Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

2 March 2021 *

(Appeal – State aid – Measures adopted by a consortium of banks governed by private law for the benefit of one of its members – Measures authorised by the Central Bank of the Member State – Concept of 'State aid' – Whether imputable to the State – State resources – Evidence supporting the conclusion that a measure is imputable – Distortion of elements of fact and of law – Decision declaring the aid incompatible with the internal market)

In Case C-425/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 29 May 2019,

European Commission, represented by P. Stancanelli, L. Flynn, A. Bouchagiar and by D. Recchia, acting as Agents,

appellant,

the other parties to the proceedings being:

Italian Republic, represented by G. Palmieri, acting as Agent, P. Gentili and S. Fiorentino, avvocati dello Stato,

Banca Popolare di Bari SCpA, formerly Tercas-Cassa di risparmio della provincia di Teramo SpA (Banca Tercas SpA), established in Teramo (Italy), represented initially by A. Santa Maria, M. Crisostomo, E. Gambaro and F. Mazzocchi, avvocati, and subsequently by A. Santa Maria, M. Crisostomo and E. Gambaro, avvocati,

Fondo interbancario di tutela dei depositi, established in Rome (Italy), represented by M. Siragusa, G. Scassellati Sforzolini, G. Faella and A. Comino, avvocati,

applicants at first instance,

Banca d'Italia, established in Rome, represented by M. Perassi, M. Todino, L. Sciotto and O. Capolino, avvocati,

intervener at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta (Rapporteur), Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, M. Ilešič, L. Bay Larsen, A. Kumin and N. Wahl, Presidents of Chambers, E. Juhász, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos and N. Jääskinen, Judges,

* Language of the case: Italian.

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2020,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167) ('the judgment under appeal'), by which it annulled Commission Decision (EU) 2016/1208 of 23 December 2015 on State aid granted by Italy to the bank Tercas (Case SA.39451 (2015/C) (ex 2015/NN)) (OJ 2016 L 203, p. 1) ('the decision at issue').

Legal framework

2 Decreto legislativo n. 385, e successive modifiche e integrazioni –Testo unico delle leggi in materia bancaria e creditizia (Legislative Decree No 385 and subsequent amendments and additions, consolidated text of the laws on banking and credit) of 1 September 1993 (GURI No 230 of 30 September 1993, and Ordinary Supplement to GURI No 92), in the version applicable to the facts at issue ('the TUB'), assigns to Banca d'Italia (the Bank of Italy) the role of the supervisory authority of the banking sector and gives it the objectives of ensuring the sound and prudent management of supervised institutions, overall stability, the efficiency and competitiveness of the financial system and compliance with the provisions on credit.

3 Under Article 96(1) of the TUB, Italian banks are required to be members of one of the deposit guarantee scheme established and recognised in Italy. Cooperative credit associations are required to be members of the deposit guarantee scheme established within their field.

4 According to Article 96a(1) of the TUB, deposit guarantee schemes are to make repayments in the event of the compulsory liquidation of licensed banks in Italy, and those schemes may engage in other types and forms of intervention. Pursuant to Article 96b(1)(d) of the TUB, the Bank of Italy authorises, among other things, measures taken by deposit guarantee schemes 'having regard to the protection of depositors and the stability of the banking system'.

Background to the dispute

5 The background to the dispute is set out in paragraphs 3 to 32 of the judgment under appeal and, for the purposes of the present judgment, can be summarised as follows.

Entities involved

6 Tercas-Cassa di risparmio della provincia di Teramo SpA (Banca Tercas SpA) ('Tercas') is a private equity bank which is active principally in the Abruzzo region (Italy). Banca Popolare di Bari SCpA ('BPB') is the holding company of a private equity banking group which is active principally in the south of Italy.

7 The Fondo interbancario di tutela dei depositi ('the FITD') is a consortium of banks governed by private law which was established on a voluntary basis in 1987. It is a mutual consortium which was established for the purpose of pursuing the common interests of its members.

8 Under Article 1 of the statutes of the FITD, the FITD has as its aim to guarantee its members' deposits. In 1996, following the transposition into the Italian legal system of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5), the FITD was recognised by the Bank of Italy as being one of the deposit guarantee schemes that was authorised to operate in Italy and the only one of which non-cooperative credit associations could become members.

9 Under Article 27 of the statutes of the FITD, in the event of the compulsory liquidation of one of its members, the FITD intervenes by repaying the deposits lodged by depositors with the FITD up to a maximum of EUR 100 000 per depositor ('mandatory intervention').

10 The FITD also has the power to intervene for the benefit of its members on a voluntary basis, in the following two situations ('voluntary interventions'). First, in accordance with Article 28 of its statutes, the FITD may, instead of making the repayment provided for under the deposit guarantee, intervene in transactions involving the transfer of assets and liabilities relating to one of its members that is placed under compulsory liquidation. Secondly, under Article 29(1) of its statutes, the FITD may intervene by means of finance, guarantees, the acquisition of shares or in the form of other technical support for one of its members placed under special administration, where there are prospects of recovery and a lesser burden is to be expected compared with the burden that would be incurred by the intervention of the FITD in the event of the compulsory liquidation of that member.

