Reports of Cases

JUDGMENT OF THE GENERAL COURT

(Fourth Chamber, Extended Composition)

20 December 2023 *

(Non-contractual liability – State aid – Aid granted by the Italian authorities to Banca Tercas – Decision declaring the aid incompatible with the internal market – Limitation period – Continuous damage – Partial inadmissibility – Sufficiently serious breach of a rule of law intended to confer rights on individuals – Causal link)

In Case T-415/21,

Banca Popolare di Bari SpA, established in Bari (Italy), represented by A. Zoppini, G.M. Roberti, I. Perego, G. Parisi and D. Gallo, lawyers,

applicant,

v

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

defendant,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of de R. da Silva Passos, President, S. Gervasoni, N. Półtorak (Rapporteur), I. Reine and T. Pynnä, Judges,

Registrar: V. Di Bucci,

having regard to the written part of the procedure,

having regard to the fact that no request for a hearing was submitted by the parties within three weeks after service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

* Language of the case: Italian.

Judgment

1 By its action under Article 268 TFEU, the applicant, Banca Popolare di Bari SpA, seeks compensation for the damage which it claims to have suffered as a result of the adoption of 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 Tercas decision').

Background to the dispute

2 On 30 April 2012, on a proposal by Banca d'Italia (Bank of Italy), which had identified irregularities within Banca Tercas ('Tercas'), the Italian Ministry of Economy and Finance decided to place Tercas under special administration.

3 In October 2013, after assessing various options, the special administrator, appointed by the Bank of Italy, entered into negotiations with the applicant, 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 Fondo interbancario di tutela dei depositi (Interbank Deposit Protection Fund, Italy; 'the FITD') covered in full that bank's negative equity.

4 On 28 October 2013, further to a request made by the special administrator of Tercas, the Executive Committee of the FITD decided to grant support measures in favour of Tercas, which were approved by the Bank of Italy.

5 On 18 March 2014, the FITD decided to suspend the planned measures on account of a disagreement between its own experts and the applicant's experts. That disagreement was subsequently resolved following an arbitration procedure.

6 On 30 May 2014, the Executive Committee and the Board of the FITD decided to take action for the benefit of Tercas.

7 On 7 July 2014, the Bank of Italy authorised the action to be taken by the FITD for the benefit of Tercas. That action consisted in three measures: first, a EUR 265 million contribution intended to cover Tercas' negative equity, second, a guarantee of EUR 35 million intended to cover the credit risk associated with certain exposures of Tercas and, third, a guarantee of EUR 30 million intended to cover the costs arising from the tax treatment of the first measure.

8 The special administrator of Tercas, in agreement with the Bank of Italy, convened a general meeting of Tercas' shareholders on 27 July 2014, in order for them to be able to take a decision on partly covering the losses discovered during the special administration and on a capital increase reserved for the applicant. That capital increase took place on the same day.

9 On 1 October 2014, Tercas was taken out of special administration and the applicant appointed the new bodies of that bank.

10 In December 2014, the applicant effected a capital increase, which included the issue of new shares. The capital increase served to reinforce the applicant's capital ratios, which had been affected by the acquisition of Tercas and its subsidiary, Banca Caripe SpA ('Caripe').

11 In March 2015, the applicant subscribed to a new increase in Tercas' capital, in order to cope with losses recorded in the fourth quarter of 2014, to cover the restructuring costs in 2015 and 2016 and to improve Tercas' capital ratios.

12 By letter of 27 February 2015, the European Commission had informed the Italian Republic of its decision to initiate the procedure laid down in Article 108(2) TFEU in respect of the measures adopted by the FITD for the benefit of Tercas.

13 On 23 December 2015, the Commission adopted the Tercas decision.

14 In that decision, the Commission concluded that the measures, authorised by the Bank of Italy on 7 July 2014 and adopted by the FITD for the benefit of Tercas, the entirety of capital which had been held by the applicant since 1 October 2014, constituted State aid incompatible with the internal market that had to be recovered from its beneficiary by the Italian Republic.

15 On 4 February 2016, the FITD carried out a 'voluntary' intervention for the benefit of Tercas and, on 14 July 2016, the applicant acquired Tercas.

