

ECO FLASH

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The FITD's support measures adopted for the benefit of Banca Tercas did not constitute State aid

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- The General Court of the European Union has annulled the European Commission's decision that the support measures granted to Banca Tercas by the Italian deposit guarantee fund constituted State aid.
- The General Court found that the European Commission did not have sufficient evidence to conclude that the measures in support of Banca Tercas entailed the use of State resources and were imputable to the State.
- The cost of the support measures was estimated to be lower than the cost of using the deposit guarantee scheme if Banca Tercas had been placed under compulsory liquidation. The measures, adopted voluntarily by a consortium of banks in support of one of its members, was therefore intended to protect their private interests. Those private interests happened to coincide with the public interest.
- Since the bank's capital needs were met solely with private resources, the measures did not circumvent the framework provided for by the European Bank Recovery and Resolution Directive (BRRD) or rules on State aid. As a result, the outcome is not an exception to the bail-in principle.

The General Court of the European Union has annulled¹ the decision by the European Commission², which had found that support measures adopted for the benefit of Banca Tercas by the Italian deposit guarantee fund (*Fondo Interbancario di Tutela dei Depositi* or FITD) in 2014 was illegal State aid. The General Court's judgment states that the non-repayable contribution and guarantees provided by the FITD, at the time of Banca Popolare di Bari's acquisition of Banca Tercas, did not fulfil the two separate conditions that must both be met for them to be designated as State aid³, i.e. they must be imputable to the State and granted through State resources.

There was not sufficient evidence that the Italian State had substantial control over the adoption of the support measures or resources used, and so the FITD – a consortium governed by private law – acted in the interest of its members. Should Banca Tercas has been liquidated, the cost of using the deposit guarantee scheme would have exceeded the cost of support measures, according to estimates resulting from an audit carried out before the measures were adopted.

¹ Judgment of the General Court of the European Union of 19 March 2019 in joined cases T-98/16, Italy v Commission, T-96/16, Banca Popolare di Bari SCpA v Commission, and T-198/16 Fondo interbancario di tutela dei depositi v Commission.
² 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]).

³ For measures to be legal, they must first be brought to the attention of the European Commission, a credible restructuring plan to restore the bank's long-term viability must be presented, holders of subordinated debt must contribute (as well as shareholders) and distortions of competition must be limited.

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The measures taken by the Italian banking system for the benefit of one of its members highlight one of the ways in which the system can clean up its aggregate balance sheet, using its own resources. This judgment is likely to influence the future measures that the FITD may take, for example in support of Banca Carige. In the meantime, the support measures for Banca Tercas do not infringe the framework provided for by the BRRD, the Treaty on the Functioning of the European Union (TFEU) or the 2013 Communication on support measures in favour of banks⁴. As a result, the FITD's measures are not an exception to the rules on State aid or to the bail-in principle.

The measures are not imputable to the Italian State

The European Commission initially concluded that the support measures adopted by the FITD for the benefit of Banca Tercas constituted State aid. It took the view that the fund was under the control of the Italian public authorities because of the public mandate that the authorities had conferred to it, and so the measures were imputable to the Italian public authorities.

The measures in support of Banca Tercas do not fall within the public mandate conferred to the FITD

The transposition into Italian law of the European directive on deposit guarantee schemes⁵ led Italy's public authorities to confer a deposit guarantee fund mandate to the FITD. In the event of a bank being liquidated, deposits are covered by the guarantee up to EUR 100,000. If a bail-in takes place as part of the bank's resolution process, depositors are the last to contribute to the resolution and only from deposits exceeding EUR 100,000. Depositors therefore have a preferential ranking in the hierarchy of the bank's creditors.

The General Court of the EU took the view, unlike the European Commission, that the FITD's measures in support of Banca Tercas did not involve the fulfilment of its deposit guarantee fund mandate. According to the Court, the public mandate conferred to the fund is limited to reimbursing depositors up to EUR 100,000 in the event that a bank is subject to compulsory liquidation.

In addition, the purpose of the support measures was different from the FITD's public mandate of protecting depositors. Their purpose was to protect the private interests of the banks that are members of the consortium. Before Banca Tercas was acquired by Banco Popolare di Bari through the latter subscribing to an issue of ordinary shares of the former, the FITD had commissioned an audit, which confirmed that reimbursing depositors following a compulsory liquidation would have been more costly than the support measures decided upon. As a result, public interests coincided with private interests but, as the Court pointed out, according to established case-law, that provides no evidence of State aid. Incidentally, the Italian public authorities do not have the legal capacity to require the FITD to carry out measures of the kind adopted in support of Banca Tercas.