11 The Bank of Italy is a public authority which performs the function of the central bank of the Italian Republic. It has its own legal personality which is separate from that of the Italian State. As a member of the European System of Central Banks (ESCB), the Bank of Italy must, under Article 127(5) TFEU, contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

12 In order to achieve the objectives set for it by the TUB, in particular with regard to the sound and prudent management of supervised institutions, the Bank of Italy has regulatory powers, monitoring and inspection powers as well as numerous authorisation powers. Those powers allow the Bank of Italy to intervene in every key event in which a bank is involved, in a manner consistent with its commercial autonomy, and for the sole purpose of verifying whether its management is sound and prudent.

13 In the exercise of its rights and powers, the Bank of Italy has, inter alia, approved the statutes of the FITD, assists in meetings of the FITD as an observer with no voting rights and, in accordance with Article 96b(1)(d) of the TUB, approves the measures adopted by the FITD for the benefit of its members.

Context and the measures adopted by the FITD for the benefit of Tercas

14 By decision of 30 April 2012, on a proposal by the Bank of Italy, which had identified irregularities within Tercas, the Ministero dell'Economia e delle Finanze (Ministry of Economy and Finance) placed Tercas under special administration. The Bank of Italy subsequently appointed a special administrator to manage Tercas during the period of special administration.

15 In October 2013, after assessing various options in the search for a solution to the difficulties faced by Tercas, the special administrator started negotiations with BPB, which had expressed an interest in subscribing to a capital increase in Tercas, on condition that a due diligence inquiry into Tercas was first carried out and that the FITD covered in full its negative equity.

16 On 28 October 2013, following a request by the special administrator of Tercas on the basis of Article 29 of the statutes of the FITD, the Executive Committee of the consortium decided to intervene for the benefit of Tercas in an amount up to EUR 280 million. That decision was ratified by the Board of the FITD on 29 October 2013. On 4 November 2013, in accordance with Article 96b(1)(d) of the TUB, the Bank of Italy approved that support measure.

17 On 18 March 2014, the FITD decided to suspend the planned measures in view of uncertainties regarding Tercas' economic situation, its assets and liabilities as well as the tax treatment of that intervention. Following the audit of Tercas' assets requested by BPB, a disagreement arose between the experts of the FITD and those of BPB. That disagreement was subsequently resolved following an arbitration procedure.

18 In the light of the conclusions presented by an auditing and advisory company in a report dated 26 May 2014, and in view of the cost of the measures compared with the cost of compensation under the mandatory intervention, on 30 May 2014, the Executive Committee and the Board of the FITD decided to intervene for the benefit of Tercas.

19 On 7 July 2014, the Bank of Italy authorised the intervention of the FITD for the benefit of Tercas. That intervention provided for three measures, namely (i) a EUR 265 million contribution intended to cover Tercas' negative equity, (ii) a EUR 35 million guarantee intended to cover the credit risk associated with certain exposures of Tercas, and (iii) a EUR 30 million guarantee intended to cover the costs arising from the tax treatment of the first measure ('the measures at issue').

20 At the Tercas shareholders' meeting, called on 27 July 2014 by the special administrator in agreement with the Bank of Italy, it was decided (i) to cover partially the losses, inter alia by reducing the capital to zero and cancelling all of the ordinary shares in circulation and (ii) to increase the capital to EUR 230 million by issuing new ordinary shares to be offered to BPB. The capital increase took place on the same day.

21 On 1 October 2014, Tercas left special administration and new management of that bank was appointed by BPB.

The administrative procedure and the decision at issue

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

23 By letter of 27 February 2015, the Commission informed the Italian Republic of its decision to initiate the procedure laid down in Article 108(2) TFEU in respect of the measures at issue. On 24 April 2015, the Commission published the opening decision in the *Official Journal of the European Union*.

24 On 23 December 2015, the Commission adopted the decision at issue, whereby it found that the measures at issue, that had been authorised in breach of Article 108(3) TFEU, constituted incompatible and unlawful aid granted by the Italian Republic to Tercas, and ordered the recovery of that aid.

The procedure before the General Court and the judgment under appeal

25 The Italian Republic (T-98/16), BPB (T-196/16) and the FITD, supported by the Bank of Italy (T-198/16), each brought an action against the decision at issue.

26 In the first place, the General Court, in paragraphs 68, 69 and 89 to 91 of the judgment under appeal held, in essence, that in order to conclude that an aid measure is imputable to the State, there is an even more stringent requirement for the Commission to put forward sufficient evidence to demonstrate that the measure has been adopted under the actual influence or control of the public authorities, where a measure adopted by a private entity is involved, than where the measure is taken by a public undertaking. The General Court noted, in that regard, that unlike a situation in which a measure taken by a public undertaking is imputed to the State, the Commission cannot, in respect of a measure adopted by a private undertaking, merely establish that the absence of actual influence and control by the public authorities over that private entity is unlikely.