16 By judgment of the General Court of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), upheld by the Court of Justice in its judgment of 2 March 2021, *Commission* v *Italy and Others* (C-425/19 P, EU:C:2021:154), the Tercas decision was annulled.

17 By letter of 28 April 2021, the applicant applied to the Commission, under Article 46 of the Statute of the Court of Justice of the European Union, for compensation for the damage it had allegedly suffered as a result of the adoption of the Tercas decision, requesting the payment of compensation in the sum of EUR 228 million.

18 On 11 May 2021, the Commission rejected that request.

Forms of order sought

19 The applicant claims that the General Court should:

– order the European Union, represented by the Commission, to pay it compensation in the sum of EUR 280 million or, in the alternative, EUR 203 million, in respect of the material damage it has allegedly suffered, together with appropriate compensation in respect of the non-material damage it has allegedly suffered, as a result of the adoption of the Tercas decision;

– order the Commission to pay the costs.

20 The Commission contends that the General Court should:

– dismiss the action as inadmissible;

– in the alternative, dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

Admissibility

21 The Commission has raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure of the General Court. It argues that the action for compensation is time-barred under Article 46 of the Statute of the Court of Justice of the European Union. According to the line of authority derived, in particular, from the judgment of 28 February 2013, *Inalca and Cremonini* v *Commission* (C-460/09 P, EU:C:2013:111, paragraph 47 and the case-law cited), the limitation period for actions in non-contractual liability begins to run once the requirements governing the obligation to provide compensation for damage are satisfied and, in particular, once the damage to be made good has materialised.

22 The Commission maintains, essentially, that the day of the announcement of the adoption of the Tercas decision, which was made, on 23 December 2015, by means of institutional communications and relayed in the press over the following days, was the moment at which the alleged damage materialised. Consequently, the starting point of the five-year limitation period was on 23 December 2015 and it expired on 23 December 2020. Since the application for compensation was made on 28 April 2021, the action for compensation is therefore time-barred.

23 In addition, the Commission maintains that the alleged damage was not continuous. According to the case-law, and in particular the judgment of 19 April 2007, *Holcim (Deutschland)* v *Commission* (C-282/05 P, EU:C:2007:226, paragraph 35), when damage is continuous, that implies that it increases in proportion to the time that elapsed. However, even if the damage allegedly suffered did increase over time, any such increase was not in proportion to the time that elapsed. On the contrary, the damage which the applicant alleges was instantaneous in nature.

24 Consequently, the application for compensation which the applicant made to the Commission on 28 April 2021 cannot be regarded as an intervening act stopping time from running for the purposes of the limitation period.

25 In that regard, the Commission contends that the moment when the alleged damage materialised coincides with the actual date of the recovery, by the national authorities, of the aid addressed in the Tercas decision. According to the Commission, it is the Tercas decision that is at the origin of the alleged damage.

26 Moreover, even if the starting point of the limitation period were the moment when the applicant was officially informed, by registered letter, of the event giving rise to the alleged damage, that would be, at the latest, the date of receipt of the registered letter that contained a copy of the Tercas decision, which is to say on 29 February 2016. In that case, the five-year limitation period would already have expired by the time the applicant applied for compensation, on 28 April 2021.

27 The applicant disputes the Commission's arguments.

28 Under Article 46 of the Statute of the Court of Justice of the European Union, which applies to proceedings before the General Court by virtue of the first paragraph of Article 53 thereof, actions against the European Union in matters arising from non-contractual liability become barred five years after the occurrence of the event giving rise to the action.

29 That limitation period has the function, first, of ensuring protection of the rights of the aggrieved person, who must have sufficient time in which to gather the appropriate information with a view to a possible action, and, second, of preventing the aggrieved person from being able to delay indefinitely the exercise of his or her right to damages (see, to that effect, judgments of 8 November 2012, *Evropaïki Dynamiki* v *Commission*, C-469/11 P, EU:C:2012:705, paragraph 33 and the case-law cited, and of 7 July 2021, *Bateni* v *Council*, T-455/17, EU:T:2021:411, paragraph 62 and the case-law cited).

