit board were nominated by the majority shareholder in no way proves, in view of the rules of the applicable Italian corporate law, that SEA's financial resources were constantly under the control of the public authorities.

22 Next, the legal basis for the adoption of Directive 2006/111 was Article 106 TFEU and not Article 107 TFEU, so that that directive's reasoning is not relevant for the assessment of the concepts contained in the latter provision.

23 Finally, according to the case-law, the requirement that there be constant public control of the resources is satisfied only if the resources concerned are constantly available to the public authorities, based on concrete evidence, which is not the situation in the present case. The Court thus held in its judgment of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671), that the mere fact that the State holds the majority of the capital in undertakings does not lead to the conclusion that the State exercises a dominant influence that enables it to direct the use of the resources of those undertakings. It is necessary, in addition, to provide evidence of instructions from the State related to the management of the resources used for the grant of the aid.

24 The Commission maintains that the General Court ruled *ultra petita* when, in the judgment under appeal, it analysed whether there was a transfer of State resources, even though, at first instance, the City of Milan had not advanced any arguments contesting the classification of

SEA's resources as State resources, as is apparent from paragraphs 55 to 58 and 64 of the judgment under appeal. Therefore, the City of Milan cannot be permitted to contest, in the context of the present appeal, the analysis by the General Court of a plea in law which had not been raised at first instance. The Commission also contests the City of Milan's arguments on the substance.

– ***Findings of the Court***

25 With regard to the admissibility of the first part of the first ground of appeal, it is true, as the Commission points out, that the General Court examined whether SEA's resources which were transferred to SEA Handling were State resources without the City of Milan's having raised any specific arguments before it in that regard, which the General Court furthermore emphasised in paragraph 64 of the judgment under appeal.

26 However, as the Advocate General observed in point 25 of her Opinion, it is clear from the application at first instance that the City of Milan disputed, by the arguments advanced as part of its first plea in law, both the imputability of the measures at issue and that the resources used were State resources. It follows that the General Court did not, through the findings which appear in paragraphs 65 and 66 of the judgment under appeal, rule *ultra petita*, so that the Commission's arguments relating to the inadmissibility of the first part of the first ground of appeal must be rejected.

27 As regards the merits of that part, it should be recalled at the outset that, according to the settled case-law of the Court, classification of a measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgment of 19 December 2019, *Arriva Italia and Others*, C-385/18, EU:C:2019:1121, paragraph 31 and the case-law cited).

28 Therefore, for it to be possible to classify advantages as State aid within the meaning of Article 107(1) TFEU, first, in accordance with the first of those conditions, they must be granted directly or indirectly through State resources and, secondly, that grant must be attributable to the State (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 14 and the case-law cited).

29 As regards, more specifically, the condition which requires that the advantage be granted directly or indirectly through State resources, according to settled case-law, the definition of 'aid' is more general than that of a 'subsidy' because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 15 and the case-law cited).

30 In that connection, the Court has already held that Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent

national authorities, is sufficient for them to be categorised as State resources (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 16 and the case-law cited).

31 As far as specifically concerns public undertakings, such as SEA, the Court has also held that the State is able, by exercising its dominant influence over such undertakings, to direct the use of their resources in order, as occasion arises, to finance specific advantages in favour of other undertakings (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 17 and the case-law cited).

32 In that regard, an undertaking which is almost wholly owned by public authorities and the members of whose administrative board are, moreover, appointed by those authorities must be regarded as a public undertaking under the control of the State, as those public authorities are able, directly or indirectly, to exercise a dominant influence over such an undertaking (see, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 33 and 34).

33 Similarly, the provision of guarantees by an undertaking which is wholly owned by a municipality involves the commitment of State resources, given that those guarantees carry a sufficiently real economic risk capable of resulting in costs for that undertaking (see, to that effect, judgment of 17 September 2014, *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraph 30).

34 Moreover, where the State is perfectly capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order, as the occasion arises, to finance specific advantages in favour of other undertakings, the fact that the resources concerned may be administered by entities that are distinct from the public authorities or that the source of those resources may be private is of no significance (judgment of 9 November 2017, *Commission* v *TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraphs 47 and 48).

35 In this case, it follows from that case-law that, in paragraphs 65 and 66 of the judgment under appeal, the General Court was able to infer, without erring in law, from the fact that the shares in SEA were almost entirely and directly held by public authorities, including the City of Milan, and that the City of Milan appointed the members of SEA's board of directors and audit board either directly, or through its majority at the general meeting of that company, that the funds granted by that company to SEA Handling must be classified as State resources.

36 Contrary to what the City of Milan claims, that finding is not invalidated either by the reference, which appears in paragraph 65 of the judgment under appeal, to Article 2(b) of Directive 2006/111 or by the guidance provided in the judgment of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671).