27 In the second place, after analysing, in paragraphs 114 to 131 of the judgment under appeal, the evidence on which the Commission relied in concluding that the measures at issue could be imputed to the Italian State, the General Court found, in paragraph 132 thereof, that the Commission had not proven to the requisite legal standard that the Italian public authorities were involved in the adoption of those measures, or, consequently, that they were imputable to the State within the meaning of Article 107(1) TFEU.

28 In the third place, with regard to the concept of intervention 'through State resources', within the meaning of Article 107(1) TFEU, the General Court held, in paragraph 161 of the judgment under appeal, after analysing in paragraphs 139 to 160 the evidence produced in that regard, that the Commission had failed to establish to the requisite legal standard that the resources at issue were controlled by the Italian public authorities and that, therefore, they were at their disposal. Consequently, according to the General Court, the Commission was not entitled to conclude that, even though the measures were adopted by the FITD for the benefit of Tercas in accordance with the statutes of that consortium and in the interests of its members, using private funds, it was in reality those authorities which, through the exercise of a dominant influence over the FITD, decided to direct the use of those resources in order to finance those measures.

29 Since the first condition to be satisfied for aid to be classified as 'State aid' for the purposes of Article 107(1) TFEU, namely that that aid is granted by the State or through State resources, was not met, the General Court annulled the decision at issue.

Procedure before the Court of Justice and forms of order sought by the parties to the appeal

30 The Commission claims that the Court should:

– set aside the judgment under appeal;

– dismiss the applications at first instance, in so far as they dispute that the decision at issue shows that the requirements relating to imputability to the State have been met for the measures in question and for their financing through State resources;

– refer the case back to the General Court for reconsideration of the remaining pleas in law at first instance; and

– reserve the costs of the proceedings at first instance and on appeal.

31 The Bank of Italy, the FITD, BPB and the Italian Republic contend that the Court should:

– dismiss the appeal; and

– order the Commission to pay the costs.

32 By document lodged at the Court Registry on 30 July 2019, the Fondazione Cassa di Risparmio di Pesaro, Montani Antaldi Srl, the Fondazione Cassa di Risparmio di Fano, the Fondazione Cassa di Risparmio di Jesi and the Fondazione Cassa di Risparmio della Provincia di Macerata applied for leave to intervene in the present case in support of the forms of order sought by the Italian Republic, BPB, the FITD and the Bank of Italy.

33 By order of the President of the Court of Justice of 13 November 2019, *Commission* v *Italy and Fondo interbancario di tutela dei depositi* (C-425/19 P, not published, EU:C:2019:980), the application to intervene was dismissed.

34 The Italian Republic, pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, requested that the Court sit in a Grand Chamber.

The appeal

35 In support of its appeal, the Commission raises two grounds of appeal.

The first ground of appeal

Arguments of the parties

36 The first ground of appeal, alleging infringement of Article 107(1) TFEU, is divided into two limbs.

37 By the first limb, the Commission claims that the General Court erred in law in imposing on the Commission, in order to determine whether the requirements relating to aid being imputable to the State and granted through State resources have been met in the present case, a heavier burden of proof than that required by the case-law of the Court of Justice.

38 In the first place, the Commission recalls that under that case-law it is for the Commission, where it seeks to establish that the measures adopted by an entity distinct from the State are imputable to the public authorities, to provide proof, through a set of indicators arising from the case under examination, of the involvement or the influence by those authorities in the adoption of the measure in question, by demonstrating either the likelihood of the involvement by the public authorities or, at least, the unlikelihood of their not being involved. By contrast, it is not required to demonstrate the existence of a specific incentive or binding instructions given by those authorities to the entity that actually granted the aid. Nor is it necessary for the Commission to show the actual impact of that involvement on the entity's conduct or to establish that the latter's conduct would have been different if it had acted autonomously. In that regard, in particular, the Commission makes clear that it is not required to show that the imputability to the State of a measure presupposes that the public interest differs from that entity's interests. Lastly, the Commission submits that the standard of proof required by the case-law of the Court of Justice does not vary according to whether the entity providing the aid is owned publicly or privately.

39 According to the Commission, in paragraphs 69 and 89 to 91 of the judgment under appeal, the General Court infringed that case-law by requiring the Commission to meet a stricter standard of proof than that provided for by that case-law, in order to demonstrate the imputability to the public

authorities of an aid measure and to prove that an intervention was made through State resources, solely on account of the fact that, in the present case, the aid measure was provided by a private entity.