30 According to the case-law, that limitation period begins once the requirements governing the obligation to provide compensation for damage are satisfied and, in particular, once the damage to be made good has materialised (judgment of 17 July 2008, *Commission* v *Cantina sociale di Dolianova and Others*, C-51/05 P, EU:C:2008:409, paragraph 54). Accordingly, the limitation period begins to run from the moment when the loss actually materialises and not on the date on which the harmful event occurred (see judgment of 28 February 2013, *Inalca and Cremonini* v *Commission*, C-460/09 P, EU:C:2013:111, paragraph 60 and the case-law cited).

31 It must also be recalled that Article 46 of the Statute of the Court of Justice of the European Union treats as an intervening act stopping time from running for the purposes of the limitation period either the institution of proceedings before the Court or the making of a prior application by the aggrieved party to the relevant institution (see, to that effect, order of 14 December 2005, *Arizona Chemical and Others* v *Commission*, T-369/03, EU:T:2005:458, paragraph 116).

32 It must also be borne in mind that, according to the case-law, where the damage was not caused instantaneously, but continued over a certain period, entitlement to compensation relates to consecutive periods. In particular, any harm which is repeated over successive periods of time and which increases with the passage of time must be regarded as continuous (orders of 4 September 2009, *Inalca and Cremonini* v *Commission*, T-174/06, not published, EU:T:2009:306, paragraphs 56 and 57, and of 19 May 2011, *Formenti Seleco* v *Commission*, T-210/09, not published, EU:T:2011:228, paragraph 50).

33 In such a case, the time-bar referred to in Article 46 of the Statute of the Court of Justice of the European Union applies to the period preceding by more than five years the date of the event which interrupted the limitation period and does not affect rights which arose during subsequent periods (see order of 4 September 2009, *Inalca and Cremonini* v *Commission*, T-174/06, not published, EU:T:2009:306, paragraph 60 and the case-law cited).

34 In the present case, the applicant claims to have suffered damage as a result of the Tercas decision. In particular, by its action, the applicant seeks compensation for the damage that was allegedly caused by the Tercas decision, consisting in a loss of confidence in it on the part of its customers, which caused it to lose deposits and customers (loss of profit) and caused damage to its reputation (non-material damage) and which generated expenditure on measures to mitigate the adverse effects of the Tercas decision (actual damage).

35 In that context, in order to determine whether the action is admissible, it is necessary to consider whether the alleged damage was continuous in nature, within the meaning of the case-law cited in paragraphs 32 and 33 above, as the applicant claims.

36 In the first place, in so far as the alleged loss of profit is concerned and as regards the starting point of the limitation period, the applicant does not dispute that the loss of direct deposits and customers caused by the Tercas decision occurred from the date on which the decision was announced, 23 December 2015. That being so, it must be held that the Tercas decision began to produce its effects, in that regard, on 23 December 2015.

37 It is, therefore, from that date that the effects of the alleged material damage actually began to occur and that the time for the purposes of the limitation period, provided for in Article 46 of the Statute of the Court of Justice of the European Union began to run (see, to that effect, judgments of 19 April 2007, *Holcim (Deutschland)* v *Commission*, C-282/05 P, EU:C:2007:226, paragraph 33, and of 17 July 2008, *Commission* v *Cantina sociale di Dolianova and Others*, C-51/05 P, EU:C:2008:409, paragraph 63).

38 The applicant argues that, on account of a loss of deposits and customers resulting from a reduction in its capacity to grant loans that adversely affected its entire business and eroded its net banking income, which materialised over the period from December 2015 to April 2021, it did not achieve the revenue that it could reasonably have expected had the Tercas decision not been adopted.

39 Therefore, the alleged damage consisting in the loss of profit resulting from the loss of direct deposits, which the applicant claims to have suffered, was continuous, within the meaning of the case-law cited in paragraph 32 above, in that the alleged material damage under that head was not caused instantaneously, but continued over a certain period and was repeated over successive periods, such that its scale increased with the passage of time, on account of the persistence of the effects of an unlawful act, namely the Tercas decision.