37 On the one hand, even if the reference to Directive 2006/111 were not relevant in the present case, the factors mentioned in paragraph 35 of the present judgment would be sufficient to support the General Court's conclusion concerning the involvement of State resources.

38 On the other hand, as the Advocate General observed in points 33 and 34 of her Opinion, it follows from paragraphs 27 and 31 to 35 of the judgment of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671), that the circumstances which gave rise to that judgment are distinguishable from those in the present proceedings. At issue, in that judgment, was an obligation to purchase green electricity which applied equally, under a legislative measure of the

Member State concerned, both to electricity suppliers whose capital was predominantly held by the State and to those whose capital was predominantly held by private operators. Thus, any advantage conferred by that intervention on the part of the Member State concerned as legislator did not arise from the powers of control which the State was entitled to exercise as majority shareholder in the public undertakings concerned and, therefore, could not be classified, in the circumstances mentioned in paragraphs 32 to 35 of that judgment, as funded through State resources.

39 In the light of the foregoing considerations, the first part of the first ground of appeal must be rejected as unfounded.

Second part of the first ground of appeal, relating to the imputability of the measures at issue

– Arguments of the parties

40 The City of Milan argues that the General Court infringed Article 107(1) TFEU when it took the view, in paragraph 80 of the judgment under appeal, that, in order to show involvement on the part of the City of Milan in the grant of the measures at issue, it was necessary to establish not positive proof of its involvement in the adoption of the measures, but merely the unlikelihood of its not being involved.

41 In that regard, the City of Milan maintains that, in order to avoid the excessive inclusion of measures in the concept of State aid, the Court has added to the imputability criterion of organisational links the stricter criterion of the active involvement of the State in the adoption of the measures concerned, which involvement must be identifiable and display a sufficiently strong, concrete causal link with each of the measures taken. It is thus necessary to show that all the measures were taken at the State's initiative or indeed that it was involved in the conception of such a measure, that it actually exercised its power of control and that it had a decisive influence on each of the decisions taken.

42 However, that was not shown in the present case, given that the General Court made use of the criterion of the unlikelihood of non-involvement, with the result that it made a manifest error in formulating the standard of proof as regards imputability.

43 The Commission points out, at the outset, that the City of Milan criticises only paragraph 80 of the judgment under appeal, which merely repeats the case-law principles relating to the concept of imputability set out in paragraph 75 of that judgment, so that that part is partly inadmissible or ineffective. In any event, the General Court did not rely on an incorrect notion of imputability or make use of negative presumptions or apply an incorrect standard of proof.

– Findings of the Court

44 At the outset, it is necessary to reject the Commission's arguments alleging that the second part of the first ground of appeal is inadmissible, as the City of Milan clearly contested the legal principles on which the General Court relied to impute SEA's conduct to the City of Milan. In that regard, it is not relevant, as such, whether the General Court referred to those principles at several points in the judgment under appeal.

45 As to the substance, it was recalled, in paragraph 28 of the present judgment, that, for it to be possible to classify advantages as State aid within the meaning of Article 107(1) TFEU, first, in accordance with the first of the conditions set down in that provision, they must be granted directly or indirectly through State resources and, secondly, that grant must be attributable to the State.

46 As regards, more specifically, the condition which requires that a measure providing advantages, taken by a public undertaking, be imputable to the State, it should be noted that imputability may not be inferred from the mere fact that the advantages have been provided by a public undertaking controlled by the State. Even if the State is in a position to control a public undertaking and to exercise a decisive influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures (see, to that effect, judgment of 17 September 2014, *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraph 31 and the case-law cited).

47 On that point, it cannot be demanded that it should be demonstrated, on the basis of a precise inquiry, that in this particular case the public authorities specifically incited the public undertaking to take the aid measures concerned. The imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken (judgments of 17 September 2014, *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraph 32 and the case-law cited, and of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 18 and the case-law cited).

48 Specifically, any indication, in the particular case, either, on the one hand, of the involvement of the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains, or, on the other hand, the absence of those authorities' involvement in the adoption of that measure is relevant (judgment of 17 September 2014, *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraph 33 and the case-law cited).

49 Similarly, the mere fact that a public undertaking has been constituted in the form of a capital company under ordinary law cannot, having regard to the autonomy which that legal form is capable of conferring upon it, be regarded as sufficient to exclude the possibility of an aid measure taken by such a company being imputable to the State. The existence of a situation of control and the real possibilities of exercising a dominant influence, which that situation involves in practice, make it impossible to exclude from the outset any imputability to the State of a measure taken by such a company, and hence the risk of an infringement of the Treaty rules on State aid, notwithstanding the relevance, as such, of the legal form of the public undertaking as one indicator, amongst others, enabling it to be determined in a given case whether or not the State is involved (judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraph 20 and the case-law cited).