⁴ Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis.

⁵ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

In 2014, the FITD made a non-repayable contribution of EUR 265 million to Banca Tercas to cover its negative equity. Previously, bank's former equity of EUR 337 million had been written down to zero in order to absorb a share of the losses. However, the bail-in principle as defined by the BRRD was only partially applied, because it also provides for subordinated debt-holders to make a contribution. The European Commission criticised this part of the plan because, if it had been State aid, the 2013 Communication requires subordinated debt instruments to be converted into equity under the burden-sharing principle. Finally, EUR 65 million of guarantees were provided to Banca Tercas to cover the cost of risk and additional expenses.

The Bank of Italy respected the fund's independence in adopting support measures

As a consortium governed by private law, the FITD is presumed to be autonomous in its decision-making. As a result, any assertion that the Italian public authorities substantially influenced the adoption of support measures requires proof. In the present case, the Court took the view that the European Commission had insufficient evidence to prove the Italian State's involvement. The fund therefore acted voluntarily, because the measures were adopted by its supervisory bodies, and there was no sufficient proof of intervention by the Italian public authorities.

More specifically, the General Court of the EU took the view that the Bank of Italy's validation of the support measures on 7 July 2014 was not binding. It was part of the normal dialogue between a bank and its supervisory authority, and so provides no evidence of Italian State intervention. In addition, minutes from the various meetings show that the Bank of Italy representatives taking part were merely observers: they did not take part in the discussions and did not have any voting rights.

The measures were not funded through State resources

In the State aid context, it is sufficient for funds to remain under the permanent control of the public authorities for them to be designated as "State resources". State aid can therefore be granted through resources held by private organisations. The fact that the consortium that granted the support measures to Banca Tercas was governed by private law, using resources collected from its members, does not by itself prove that the support did not involve State resources. However, State control over the funds used must be proven.

The European Commission took the view that the resources used were under the control of the Italian State because banks are legally required to belong to a deposit guarantee scheme and they are also required to contribute when the FITD intervenes. However, the General Court's view was that the obligation for banks within the consortium to help finance support measures arises from a statutory provision, whereas the obligation to belong to a deposit guarantee scheme is a regulatory provision. As a result, banks are required to help finance support measures adopted by the FITD because they have chosen to belong to the consortium, whereas belonging to a deposit guarantee scheme is a legal requirement. Accordingly, the fund remains autonomous when taking support measures. The FITD's voluntary intervention scheme (*Schema volontario di intervento*) also has its own section, separate from the section on the deposit guarantee scheme, in the document that sets out the fund's statutes.

The Court also highlighted the fact that the FITD predated the 2014 European directive.

Moreover, likewise the European Commission's arguments that attributed the FITD's intervention to the Italian State, the public mandate conferred to the fund and the presumed control of the public authorities were insufficient to prove that the funds used were "State resources". The General Court took the view that the European Commission insufficiently distinguishes between the question of whether the intervention was imputable to the public authorities and the question of whether it was financed by State resources.

The Italian banking system must continue to clean up its balance sheet using its own resources

The General Court's judgment is a reminder of the limitations of rules regarding State aid in favour of banks in the EU⁶. The European Commission's decision to characterise the measures to support Banca Tercas as illegal State aid meant that the bank had to repay the funds received in April 2016. Taking the view that the decision had made resolving Banca Tercas' difficulties more costly for the banking system, Italy's foreign affairs minister Enzo Moavero Milanesi has not ruled out seeking compensation from the European Commission. The Commission, meanwhile, is considering its options: it has two months from the judgment notification date to appeal to the Court of Justice of the EU.

The judgment by the General Court of the EU highlights one of the ways in which the Italian banking system can continue the cleaning up of its aggregate balance sheet. In the near term, the judgment could influence the measures that the FITD may take, notably for the benefit of Banca Carige. On 30 November 2018, the fund decided a voluntary intervention, buying EUR 318.2 million of the bank's Tier 2 subordinated bonds. However, the recovery plan presented by Banca Carige's management has not been fully approved by all the bank's shareholders. The bank is currently undergoing early intervention measures, as provided for by the BRRD. Three temporary administrators have been appointed by the ECB and their term of office has been extended until 30 September 2019. Banca Carige could also receive State aid on the grounds of its strong regional footprint.

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⁶ Regarding the NordLB case, see C. Choulet (2019), *Does the support of an IPS constitute state aid?* BNP Paribas, EcoFlash 29 April 2019



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