40 The applicant submits, moreover, that it suffered a loss of profit associated with a loss of customers until April 2021. In particular, it alleges that it lost 7 783 customers in 2015 and 2016. In addition, as regards the growth forecasts made on the basis of market trends and contained in the business plan for the period 2016 to 2020, which predicted an increase in the number of new customers of 50 000, or 10 000 per annum, the applicant achieved an increase in customer numbers corresponding to half of that forecast, which is to say 5 000 customers per annum from the 2017 financial year onwards.

41 According to the applicant, the Tercas decision caused that loss of customers, as a result of which it suffered a loss of profit consisting in a loss of commission margins during the period from December 2015 to April 2021, a failure to increase customer numbers as forecast in the 2016 to 2020 business plan, a decline in commission margins relating to the customers that remained, and a failure to achieve the forecast growth in net banking income during the period from December 2015 to April 2021.

42 It must be observed that the studies produced by the applicant, namely the technical reports of an audit firm and of a university professor, show that the alleged damage relating to the loss of customers persisted until the Tercas decision ceased to have effect, that is, until April 2021. In particular, without prejudice to the examination of the causal link, which will follow, the applicant, first, continued to lose customers and, secondly, was unable to attract new customers. Consequently, the alleged loss of profit resulting from that loss of customers recurred over successive periods and increased with the passage of time. Therefore, it must be held that the alleged damage consisting in the loss of profit resulting from the loss of customers was continuous, within the meaning of the case-law cited in paragraph 32 above.

43 Thus, the alleged loss of profit resulting both from the loss of direct deposits and from the loss of customers did not materialise instantaneously or wholly at the time when the Tercas decision was announced. Nor did it merely worsen with the passage of time. New damage occurred, inasmuch as, first, new customers could decide to close their accounts with the applicant or to withdraw their deposits, and, second, there were new losses of earnings in connection with lost profits. Since the damage in question, if proven, accumulated and recurred over successive periods, it must be held that the criteria which determine the existence of continuing damage, mentioned in paragraph 32 above, are satisfied.

44 Therefore, the damage consisting in the loss of profit allegedly suffered by the applicant may be regarded as continuous.

45 Furthermore, the Commission's argument that the alleged damage was not continuous, in that it was caused by the announcement of the Tercas decision, cannot succeed for the reason that, without prejudice to the analysis of the causal link, even though that decision may constitute the event that gave rise to the alleged damage, that damage was nevertheless continuous over a period of several years.

46 Lastly, the Commission maintains that, even if the damage could not be precisely quantified on the date when the Tercas decision was adopted, it was real and certain and, consequently, the applicant could have made its application for compensation before 28 April 2021. On that point, the applicant emphasises that, as is shown by the analysis in the technical note which it presented in its observations on the plea of inadmissibility, amidst the uncertainty that reigned at the time, the reactions of its customers could not have been all the same or immediate, being triggered by the different assessments made by each customer, and so the scale of the damage was not foreseeable. It is clear from the case-law that the fact that the alleged damage began to occur as soon as the Tercas decision was announced and that the applicant could have brought an action for compensation from that moment onwards does not preclude the damage from being continuous if the unlawful act, which the applicant claims to be the cause of the damage it allegedly suffered, remained in force and the persistence of its effects was liable to cause a loss of profit that accumulated with the passage of time (see, to that effect, judgments of 7 June 2017, *Guardian Europe* v *European Union*, T-673/15, EU:T:2017:377, paragraphs 34 to 38, and of 21 April 2005, *Holcim (Deutschland)* v *Commission*, T-28/03, EU:T:2005:139, paragraphs 68 and 69).

47 Thus, it is clear from the case file and from paragraphs 38 to 40 above that the damage, assuming it is proven, consisting in a loss of profit increased with the passage of time over the period from December 2015 to April 2021. Consequently, that damage was continuous.

48 In that connection, it is clear from the case file that, on 28 April 2021, the applicant, as is required by the second sentence of the first paragraph of Article 46 of the Statute of the Court of Justice of the European Union, made a prior application to the Commission for compensation for the damage caused, which it followed up by instituting proceedings within the following two months. That application may therefore be regarded as constituting an act interrupting the limitation period, within the meaning of Article 46 of the Statute and the case-law cited in paragraph 31 above. In accordance with the case-law mentioned in paragraph 33 above, where the damage in question is continuous, an application for compensation will not be time-barred to the extent that it concerns the reparation of damage allegedly suffered during the five years preceding the act interrupting the limitation period, meaning, in the present case, after 28 April 2016.