40 It follows, in the Commission's view, that the General Court wrongly assessed, in paragraphs 114, 116, 117 and 127 of the judgment under appeal, the evidence provided by the Commission in that regard in the decision at issue. In particular, the General Court was wrong to take the view that the Commission must provide positive proof that the public authorities had exercised a dominant influence over the adoption of the measures at issue, and that the Commission was required to establish that those authorities were involved in every step of the adoption of those measures, by giving binding instructions, and that the involvement of the public authorities had had an impact on the content of those measures.

41 Moreover, the Commission observes that it makes no sense to impose upon it a heavier burden of proof where the entity that adopted the measures is a private entity since, in such a case, only a reduced number of indicators is available to it, by definition, to demonstrate the involvement of the public authorities. In particular, in the absence of links of an organisational nature, that involvement would have to be sought on the basis of less visible indicators.

42 In the second place, the Commission, in the alternative, claims that the FITD is an entity to which the Italian Republic assigned specific responsibilities under Directive 94/19. Consequently, in the light of the Court's case-law concerning the direct effect of directives that are not transposed or are incorrectly transposed, in particular in the judgment of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745), that consortium may be considered to be an emanation of the Italian State. For that reason, even if the General Court did not err in law in taking the view that a stricter standard of proof was required where the entity providing the aid measures is a private entity, it nonetheless caused the judgment under appeal to be vitiated by an error of law by applying to the FITD the distinction between private entities and public entities in respect of the requirements relating to aid being imputable to the State and granted through State resources.

43 In the third place, the Commission recalls that, pursuant to Article 11(3) of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149), the deposit guarantee schemes may adopt, in order to avoid the failure of a credit institution, 'alternative measures'. Use of such an instrument is nonetheless subject to the condition that no resolution action has been taken in relation to the credit institution concerned. Under Article 32(4)(d) of Directive 2014/59/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), resolution action may be taken only if 'extraordinary public financial support' is required, the latter being defined in point 28 of Article 2(1) of that directive as meaning 'State aid within the meaning of Article 107(1) TFEU'.

44 Thus, to the extent that, by virtue of the stricter standard of proof applied by the General Court, it would be almost impossible for the Commission to prove that State resources are involved and that the measures adopted by the deposit guarantee schemes are imputable to the State where the schemes consist in private banks, those schemes could constantly adopt 'alternative measures' within the meaning of Article 11(3) of Directive 2014/49, without resolution under Article 32 of Directive 2014/59. Consequently, the judgment under appeal would allow Member States and banks to circumvent or, in any event, weaken the effects of Banking Union legislation.

45 By the second limb of the first ground of appeal, the Commission submits that the General Court erred in law in failing to carry out an overall analysis of the evidence produced by that institution to demonstrate that the conditions relating to imputability and State resources were, in this case, satisfied.

46 The Commission claims that, in so doing, the General Court disregarded the case-law of the Court of Justice which requires the probative value of the items of evidence to be assessed by examining the evidence as a whole, even if those items, viewed in isolation and outside their context, are not necessarily decisive.

47 According to the Commission, the adoption of that incorrect approach, first, in paragraphs 96 to 99 of the judgment under appeal, resulted in the General Court stating that the measures adopted by the FITD are aimed at furthering the private interests of its members, without providing the reasons that might justify such a statement. Secondly, in paragraphs 100 to 106 of the judgment under appeal, the General Court failed to have regard to the nature of the public mandate conferred on the FITD by Italian law, by holding that the FITD confines itself to mandatory interventions, namely the reimbursement of depositors. However, according to the Commission, voluntary interventions are closely linked to mandatory interventions, in so far as the former may be carried out only if they represent a less onerous burden compared with a potential mandatory intervention. Thirdly, the Commission claims that in paragraphs 115, 116 and 126 of the judgment under appeal, the General Court was wrong to reject one by one the items of evidence produced by the Commission concerning the Bank of Italy's involvement in granting the measures at issue, whereas those items, viewed together, would have allowed the measures at issue to be imputed to the Italian State.

48 The Italian Republic, BPB, the FITD and the Bank of Italy contend, primarily, that the first ground of appeal is inadmissible. In that regard, they argue that the Commission, under the guise of relying on an error of law committed by the General Court, seeks to obtain from the Court of Justice a further assessment of the facts and the evidence than that carried out in the judgment under appeal, inter alia concerning the imputability to the State of the measures at issue and the nature of the mandate conferred on the FITD.

49 The Italian Republic also alleges the inadmissibility of the Commission's argument that the General Court should have assessed the evidence taking account of the context of the negotiations between the FITD, BPB and the special administrator, in so far as the appeal does not challenge paragraphs 125 to 132 of the judgment under appeal, in which the General Court addressed that matter.

50 In the alternative, the Italian Republic, BPB, the FITD and the Bank of Italy take the view that the first ground of appeal is unfounded.

51 The Commission rejects the arguments relating to the alleged inadmissibility of the first ground of appeal, claiming that, by that ground of appeal, the Commission raises the question of the legal criterion that the General Court took as the basis for its appraisal of the evidence produced to demonstrate the influence exercised by the Italian authorities on the decisions of the FITD.