50 In this case, it must be found that the General Court, when it verified in paragraphs 80 to 88 of the judgment under appeal, whether the indicators invoked by the Commission in recitals 195 to 200 of the decision at issue supported a presumption that the City of Milan had been involved in the adoption of the measures at issue, applied the principles identified by the Court in its case-law recalled in paragraphs 46 to 49 of the present judgment.

51 On the one hand, it is apparent, inter alia, from those principles that, contrary to what the City of Milan claims, it was neither for the Commission to demonstrate nor for the General Court to satisfy itself that the public authorities had specifically incited the public undertaking to take the measures at issue.

52 On the other hand, it is not necessary to rule on whether, according to the case-law recalled in paragraph 48 of the present judgment, the Commission was entitled to rely exclusively on indications, in the particular case, of the unlikelihood of the public authorities' not being involved. As the Advocate General observed in points 38 to 44 of her Opinion, the City of Milan's line of argument is based on an incorrect reading of the judgment under appeal, according to which the General Court accepted that the Commission was entitled to base its finding as to the imputability of the measures at issue exclusively on the unlikelihood of the City of Milan's not being involved in their adoption.

53 First of all, in paragraphs 80 to 83 of the judgment under appeal, the General Court found, first, that the terms of the trade union agreement of 26 March 2002 created a clear and precise obligation on SEA to cover the losses of SEA Handling, at least for a period of five years. Secondly, it took the view that, by signing that agreement, the City of Milan had formally given its approval, including in its capacity as SEA's majority shareholder, not only in respect of the establishment of that obligation but also to its subsequent observance and implementation by SEA. Thirdly, on that basis it concluded that the City of Milan's active participation in the negotiation and conclusion of that agreement was key evidence of the Italian authorities' involvement in the grant of the measures at issue.

54 Next, in paragraphs 84 to 87 of the judgment under appeal, the General Court attributed, in its assessment of the facts, positive probative value to the minutes of the meetings of the board of directors of SEA Handling, the fact that the mayor of Milan had called for and secured the resignation of the chairman of SEA's board of directors in 2006 and the existence of blank letters of resignation which the members of the board of directors had submitted to the mayor.

55 Finally, in paragraph 88 of the judgment under appeal, the General Court upheld the view adopted by the Commission in recital 210 of the contested decision that the measures at issue were 'important decisions', from which the Commission inter alia inferred, in the same paragraph, that it was unlikely that the City of Milan was not involved in their adoption.

56 Therefore, it is clear from paragraphs 80 to 88 of the judgment under appeal that the General Court found that there were positive indicators which showed, in the particular case, that the City of Milan was involved in the adoption of those measures, and that it is on the basis of those positive indicators that the General Court accepted that the Commission was also entitled to rely on the unlikelihood of the City of Milan's not being involved in the adoption, at least, of some of the measures at issue in the period which followed the conclusion of the trade union agreement of 26 March 2002.

57 In the light of the foregoing considerations, the second part and, therefore, the first ground of appeal in its entirety must be rejected as unfounded.

Second ground of appeal, relating to the principles of the burden of proof

First part of the second ground of appeal, relating to the allegedly unequal burden of proof

– Arguments of the parties

58 The City of Milan maintains that the General Court failed to carry out a careful examination of the evidence put forward by the City of Milan, when, in paragraphs 89 to 94 of the judgment under appeal, the General Court summarily, and by merely revisiting the text of the recitals in the decision at issue, rejected the evidence produced as insufficient to refute the unlikelihood of the City of Milan's not being involved in the measures at issue.

59 By doing so, the General Court allowed the Commission to rely on evidence of the negative, of the unlikelihood of non-involvement, whilst it required the City of Milan to provide positive and certain evidence of non-involvement, the effect of which was to subject it to a *probatio diabolica*.

60 That is evidenced, inter alia, by paragraph 82 of the judgment under appeal, in which the General Court rejected the City of Milan's argument that it was involved in the conclusion of the trade union agreement of 26 March 2002 only as a political mediator, whereas that had been established by ad hoc statements under oath by the trade union representatives. In addition to the fact that it did not accord any value to those statements, the General Court held that it was not relevant that the signature on that agreement was that of the deputy mayor responsible for personnel and labour, and not that of the deputy mayor responsible for the budget.

61 The Commission takes the view that the City of Milan's arguments are inadmissible as the City of Milan is asking the Court of Justice to reassess the facts. In any event, the General Court did not make it impossible to prove the absence of imputability or apply an unequal burden of proof, but diligently assessed both the indicators of imputability and the indicators of non-imputability.