49 In the second place, in so far as concerns the alleged non-material damage, the applicant argues that that resulted from the damage to its reputation caused by the Tercas decision.

50 Non-material damage consisting in damage to reputation has been characterised in the case-law as either instantaneous or continuous, depending on its source. On the one hand, the Court has held that damage to reputation resulting from involvement in administrative, civil or criminal proceedings occurs entirely at the time when the proceedings are commenced and cannot, therefore, be equated with continuous damage (see, to that effect, orders of 4 September 2009, *Inalca and Cremonini* v *Commission*, T-174/06, not published, EU:T:2009:306, paragraph 78, and of 7 February 2018, and *AEIM and Kazenas* v *Commission*, T-436/16, not published, EU:T:2018:78, paragraph 35).

51 On the other hand, the Court acknowledged that, by its very nature, non-material damage is continuous when the alleged reputational damage is not instantaneous but recurs daily throughout the entire period during which the event that gave rise to the damage persists (see, to that effect, judgment of 16 December 2015, *Chart* v *EEAS*, T-138/14, EU:T:2015:981, paragraph 93). That is the case when the reputational damage derives from unlawful conduct on the part of a European Union institution, such as an omission, or from a Commission decision which is initially adopted and made public by means of a press release and is subsequently published in the *Official Journal of the European Union* in the form of a summary (judgment of 7 June 2017, *Guardian Europe* v *European Union*, T-673/15, EU:T:2017:377, paragraph 42).

52 It must be observed that, in the latter case, according to the case-law, damage to reputation, while it may take different forms, is in general damage which recurs on a daily basis and continues for as long as the cause of such damage has not been brought to an end (judgment of 7 June 2017, *Guardian Europe* v *European Union*, T-673/15, EU:T:2017:377, paragraph 42).

53 In the present case, the source of the alleged non-material loss resulting from the damage to the applicant's reputation was, according to the applicant, the Tercas decision, which was initially adopted and made public by means of a press release and which was subsequently published in the *Official Journal*. Therefore, assuming it is proven, that damage was continuous.

54 Consequently, the action for compensation is time-barred only to the extent that it seeks compensation for reputational damage prior to 28 April 2016.

55 In the third place, the applicant also alleges that it suffered actual damage consisting in the additional expenditure which it incurred in adopting measures to mitigate the adverse effects of the Tercas decision, in particular, a 30 December 2015 incentive scheme to encourage employees to leave, the aim of which was to reduce the staff by 85 employees; synthetic securitisation transactions effected on 10 May 2019 in response to the need to put in place equity support initiatives so that it could comply with own funds requirements following the loss of net banking income resulting from the decline in deposits and customers recorded immediately after the decision was adopted and over the following years; risk mitigation initiatives consisting in two transactions to transfer non-performing loans, decided upon or implemented, the first, on 1 August 2016 and the second, on 16 November 2017; commercial measures, adopted between 2016 and 2019 and directed at associates, designed to restore the relationship, in particular by means of discounts on the bank's standard terms and conditions for unsecured loans; legal adviser fees incurred on 21 January and 29 March 2016, 13 January 2017, 11 November 2019, 26 May 2020 and 7 June 2021.

56 That damage, assuming it is proven, materialised over several periods following the adoption of the Tercas decision, in the form of the various expenses the applicant had to bear.

57 In accordance with the case-law cited in paragraph 30 above, the limitation period began to run from the time when the Tercas decision produced injurious effects on the applicant. The decisive criterion for determining the starting point of the limitation period is not the occurrence of the act giving rise to the damage, since, inter alia, it may not be claimed, as against the applicant, that the limitation period began before the date on which those injurious effects were produced (judgment of 28 February 2013, *Inalca and Cremonini* v *Commission*, C-460/09 P, EU:C:2013:111, paragraph 52).

58 In the present case, first of all, the alleged damage suffered, consisting in the expenditure associated with the reduction in staff numbers, the synthetic securitisation transactions and the risk mitigation initiatives was not continuous within the meaning of the case-law cited in paragraph 32 above. That expenditure was incurred instantaneously and actually materialised on the date of each of the transactions in question and the amount of that expenditure did not increase with the passage of time.