Findings of the Court

– Admissibility

52 It is apparent from Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that an appeal is to be limited to points of law and that the General Court therefore has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The assessment of the facts and evidence does not, save where the facts or evidence are distorted, constitute a point of law, which is subject, as such, to review by the Court of Justice on

appeal. Such a distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and evidence (judgment of 10 July 2019, *VG* v *Commission*, C-19/18 P, EU:C:2019:578, paragraph 47 and the case-law cited).

53 However, where the General Court has found or appraised the facts, the Court of Justice has jurisdiction to carry out a review, provided that the General Court has defined their legal nature and determined the legal consequences (judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 65 and the case-law cited). The jurisdiction of the Court of Justice to review extends, inter alia, to the question whether the rules relating to the burden of proof and the taking of evidence have been observed and whether the General Court has taken the right legal criteria as the basis for its appraisal of the facts and evidence (see, to that effect, judgment of 18 January 2017, *Toshiba* v *Commission*, C-623/15 P, not published, EU:C:2017:21, paragraph 39 and the case-law cited).

54 In the present case, first, it must be found that, by its line of argument in the first ground of appeal, the Commission criticises not the factual assessment, by the General Court, of the probative value of the evidence that the Commission had produced before it, but the application by the General Court of the rules relating to the burden of proof and the taking of evidence for the assessment of that evidence and the classification of the measures at issue.

55 Secondly, with regard to the plea of inadmissibility mentioned in paragraph 49 above, it must be recalled that 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 as well as from Article 168(1)(d) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or the ground of appeal in question will be dismissed as inadmissible (judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 29 and the case-law cited). In the present case, it is sufficient to note that the Commission made clear, in its appeal, that it challenged, inter alia, paragraph 126 of the judgment under appeal.

56 In those circumstances, the first ground of appeal is admissible.

– *Substance*

57 As regards the first limb of the first ground of appeal, it must be recalled, at the outset, that classification as 'State aid' for the purposes of Article 107(1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or through State resources, that the intervention be liable to affect trade between Member States, that it confer a selective advantage on the beneficiary and that it distort or threaten to distort competition (judgment of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 46 and the case-law cited).

58 As regards the existence of an intervention by the State or through State resources, which is the only condition at issue in the present case, it should be borne in mind that, in order for it to be possible to classify advantages as 'aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be imputable to the State (see, to that effect, judgment of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 47 and the case-law cited).

59 Concerning specifically the imputability to the State of a measure, the Court has held that this may not be inferred from the mere fact that the measure was taken by a public undertaking. Even if the State is in a position to control a public undertaking and to exercise a dominant 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 the measure in question (see, to that effect, judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 50 to 52; of 23 November 2017, *SACE and Sace BT* v *Commission*, C-472/15 P, not published, EU:C:2017:885, paragraph 34; and of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 46).

60 Thus, 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. In that regard it cannot be demanded that it be demonstrated, on the basis of a precise instruction, that the public authorities specifically incited the public undertaking to take the measure in question (see, to that effect, judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 53 and 55; of 23 November 2017, *SACE and Sace BT* v *Commission*, C-472/15 P, not published, EU:C:2017:885, paragraph 35; and of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 47 and the case-law cited).

61 Specifically, any indication, in the particular case, either, on the one hand, of the involvement by 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 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 48).

62 Evidence supporting the conclusion that the measure is imputable to the State includes, in addition, the fact that the public undertaking in question could not have taken the decision at issue without taking account of the requirements of the public authorities or the directives emanating from the public authorities, the integration of the public undertaking into the structures of the public administration, the nature of its activities and the exercise of those activities on the market in normal conditions of competition with private operators, the legal status of the undertaking as well as the intensity of the supervision exercised by the public authorities (see, to that effect, judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 55 and 56, and of 23 November 2017, *SACE and Sace BT* v *Commission*, C-472/15 P, not published, EU:C:2017:885, paragraph 36).

63 In the present case, it must be noted, as a preliminary point, that the General Court, in paragraph 70 of the judgment under appeal, held that the Commission, in the decision at issue, did not seek to draw a clear distinction between the requirement relating to the imputability of a measure to the State and that relating to State resources. Similarly, in its appeal, the Commission, with regard to that second requirement, merely states that, in paragraph 91 of the judgment under appeal, the General Court referred to its own reasoning concerning the requirement of imputability. Lastly, in the first limb of the first ground of appeal, the Commission does not identify any of the grounds, in paragraphs 133 to 161 of the judgment under appeal, dedicated specifically to the examination of the requirement relating to the use of State resources.

64 In those circumstances, only the condition relating to the imputability of the measures at issue to the Italian authorities needs be examined.