– Findings of the Court

62 Inasmuch as the City of Milan claims that the General Court based the finding of imputability in respect of the measures at issue exclusively on the unlikelihood of its not being involved in their adoption, it has already been pointed out, in paragraphs 52 and 56 of the present judgment, that that line of argument is based on an incorrect reading of the judgment under appeal, as the General Court found, in paragraphs 80 to 88 of the judgment under appeal, that there were positive indicators which specifically showed that the City of Milan was involved in the adoption of the measures at issue.

63 Moreover, as the Advocate General observed in point 48 of her Opinion, the General Court dealt in the same way, in the light of the principles developed in the case-law, with the indicators invoked by the City of Milan which, it argued, suggested that it was not involved in the adoption of those measures.

64 Thus, for each of the indicators put forward by the Commission or the City of Milan, the General Court examined the factors positively and negatively affecting their probative value and those relating to the importance to be accorded to them. It follows that the General Court examined in a fair manner the arguments and evidence put forward by the parties and it reached its conclusion following a detailed analysis of all of the elements submitted.

65 Consequently, as the Advocate General observed in point 49 of her Opinion, the rejection by the General Court of the City of Milan's arguments is due, contrary to what the City of Milan claims, neither to the imposition by the General Court of an obligation to provide positive and certain evidence of its not being involved in the adoption of the measures at issue, nor to the application by the General Court of an unequal burden of proof, but to the assessment by the General Court of the probative value of each of the indicators put forward.

66 Finally, inasmuch as the City of Milan seeks to call into question, by the arguments summarised in paragraph 60 of the present judgment, that assessment by the General Court, it must be regarded, as the Commission correctly argues, as seeking to obtain a reassessment of the facts, which falls outside the jurisdiction of the Court of Justice (see, to that effect, judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 97).

67 It follows that the first part of the second ground of appeal must be rejected as partly inadmissible and partly unfounded.

Second part of the second ground of appeal, relating to the subject of the evidence to be adduced

– Arguments of the parties

68 The City of Milan is of the opinion that the General Court erred in law when it took the view, in paragraphs 73 and 83 of the judgment under appeal, that the Commission was entitled to consider that its proven active involvement in the conclusion of the trade union agreement of 26 March 2002 was sufficient, as such, to justify its being regarded as having been involved in the grant of the measures at issue, which should be regarded as a single intervention.

69 According to the case-law, the Commission was obliged to show the imputability of each of the recapitalisation measures taken over the period at issue, inasmuch as those various measures were entirely distinct from one another. Whilst the Court has accepted that several consecutive measures of State intervention may be regarded as a single intervention, that is on the condition that those measures, having regard to their chronology, their purpose and the circumstances of the undertaking, are so closely related to each other that they are inseparable from one another. In addition, the General Court was wrong to extend to the imputability of a measure that case-law relating to the State resources criterion and the private operator test.

70 In that regard, the City of Milan, first of all, indicated to the General Court that the alleged indicators of imputability were few in number, of unsatisfactory quality and not directly linked to the measures at issue. Next, it is not correct to assert that the Italian authorities and SEA had admitted that there was a multiannual strategy of covering SEA Handling's losses during the period required for its restructuring, as the assertions at issue referred only to a strategy of reorganising SEA Handling. Finally, the recapitalisations always took place in contexts which were in no way coherent.

71 The Commission argues in response that it would be contrary to the terms and logic of the case-law of the Court, relating to the conditions required for several consecutive measures of State intervention to be regarded as a single intervention, to limit that case-law to the State resources criterion and the private operator test alone. Moreover, the City of Milan is merely asking the Court to reassess the facts, which is inadmissible at the appeal stage.

– Findings of the Court

72 According to settled case-law, since State interventions take various forms and have to be assessed in relation to their effects, it cannot be excluded that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. That could be the case, in particular, when consecutive interventions, having regard, inter alia, to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely related to each other that they are inseparable from one another (judgments of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 97 and the case-law cited, and of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 33 and the case-law cited).

73 Inasmuch as that case-law covers, for the purposes of Article 107(1) TFEU, State interventions as such and means that they must be assessed objectively in relation to their effects, it cannot apply exclusively to some of the criteria set down in that provision. Consequently, as the Advocate General observed in point 54 of her Opinion, that case-law can also apply to the criterion that such interventions be imputable to the State.

74 It follows that, contrary to what the City of Milan claims, the General Court did not err in law when it referred, in paragraph 71 of the judgment under appeal, to that case-law and, subsequently, applied it in its analysis of the imputability to the City of Milan of the measures at issue.

75 Moreover, as the Commission correctly argues, the City of Milan is merely asking, through the arguments summarised in paragraph 70 of the present judgment, for a reassessment of the facts, in comparison with that carried out by the General Court in paragraphs 72 to 73 of the judgment under appeal, which, as is apparent from the case-law cited in paragraph 66 of the present judgment, is not admissible at the appeal stage.