59 Accordingly, it is necessary to determine the date from which the injurious effects of the damage in question arose for the applicant, within the meaning of the case-law cited in paragraph 30 above. It is from that time that the limitation period provided for in Article 46 of the Statute of the Court of Justice of the European Union began to run.

60 As stated in paragraph 55 above, the damage allegedly suffered as a result of the synthetic securitisation transactions and the risk mitigation initiatives occurred on 10 May 2019, and so the five-year limitation period had not yet expired when the applicant made its prior application to the Commission, which was on 28 April 2021. The action is therefore admissible in so far as that alleged damage is concerned.

61 On the other hand, as regards the possible damage associated with the reduction in staff numbers, that resulted from the incentive plan that was put in place on 30 December 2015. Accordingly, it must be held that it was at that precise time that the alleged damage materialised. It follows that the five-year limitation period had expired by the time the applicant made its prior application to the Commission and that, consequently, the action is time-barred in so far as concerns the compensation of that damage.

62 Second, as regards more specifically, the lawyers' fees incurred on 21 January and 29 March 2016, 13 January 2017, 11 November 2019, 26 May 2020 and 7 June 2021, it is clear from the case-law that those fees were, by their very nature, instantaneous. Those fees were actually incurred on a precise date and their amounts did not increase with the passage of time (see, to that effect, judgment of 16 December 2015, *Chart* v *EEAS*, T-138/14, EU:T:2015:981, paragraphs 82 and 84).

63 In the present case, it is apparent from the document provided by the applicant, which sets out details of the fee notes for legal assistance, that those fee notes relate, in particular, to advice on State aid matters given between February and December 2015, including an examination of the Tercas decision (fee notes of 21 January and 29 March 2016), to work carried out in connection with the proceedings in the case registered under number T-196/16, which gave rise to the judgment of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167) (fee note of 13 January 2017), to legal assistance with the proceedings relating to

the Tercas decision before the General Court and the Court of Justice until 31 October 2019 (fee note of 26 May 2020), and to a payment made on 20 May 2020 in connection with the continuation of the proceedings relating to the Tercas decision (fee note of 7 June 2021).

64 On the one hand, it must be observed that, in so far as concerns the fee notes of 21 January and 29 March 2016 relating to legal advice given between February and December 2015, the five-year limitation period expired before 28 April 2021, the date on which the applicant submitted its prior application, such that the action for compensation is time-barred.

65 On the other hand, as regards the fee notes of 13 January 2017, 26 May 2020 and 7 June 2021, those cover the fees incurred by the applicant for the management of the case files in the proceedings relating to the Tercas decision before the General Court and the Court of Justice. It must be observed that that expenditure was instantaneous in that it was actually incurred, at the latest, at the time when the applicant's counsel took the first steps to commence each of the sets of proceedings in question (order of 7 February 2018, *AEIM and Kazenas* v Commission, T-436/16, not published, EU:T:2018:78, paragraph 33).

66 In particular, the Court would point out that the application in the case which gave rise to the judgment of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), was lodged at the Registry of the General Court by the applicant's representative on 29 April 2016 and that the Commission's appeal against that judgment, which gave rise to the judgment of 2 March 2021, *Commission* v *Italy and Others* (C-425/19 P, EU:C:2021:154), was lodged on 29 May 2019. Given that the applicant submitted its prior application on 28 April 2021, the five-year limitation period had not yet expired by that date, and so the action is not time-barred in so far as concerns the alleged damage associated with the lawyers' fees incurred for those two sets of proceedings.

67 Third, as regards the commercial measures directed at associates and implemented during the period from 2016 to 2019, consisting in discounts on unsecured loans, it appears that the alleged damage resulting from those measures was liable to recur during that period and could not be forecast at the time when those measures were adopted or first implemented. Accordingly, the resulting damage, if proven, may be regarded as continuous, within the meaning of the case-law cited in paragraph 32 above, such that, to the extent that the claim for compensation relates to damage arising after 28 April 2016, it is not time-barred.