65 In the first place, it should be noted, first of all, that in paragraphs 63 to 68 and 83 to 86 of the judgment under appeal the General Court recalled the case-law of the Court of Justice on the imputability of aid to public authorities where advantages are granted by entities distinct from the State. In particular, in paragraph 68 of the judgment under appeal, the General Court pointed out, by referring to paragraphs 50 to 52 and 55 of the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), that, even in a situation where aid is granted by a public undertaking, the exercise of the public authorities' control cannot be presumed and that the Commission must have a

set of indicators arising from the circumstances of the case and the context in which the financial assistance was given in order to establish the degree of involvement by the public authorities in granting the aid through the intermediary of a public undertaking.

66 It is only after having recalled that case-law that the General Court found, in paragraph 69 of the judgment under appeal, that the 'obligation of the Commission' to have such evidence 'is all the more necessary' in a situation where the measure under examination is taken by a private entity. As noted by the General Court in that paragraph 69, the Commission cannot rely on the existence of links of a capital nature between such an entity and the State, since such links are missing in a situation of that type.

67 It is in the light of those considerations that the General Court held, in paragraphs 87 to 90 of that judgment, that the Commission could not, in the present case, rely on the unlikelihood of an absence of actual influence and control by the public authorities over the private entity providing the aid, but that, on the contrary, in such a situation there was an even more stringent requirement for the Commission to set out and substantiate 'sufficient evidence' capable of establishing that the aid measure under consideration had been adopted under the actual influence or control of the public authorities and that, accordingly, that measure is imputable to the State.

68 Lastly, in paragraphs 94 to 132 of the judgment under appeal, the General Court analysed the evidence put forward by the Commission and held, on completion of that analysis, that the measures at issue could not be imputed to the Italian authorities.

69 In making the findings set out in paragraphs 68, 69 and 88 to 90 of the judgment under appeal, the General Court neither failed to have regard to the case-law mentioned in paragraphs 58 to 62 above, according to which it is for the Commission to demonstrate, on the basis of a set of indicators, that the measures at issue were imputable to the State, nor, therefore, did it require the Commission to meet a higher standard of proof solely on account of the fact that the FITD is a private entity.

70 By such findings, the General Court limited itself to taking note, as is apparent, inter alia, from paragraphs 87 and 88 of the judgment under appeal, of the objective differences between a situation where the entity providing the aid is a public undertaking and that in which, as in the present case, that entity, namely the FITD, is a private entity.

71 Moreover, in paragraphs 69, 89 and 90 of the judgment under appeal, the General Court drew the appropriate conclusions from those objective differences in order to specify the type of evidence which would make it possible, in the present case, to demonstrate that the measures at issue were imputable to the Italian authorities.

72 Thus, contrary to the Commission's assertions, in a situation where, as in the present case, the entity that provided the aid is a private entity, the appropriate evidence for the purpose of demonstrating that the measure is imputable to the State differs from that required in a situation where the entity providing the aid is a public undertaking.

73 In so doing, the General Court did not impose different standards of proof but, rather, applied the case-law cited in paragraph 60 above, according to which the appropriate evidence for the purpose of demonstrating the imputability of an aid measure arises from the circumstances of the case and the context in which that measure was taken, and the absence of a link of a capital nature between the entity concerned and the State is clearly relevant in that regard.

74 Moreover, the Commission's argument that the General Court made the imputability to the Italian authorities of the measures at issue conditional on the fact that all of the steps in the implementation of the measures at issue adopted by the FITD were influenced by those authorities is based on an incorrect reading of paragraph 114 of the judgment under appeal. Indeed, the General Court merely

recalled in that paragraph that the evidence, on the basis of which the Commission itself considered in the decision at issue that those authorities had the authority and the means to influence all of the steps in the implementation of the measures at issue, must be examined.

75 Similarly, the Commission wrongly contended that the General Court held, in paragraph 116 of the judgment under appeal, that in order to establish that a measure adopted by a private entity is imputable to the State, the Commission must show that the involvement by the public authorities had an impact on that measure. As noted by the Advocate General in point 97 of his Opinion, the General Court, in that paragraph 116, did not examine whether, in practice, the intervention of the Bank of Italy had an impact on the content of the measures at issue, but merely stated that that national authority did not have the power to influence the content of the measures and that the Bank of Italy had the power only to check the measures' compliance with the regulatory framework, for the purposes of prudential supervision.

76 Lastly, in paragraphs 117 and 127 of the judgment under appeal, the General Court did not hold either that, in order to find that the measures at issue were imputable to the Italian authorities, the Commission was required to establish that the Bank of Italy had the power to instruct the deposit guarantee schemes to adopt intervention measures such as those at issue. In examining the evidence relied on by the Commission in the decision at issue to conclude that the measures at issue could be imputed to the Italian State, the General Court merely found that the invitation by the Bank of Italy to the FITD and BPB to reach a balanced agreement was not intended to give instructions to those parties and did not have the slightest impact on the FITD's decision to intervene for the benefit of Tercas by means of the measures at issue.