76 Consequently, the second part of the second ground of appeal and, therefore, that ground of appeal in its entirety must be rejected as partly inadmissible and partly unfounded.

Third ground of appeal, alleging distortion of evidence

Arguments of the parties

77 The City of Milan claims that the General Court distorted the trade union agreement of 26 March 2002 when it found, in paragraph 77 of the judgment under appeal, that that agreement provided for a clear and precise obligation on SEA to maintain, for a minimum period of five years, the cost/revenue balance and the general economic framework of SEA Handling and inferred from this that, under that obligation, SEA was required to cover any losses of SEA Handling liable to affect the continuation of its economic activity.

78 The City of Milan explains, in that regard, that that agreement did not impose any obligations on SEA to recapitalise SEA Handling, since it makes no mention of losses, recapitalisations or even SEA's commitments should such events occur. Consequently, the General Court, in the light of the later recapitalisations, read that agreement retroactively and therefore failed to place itself in

the context of the conclusion of that agreement. Under the terms of that agreement, SEA Handling was set up in order to make it possible to compete in the other Italian airports and therefore with a view to a positive, growth scenario.

79 The City of Milan adds that, whilst it 'confirmed', in a clause of the trade union agreement of 26 March 2002, that 'the cost/revenue balance and the general economic framework' of SEA Handling would be maintained, such clause appears between that relating to the reduction of headcount and that concerning the expansion of SEA Handling's activities into other markets, which measures were supposed to make it possible to avoid recapitalisations. Moreover, that agreement refers to the possible acquisition by shareholders of a stake in SEA Handling, so as to strengthen its positive prospects. Finally, it is asserted in that agreement that SEA Handling's management capabilities would be maintained with a view to further improving its ability to compete effectively on national and international markets.

80 It follows that the City of Milan did not, in the trade union agreement of 26 March 2002, make any material or legal commitments related to recapitalisations.

81 The Commission takes the view that the City of Milan is merely contesting, under the guise of an alleged distortion, the assessment carried out by the General Court of the indicators of the imputability to the City of Milan of SEA's conduct, which renders that line of argument inadmissible. In any event, that line of argument is entirely unfounded.

Findings of the Court

82 It follows from the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts (judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 97 and the case-law cited).

83 Therefore, the appraisal of the facts by the General Court does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 98 and the case-law cited).

84 Where an appellant alleges distortion of the evidence by the General Court, he or she must, pursuant to Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of its Rules of Procedure, indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in his or her view, led to such distortion. In addition, according to the Court of Justice's settled case-law, that distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and the evidence (judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 99 and the case-law cited).

85 In this case, the General Court pointed out, in paragraph 77 of the judgment under appeal, that SEA assumed, under the trade union agreement of 26 March 2002, a clear and precise obligation to maintain, for a minimum period of five years, 'the cost/revenue balance and the general economic framework' of SEA Handling, 'by maintaining [its] management capabilities and significantly improving [its] ability to operate on national and international markets'.

86 Therefore, it must be found that the terms of the trade union agreement of 26 March 2002 permit the reading adopted by the General Court in paragraph 77 of the judgment under appeal, according to which SEA was required, under that obligation, to cover any losses of SEA Handling liable to affect the continuation of its economic activity. That reading is furthermore supported, as the General Court found in the same paragraph, by the later trade union agreements referred to in paragraph 5 of the present judgment, so that the alleged distortion is not, in any event, obvious from the documents in the Court's file.

87 Moreover, it is sufficient to point out, as the Commission correctly argues and as the Advocate General observed in points 65 to 68 of her Opinion, that the City of Milan is merely contesting, under the guise of an alleged distortion of that agreement, the General Court's assessment of that piece of evidence when it maintains that the General Court failed to place itself in the context of the conclusion of that agreement.

88 Therefore, the third ground of appeal must be rejected as partly inadmissible and partly unfounded.

Fourth ground of appeal, relating to the private investor test

Arguments of the parties

89 The City of Milan invokes an incorrect classification of the facts by the General Court in paragraphs 97, 107 and 108 of the judgment under appeal, through which the General Court misapplied the private investor test.

90 First, it asserts that, as was shown in the context of the second ground of appeal, neither the trade union agreement of 26 March 2002 nor any other document supports the conclusion that there was a strategy of the coverage by SEA of the losses of SEA Handling.

91 Secondly, according to the City of Milan, to apply the private investor test, the General Court did not place itself in the context of SEA's particular situation at the time, which was distinguishable from that of a generic private investor since SEA held an exclusive concession for the management of Milan's airports until 2041 and was therefore a low-risk operation, with the prospect of its investments' being profitable over the very long term.