68 It follows that the action is inadmissible in so far as it concerns the alleged damage relating to the reduction in staff numbers and in the fee notes for legal assistance, with the exception of those relating to the commencement of legal proceedings in relation to the Tercas decision before the General Court and the Court of Justice.

69 On the other hand, the action is admissible in so far as it concerns the alleged damage consisting in the loss of profit, the non-material damage and the part of the actual damage relating to the synthetic securitisation transactions, the risk mitigation initiatives, the commercial measures directed at associates and the cost of legal assistance in connection with the commencement of legal proceedings in relation to the Tercas decision before the General Court and the Court of Justice.

Substance

70 The second paragraph of Article 340 TFEU provides that, in the case of non-contractual liability, the European Union must, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

71 It is clear from the Court's case-law that the non-contractual liability of the European Union and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, relating to the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of (judgment of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraph 32).

72 If any one of those conditions is not satisfied, the entire action must be dismissed and it is unnecessary to consider the other conditions for non-contractual liability on the part of the European Union (judgment of 14 October 1999, *Atlanta* v *European Community*, C-104/97 P, EU:C:1999:498, paragraph 65, see also, to that effect, judgment of 15 September 1994, *KYDEP* v *Council and Commission*, C-146/91, EU:C:1994:329, paragraph 81). In addition, the Courts of the European Union are not required to examine those conditions in any particular order (see judgment of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission*, C-419/08 P, EU:C:2010:147, paragraph 42 and the case-law cited).

73 It is in the light of those principles that the merits of the applicant's case must be examined.

74 The Court considers it appropriate to begin by examining the condition for establishing non-contractual liability that relates to the unlawfulness of the conduct complained of, for the purpose of the case-law set out in paragraph 71 above.

The unlawfulness of the conduct

75 In order for unlawfulness to be established for the purposes of non-contractual liability, within the meaning of Article 340 TFEU, the act or conduct of the EU institution in question must be held to be a sufficiently serious breach of a rule of law intended to confer rights on individuals (judgment of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 42).

– *Breach of a rule of law intended to confer rights on individuals*

76 The applicant argues that Article 107(1) TFEU, as a provision having direct effect, may be relied on before the national courts, together with Article 108(3) TFEU, and that it therefore does confer rights on individuals, at least when non-notified aid is at issue.

77 Moreover, according to the applicant, the Commission breached the principle of sound administration, enshrined in Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter') and, in particular, the duty to state reasons, in that it disregarded the arguments and evidence presented by the parties when adopting the Tercas decision.

78 The Commission disputes those arguments. It replies that Article 107(1) TFEU does not confer rights on individuals, but merely prohibits the Member States from granting aid to undertakings. That interpretation is also confirmed by the fact that, in accordance with the case-law (judgment of 8 July 2004, *Technische Glaswerke Ilmenau* v *Commission*, T-198/01, EU:T:2004:222, paragraph 192), interested parties other than the Member State responsible for granting the aid cannot claim a right to debate the issues with the Commission.

79 Furthermore, the Commission submits that it did not disregard the counter-arguments that were put to it in the course of the investigation relating to the Tercas decision, but that it reached different conclusions, such that there was no breach of the duty to state reasons.

80 As a preliminary point, it should be observed that it is clear from the case-law that a rule of law is intended to confer rights on individuals, in particular, where it is a provision which gives rise to rights for individuals which the national courts must protect, so that it has direct effect, or which creates an advantage that could be defined as a vested right, or which is intended to protect the interests of individuals, or which entails the grant of rights to individuals and the content of those rights is sufficiently identifiable (see judgments of 16 October 2014, *Evropaïki Dynamiki* v *Commission*, T-297/12, not published, EU:T:2014:888, paragraph 76 and the case-law cited, and of 9 February 2022, *QI and Others* v *Commission and ECB*, T-868/16, EU:T:2022:58, paragraph 90 and the case-law cited).