77 In the second place, as regards the Commission's arguments relating to the nature of the FITD, it must be recalled, as noted by the Advocate General in points 128 and 129 of his Opinion, that the concept of 'emanation of the State' was developed by the Court with a view to allowing individuals to rely on unconditional and sufficiently precise provisions of a directive that is not transposed or is incorrectly transposed, against organisations or bodies which are subject to the authority or control of the State or which possess special powers beyond those which result from the normal rules applicable to relations between individuals (see, to that effect, judgment of 10 October 2017, *Farrell*, C-413/15, EU:C:2017:745, paragraph 33). Thus, that concept has not been developed for the purpose of classifying as State aid the measures adopted by such organisations or bodies and cannot, therefore, be applied to the question whether aid measures are imputable to the State.

78 In the third place, as regards the risk of circumvention of Banking Union legislation, it is sufficient to note that the Commission's argument is based on the premiss that the alleged stricter standard of proof relating to imputability to the State, allegedly applied by the General Court, would make it almost impossible for the Commission to show that imputability in respect of the measures adopted by the deposit guarantee schemes. First, it is apparent from paragraphs 65 to 73 above that the General Court did not apply, in the judgment under appeal, a stricter standard of proof. Secondly, as noted by the Advocate General in point 125 of his Opinion, even if it is considered that, in the present case, the measures at issue are not imputable to the Italian State, it would not follow that a measure taken by a deposit guarantee scheme could never be classified as State aid and, accordingly, would never trigger resolution under Article 32 of Directive 2014/59. Such a classification would still be possible but would depend on the features of the deposit guarantee scheme and of the particular measure.

79 In the light of all of the above, the first limb of the first ground of appeal must be dismissed.

80 As regards the second limb of the first ground of appeal, it must be found that that limb is based on an incorrect reading of the judgment under appeal, since, contrary to the Commission's assertions, the General Court did not fail to carry out an overall analysis of the evidence produced by the Commission in order to demonstrate that the measures adopted by the FITD were imputable to the Italian State.

81 In the first place, in paragraphs 71 to 82 of the judgment under appeal, the General Court set out, by summarising it, all of that evidence.

82 In the second place, in examining the scope of the public mandate conferred on the FITD, the General Court, in paragraphs 96 to 105 of the judgment under appeal, analysed all of the evidence produced by the Commission in that respect. It is only after that analysis that the General Court concluded, in paragraph 106 of that judgment, that a voluntary intervention of the FITD, such as that at issue in the present case, in that it has a different purpose from that relating to the repayment of deposits under Directive 94/19, does not constitute the fulfilment of a public mandate.

83 In the third place, in examining the FITD's autonomy in the adoption of the measures at issue, after recalling that the FITD acts 'in the interests [of its members]' and that 'no factors relating to [the way in which] it is organised' link the FITD to the Italian public authorities, the General Court found, in paragraph 114 of the judgment under appeal, that that was 'the context in which' the evidence on which the Commission relied in the decision at issue must be examined. The General Court also held, in that paragraph 114, that it must be determined whether 'the evidence' put forward by the Commission was sufficient to demonstrate the imputability to the Italian State of the measures at issue. The General Court proceeded to determine this in paragraphs 115 and 131 of the judgment under appeal, by assessing, inter alia in paragraphs 125 to 127 of that judgment, the 'context in which the measures taken by the FITD for the benefit of Tercas were adopted'.

84 In those circumstances, it must be held that, as is apparent from paragraph 132 of the judgment under appeal, it is on the basis of the analysis of all of the evidence on which the Commission relied, taken in its proper context, and therefore in a manner consistent with the case-law recalled in paragraph 60 above, that the General Court found that the Commission had erred in law in taking the view, in recital 133 of the decision at issue, that it had demonstrated that the Italian authorities had exercised substantial public control in establishing the measures adopted by the FITD for the benefit of Tercas.

85 In the light of the foregoing, the second limb of the first ground of appeal and, accordingly, the first ground of appeal in its entirety must be dismissed.

The second ground of appeal

Arguments of the parties

86 By its second ground of appeal, the Commission submits that the General Court distorted the facts of the case and Italian law.

87 First, the Commission claims that in paragraph 116 of the judgment under appeal the General Court manifestly distorted the content of Article 96b(1) of the TUB, by finding that the Bank of Italy conducted a review only of the legality, and not of the appropriateness, of the measures at issue. To the extent that it is apparent from that provision that the Bank of Italy must authorise support measures for the benefit of banks 'having regard to the protection of depositors and the stability of the banking system', the control which that public authority may exercise goes beyond a mere review of legality of the measures at issue, with the result that it could be led to check whether such measures satisfy its banking and financial policy objectives.

88 Secondly, the Commission claims that the General Court, in paragraph 153 and 154 of the judgment under appeal, distorted the content of Article 21 of the statutes of the FITD, by holding that the financing of voluntary interventions differed from that of mandatory interventions.