92 The City of Milan maintains that the error made by the General Court lies in the importance which it attached to the absence of contemporaneous economic studies demonstrating a careful examination of the profitability of the recapitalisations of SEA Handling and of the time for a return to be achieved on those investments, based on a cost-benefit analysis. That is apparent, inter alia, from paragraph 114 of the judgment under appeal, in which the General Court wrongly refused to accept the relevance of an economic study provided by the City of Milan purely because it had been prepared after the adoption of the measures at issue.

93 The City of Milan asserts that the case-law requires not that the evidence relating to the economic rationality of a measure be contemporaneous with the adoption of that measure, but that the assessment of that measure against that criterion be made in the context of its adoption, so that it is the perspective adopted in the economic study which must be *ex ante* and not the economic study as such. It would be absurd to require, as the General Court did, a private undertaking to provide, as a condition *sine qua non* of being able successfully to rely on the private investor test, a document corroborating its forecasts.

94 In that regard, the City of Milan recalls that, in 2002, SEA Handling's prospects were good and a series of exogenous and unforeseeable events which occurred subsequently delayed the process of its reorganisation. Thus, SEA did not need, for each recapitalisation, to carry out further specific assessments of their profitability and nor was it obliged by national law to justify in writing, with the help of third-party economists, the rationality of its interventions. In particular, as SEA Handling's difficulty was linked, essentially, to the cost of labour, there was no reason to commission economic studies.

95 Thirdly, according to the City of Milan, the General Court was wrong to take the view that the complex economic assessments carried out by the Commission are subject to only limited review by the EU Courts. According to the case-law, it is incumbent on them, inter alia, to carry out an in-depth and complete review of the facts and law, covering, inter alia, the Commission's interpretation of economic data.

96 Fourthly, the City of Milan claims that the General Court placed the burden of proof in respect of the private investor test on the City of Milan, as the Commission, for its part, did not demonstrate anything in that regard. As it admitted before the General Court, the Commission did not carry out any studies of the airport support services market or any economic studies relating to that test or any analyses of the economic performance of other, comparable operators. Similarly, nor did it indicate the measures which SEA should have taken under that test.

97 Contrary to what the case-law requires, the Commission, in the absence of evidence capable of positively establishing its existence, assumed that SEA Handling was given an advantage, by relying on a negative presumption, based on the absence of information allowing the opposite conclusion to be reached. Therefore, by failing to verify whether the Commission had taken into account, in its assessment, all the relevant evidence, the General Court made errors of law.

98 The Commission contests the merits of the arguments advanced by the City of Milan.

Findings of the Court

99 In the first place, it must be pointed out that the City of Milan's line of argument which is summarised in paragraph 90 of the present judgment merely repeats that advanced in the context of the second ground of appeal, so that, for the same reasons as set out in paragraph 75 of the present judgment, it cannot succeed.

100 In the second place, as regards the line of argument summarised in paragraph 95 of the present judgment, relating to the judicial review which is incumbent on the General Court, it is settled case-law that the examination which it falls to the Commission to carry out, when applying the private operator principle, requires a complex economic assessment and that, in the context of a review by the Courts of the European Union of complex economic assessments made by the

Commission in the field of State aid, it is not for those Courts to substitute their own economic assessment for that of the Commission (judgment of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 39).

101 Consequently, the General Court did not vitiate the judgment under appeal through an error of law when it limited itself to verifying whether the Commission's economic assessments relating to the application of the private investor test were vitiated by a manifest error of assessment.

102 Contrary to what the City of Milan claims, no other conclusion can be drawn from the case-law resulting from the judgments of 8 December 2011, *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:810), and of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815). As the Advocate General observed, in essence, in point 80 of her Opinion, that case-law, which relates to the judicial review of decisions of the Commission finding infringements of Articles 101 and 102 TFEU and imposing, where appropriate, pecuniary penalties on the basis of those infringements, cannot be applied as is to the judicial review of decisions of the Commission on State aid matters.

103 In the third place, with regard to the alleged misallocation by the General Court, in paragraphs 113 to 117 of the judgment under appeal, of the burden of proof, it is important to recall that the definition of 'aid', within the meaning of Article 107(1) TFEU, cannot cover a measure granted to an undertaking through State resources where it could have obtained the same advantage in circumstances which correspond to normal market conditions, as the assessment of the conditions under which such an advantage was granted is made, in principle, by applying the private operator principle (judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 45 and the case-law cited).

104 In that regard, where it appears that the private investor test could be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that principle are met (judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 104, and of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 47).

105 The private investor test is applied in order to determine whether, because of its effects, the economic advantage granted, in whatever form, through State resources to an undertaking distorts or threatens to distort competition and affects trade between Member States (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 89). Consequently, it is necessary to verify not whether a private investor would have acted in exactly the same way as the public investor, but whether, in similar circumstances, it would have contributed an amount equal to that contributed by the public investor (see, to that effect, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 95).

106 In order to assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder – to the exclusion of those linked to its situation as a public authority – are to be taken into account (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 79). If a Member State relies on the private investor test during the administrative procedure, it must, where there is

doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as shareholder (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 82).

107 That evidence must show clearly that, before or at the same time as conferring the economic advantage, the Member State concerned took the decision to make an investment, by means of the measure actually implemented, in the public undertaking. In that regard, it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 83 and 84).

108 In this case, as the Advocate General observed in point 101 of her Opinion, it is clear from the decision at issue and the judgment under appeal that the Commission applied the private operator principle in that decision and that the applicability, in the present case, of the private investor test was not in dispute either before the Commission or before the General Court, which the Commission furthermore confirmed at the hearing before the Court of Justice.

109 As regards the application of the private investor test, that test is one of the factors that the Commission is required to take into account for the purposes of establishing the existence of aid and is not, therefore, an exception that applies only if a Member State so requests, when it has been found that the constituent elements of 'State aid', as laid down in Article 107(1) TFEU, exist (judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 103, and of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 64 and the case-law cited).

110 The Commission therefore has the burden of proving, taking into account, inter alia, the information provided by the Member State concerned, that the conditions for the application of the private operator principle have not been satisfied, so that the State intervention at issue entails an advantage within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 65 and the case-law cited).

111 In that regard, it must be pointed out that the Commission cannot assume, in a decision to close the formal investigation procedure under Article 7 of Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage (judgments of 17 September 2009, *Commission* v *MTU Friedrichshafen*, C-520/07 P, EU:C:2009:557, paragraph 58, and of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 70 and the case-law cited).

112 However, according to the case-law, for the purposes of applying the private investor test, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to make the investment was taken (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 105). Furthermore, as the Commission does not have direct knowledge of the circumstances in which an investment decision was taken, it must rely, for the purposes of applying that test, to a large extent, on the

objective and verifiable evidence produced by the Member State at issue for the purposes of establishing that the measure implemented falls to be ascribed to the State acting as shareholder and, therefore, that that test is applicable, in accordance with the case-law cited in paragraphs 106 and 107.

113 Therefore, since it is necessary to take into account the decision which the private investor would have taken at the time when the investment was made, the absence of a prior evaluation, although not decisive in itself, may constitute a relevant factor in reviewing complex economic assessments which the Commission is called on to carry out in applying the private investor test.

114 When injections of capital by a public investor disregard any prospect of profitability, even in the long term, they cannot be regarded as satisfying the private investor test and must be regarded as aid within the meaning of Article 107(1) TFEU (see, to that effect, judgments of 21 March 1991, *Italy* v *Commission*, C-303/88, EU:C:1991:136, paragraph 22, and of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 61).

115 In that regard, it is for the General Court to satisfy itself, as was recalled in paragraphs 100 and 101 of the present judgment, that such complex economic assessments by the Commission are not vitiated by a manifest error of assessment, which means that it must establish not only whether the evidence relied on was factually accurate, reliable and consistent, but also whether that evidence contained all the relevant information which must be taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions drawn from it (judgment of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 41 and the case-law cited).

116 In the present case, as the Advocate General observed in points 103 and 104 of her Opinion, the assessment which appears in paragraphs 113 to 117 of the judgment under appeal, regardless of the choice of terms used in those paragraphs, does not demonstrate a breach, by the General Court, of the rules relating to the allocation of the burden of proof with regard to the private investor test.

117 It follows from the analysis which appears in paragraphs 85 and 86 of the present judgment that the General Court did not err in law by finding that, in the trade union agreement of 26 March 2002, SEA had agreed to cover, for a minimum period of five years, any losses of SEA Handling liable to affect the continuation of its economic activity. As the Advocate General observed in points 105 and 106 of her Opinion, a private investor would not have made such a commitment without first having carried out an appropriate evaluation of the profitability and economic rationality of its commitment. In those circumstances, and in the light of the case-law cited in paragraphs 107 and 114 of the present judgment, the absence of any appropriate prior evaluations of the profitability or economic rationality of such investments may constitute an essential factor suggesting that a private investor would not, in similar circumstances, have contributed an amount equal to that contributed by the public investor.

118 After taking into consideration, in paragraph 97 of the judgment under appeal, the matters of fact on which the Commission relied in the decision at issue to find that the measures at issue had been adopted in the absence of any of the appropriate prior evaluations which a private investor in SEA's situation would have had prepared in order to satisfy itself of their profitability or economic rationality, the General Court examined, inter alia in paragraphs 113 to 117 of the

judgment under appeal, whether or not those assessments by the Commission were vitiated by manifest errors of assessment. In paragraphs 120 and 132 of the judgment under appeal, it held that they were not.