89 In that regard, the Commission notes that the fact that paragraph 153 of the judgment under appeal starts with 'furthermore' does not lead to the conclusion that the arguments contained therein are for the sake of completeness and, consequently, that the complaints raised against those arguments are inconsequential. According to the Commission, it is precisely in that paragraph that the General Court rejected its argument that the contributions paid to the FITD by the members of that consortium have a mandatory nature and constitute, consequently, State resources.

90 The Italian Republic, BPB, the FITD and the Bank of Italy contend, primarily, that the second ground of appeal is inadmissible and, in the alternative, that it is unfounded and, in any event, ineffective.

Findings of the Court

91 By its second ground of appeal, the Commission submits that, in paragraphs 116 and 153 to 154 of the judgment under appeal, the General Court distorted national law and the relevant facts, respectively.

92 In that regard, it must be recalled, as is apparent from the case-law set out in paragraph 52 above, that appraisal of the facts does not, save where the facts are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice.

93 Similarly, with respect to the examination, in the context of an appeal, of the General Court's findings with regard to national law, the Court of Justice has jurisdiction only to determine whether that law was distorted (see, to that effect, judgment of 9 November 2017, *TV2/Danmark* v *Commission*, C-649/15 P, EU:C:2017:835, paragraph 49 and the case-law cited).

94 Lastly, as recalled in paragraph 52 above, distortion must be obvious from the documents in the Court's file without any need for a new assessment of the facts and the evidence (judgment of 9 November 2017, *TV2/Danmark* v *Commission*, C-649/15 P, EU:C:2017:835, paragraph 50 and the case-law cited).

95 In the present case, with regard to the alleged distortion of national law, it must be noted that, in paragraph 116 of the judgment under appeal, the General Court recalled that under Article 96b(1)(d) of the TUB, the Bank of Italy authorises interventions by the deposit guarantee schemes 'having regard to the protection of depositors and the stability of the banking system'.

96 The wording of that provision permits the inference that the Bank of Italy is empowered, as are the other authorities also entrusted with the protection of public interests, to conduct a review of the measures adopted by the deposit guarantee schemes under the regulatory framework in force, in order to safeguard those interests.

97 Moreover, it should be noted that in that paragraph 116 of the judgment under appeal, the General Court recalled the regulatory framework of Article 96b(1)(d) of the TUB, in the light of which that provision must, in its view, be interpreted. Thus, pursuant to Article 5 of the TUB, the Bank of Italy exercises its prudential supervisory duties 'having regard to the sound and prudent management of institutions subject to its supervision, overall stability, the effectiveness and the competitiveness of the financial system and compliance with the applicable provisions'. Similarly, it is apparent from paragraph 116 of the judgment under appeal that, under Article 19 of the TUB, the Bank of Italy authorises a number of major decisions by banks, such as those involving acquisitions.

98 In those circumstances, contrary to the Commission's allegations, it is not manifestly apparent from the expression 'having regard to the protection of depositors and the stability of the banking system', in Article 96b(1)(d) of the TUB, that the Bank of Italy conducts a review of the appropriateness of measures adopted by the deposit guarantee schemes, such as the measures at issue, with the result that the Commission has not established that the General Court, in paragraph 116 of the judgment under appeal, distorted that provision by holding that the Bank of Italy checks only whether the intervention measures comply with the regulatory framework, for the purposes of prudential supervision.

99 As regards the alleged distortion of Article 21 of the statutes of the FITD, it should be noted that the Commission's arguments are based on an incorrect reading of the judgment under appeal, in so far as, contrary to the Commission's assertion, the General Court did not hold, in paragraphs 153 and 154 of that judgment, that the financing of voluntary interventions differed from that of mandatory interventions.

100 In examining the alleged mandatory nature of the contributions used by the FITD for the measures at issue, the General Court, in paragraph 153 of the judgment under appeal, as noted by the Advocate General in point 177 of his Opinion, merely held that, unlike the resources needed for the consortium to operate efficiently, those contributions were regarded as advances 'paid by the members of the FITD, which managed them on their behalf as agent'.

101 Moreover, in paragraph 154 of the judgment under appeal, the General Court found that, as regards mandatory interventions, it was the obligation to contribute to the intervention measures, and not the means of financing the contributions, which stemmed from a – private – statutory provision, since the General Court stated that the obligation to intervene stems from a regulatory provision where the FITD is 'specifically mandated by the State to manage the contributions made by members under the statutory deposit guarantee'.

102 In those circumstances, the second ground of appeal must be dismissed as being unfounded, without any need to rule on its admissibility.

103 Since none of the grounds of appeal put forward by the Commission in support of its appeal has been upheld, the latter must be dismissed in its entirety.

Costs

104 In accordance with the Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, applicable to the procedure on an appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

105 Since the Italian Republic, BPB, the FITD and the Bank of Italy applied for costs against the Commission and since the Commission's appeal was unsuccessful, the latter must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders the European Commission to pay the costs.

[Signatures]