119 Consequently, by examining, inter alia in paragraphs 113 to 117 of the judgment under appeal, whether the Commission was able, without making a manifest error of assessment, to find that the evidence provided during the administrative procedure was or was not capable of showing that such an evaluation was lacking, the General Court undertook the review which it was incumbent on it to carry out.

120 In those circumstances, the General Court did not disregard the fact that it is for the Commission to prove that the conditions for the application of the private operator principle have not been satisfied when it found, in paragraphs 113 to 117 of the judgment under appeal, that the Commission had not made a manifest error of assessment when it made the findings recalled in paragraph 97 of the judgment under appeal.

121 In addition, in the light of the considerations which appear in paragraphs 117 to 120 of the present judgment, the City of Milan cannot validly claim that the General Court disregarded the burden of proof incumbent on the Commission by not censuring it for failing to carry out market studies, for relying on negative presumptions or for not taking into account all the relevant factors.

122 In the fourth place, inasmuch as the City of Milan claims that the General Court failed to take into account, in paragraph 114 of the judgment under appeal, an economic study purely because it had been prepared subsequent to the measures at issue, it must be pointed out straightaway that that line of argument is based on an incorrect reading of that judgment. It follows from the very terms of paragraph 114 that the General Court verified the content of the economic study provided by the City of Milan and rejected it due, first of all, to the concise and contradictory nature of the statements which appeared in it and, therefore, to its inherent inadequacy for the purposes of an analysis under the private investor test. It was only later in paragraph 114 that it also pointed out that that economic study had been prepared subsequent to the measures at issue.

123 In any event, it must be found that, for the purposes of applying the private operator principle the only relevant evidence is; the information which was available, and the developments which were foreseeable, at the time when the decision to proceed with the measure at issue was taken (judgment of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 31 and the case-law cited), including to establish the reasons which were in fact behind the decision of the State entity at issue to carry out the disputed investment. However, the economic assessment carried out by the Commission during the administrative procedure necessarily takes place, in the case of aid granted in breach of the notification obligation laid down in Article 108(3) TFEU, after the adoption of the measures concerned.

124 Consequently, economic studies and analyses on which that economic assessment by the Commission is based, and also any second opinions of that nature invoked by the Member State concerned or the recipient of the aid to respond to the assessments on which the Commission relies, may be relevant for the purposes of the application of the private operator principle inasmuch as they are based only on the information which was available, and the developments which were foreseeable, at the time when the decision to proceed with the measure at issue was taken.

125 In this case, as the economic study on which the City of Milan relies for the purposes of its assessment was carried out after the adoption of the measures at issue, it is not capable of calling into question the Commission's finding as to the absence of an appropriate prior evaluation of the profitability and economic rationality of those measures, a finding which constituted an essential factor on which the Commission relied to establish that a private investor would not, in similar circumstances, have contributed amounts equal to those contributed by SEA to SEA Handling.

126 It follows that the General Court did not err in law when it, on the one hand, verified whether the economic study invoked by the City of Milan contained elements of economic analysis relevant to the economic assessment which the Commission was obliged to carry out in applying the private operator principle and, on the other, took the view that the fact that that study was carried out after the periods of time when the measures at issue were adopted ruled out the possibility that its existence might vitiate, through a manifest error, the Commission's assessment in the decision at issue according to which those measures were adopted in the absence of any of the appropriate prior evaluations which a private investor in SEA's situation would have had prepared in order to satisfy itself of their profitability or economic rationality.

127 In the fifth place, as regards the City of Milan's argument that the General Court failed to place itself in SEA's particular situation at the time at issue, which was characterised by prospects of profitability over the very long term, it is apparent, first of all, from paragraph 112 of the judgment under appeal that the General Court took that factor into account in its assessment.

128 Next, even if the prospects of profitability had to be extended, as the City of Milan claims, until 2041, it would also have been necessary for it to establish the prospect of a return on investment from those measures before that date. It must be found that the examination carried out by the General Court in paragraphs 113 to 131 of the judgment under appeal sought precisely to verify whether that was the case.

129 Finally, in so far as the City of Milan wishes to contest the merits of the examination thus carried out by the General Court, it must be regarded as asking the Court of Justice to reassess the facts, which, in accordance with the case-law cited in paragraph 66 of the present judgment, does not fall within the jurisdiction of the Court of Justice.

130 In those circumstances, the fourth ground of appeal must be rejected.

131 It follows from all of the foregoing considerations that the appeal must be dismissed.

Costs

132 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.

133 Under Article 138(1) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 184(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

134 Since the City of Milan has been unsuccessful and the Commission has applied for costs to be awarded against it, it must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders the Comune di Milano to pay the costs.

[Signatures]