81 Also, according to settled case-law, those rights arise not only where they are expressly granted by provisions of EU law, but also by reason of positive or negative obligations which those provisions impose in a clearly defined manner, whether on individuals, on the Member States or on the EU institutions. The breach of such positive or negative obligations by a Member State is liable to hinder the exercise by the individuals concerned of the rights implicitly conferred on them under the provisions of EU law in question, rights they are deemed to be able to invoke at national level, and thus to alter the legal situation which those provisions seek to establish for those individuals. That is the reason why the full effectiveness of those rules of EU law and the protection of the rights which they are intended to confer require that individuals have the possibility of obtaining redress, irrespective of whether the provisions in question have direct effect, since direct effect is neither necessary nor sufficient in itself in order for the condition for the European Union to incur non-contractual liability relating to breach of a rule of law intended to confer rights on individuals to be satisfied (see, to that effect, the judgment of 22 December 2022, *Ministre de la Transition écologique and Premier ministre (Liability of the State for air pollution)*, C-61/21, EU:C:2022:1015, paragraphs 46 and 47 and the case-law cited).

82 It must be borne in mind that, in accordance with Article 107(1) TFEU, ‘save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.’

83 Thus, it must be observed, in the first place, that, in that it provides a definition of the concept of ‘State aid’ incompatible with the internal market, so as to ensure fair competition among the undertakings of the Member States, Article 107(1) TFEU is intended to protect the interests of individuals and, in particular, undertakings.

84 In that connection, it must be recalled, by analogy, that the Court has already held that Article 101(1) TFEU, which prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, produces direct effects in relations between individuals and creates rights for individuals. In particular, that provision confers rights on individuals (judgment of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraphs 21 and 31).

85 In the second place, for the purposes of determining whether Article 107(1) TFEU is intended to confer rights on individuals, the interpretation of that provision must take account not only its wording, but also its context and the objectives of the European Union's State aid policy (see, to that effect, judgment of 22 January 2015, *T-Mobile Austria*, C-282/13, EU:C:2015:24, paragraph 32 and the case-law cited).

86 The Court has already held that individuals cannot, on the basis of Article 107 TFEU alone, challenge the compatibility of aid with EU law before national courts or ask them to decide as to any compatibility which may be the main issue in actions before them or may arise as a subsidiary issue. That right exists, however, where the provisions of Article 107 TFEU have been applied by the general provisions provided for in Article 109 TFEU or by specific decisions under Article 108(2) TFEU (judgment of 22 March 1977, *Steinike & Weinlig*, 78/76, EU:C:1977:52, paragraph 10).

87 In that connection, it must be observed that the concept of 'State aid' contained in Article 107(1) TFEU must be applied, in particular, in order to determine whether or not State aid should have been made subject to the preliminary examination procedure provided for in Article 108(3) TFEU and, if so, whether the Member State concerned has complied with that obligation (see, to that effect, judgment of 18 July 2013, *P*, C-6/12, EU:C:2013:525, paragraph 38 and the case-law cited).

88 Thus, the application of the concept of 'State aid' contained in Article 107(1) TFEU is linked to the application of Article 108(3) TFEU. Accordingly, it must be recalled that the notification requirement is one of the fundamental features of the system of control put in place by the FEU Treaty in the field of State aid. Within that system, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid for the purposes of Article 107(1) TFEU and, second, not to implement such a measure, in accordance with Article 108(3) TFEU, until that institution has taken a final decision on the measure (see the judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 56 and the case-law cited).

89 The prohibition which forbids the Member State concerned from putting its proposed aid measures into effect extends to all aid that is granted without being notified. In the event of notification, it operates during the preliminary period and if the Commission sets in motion the procedure provided for in Article 108(2) TFEU, up to the final decision. As regards the whole of this period, it confers rights on individuals which the national courts are bound to safeguard (see, to that effect, judgment of 11 December 1973, *Lorenz*, 120/73, EU:C:1973:152, paragraphs 6 and 7).

90 While assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union, it is for the national courts to ensure the safeguarding, until the final decision of the

Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU (see judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 28 and the case-law cited).

91 It follows from the direct effect of Article 108(3) TFEU that national courts must offer to individuals the certain prospect that all the appropriate conclusions will be drawn from an infringement of that provision, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures (see, to that effect, judgments of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 39 and 40; of 16 April 2015, *Trapeza Eurobank Ergasias*, C-690/13, EU:C:2015:235, paragraph 52; and of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraphs 23 and 24).

92 The Court has held that the prohibition on the implementation of planned aid laid down in the last sentence of Article 108(3) TFEU has direct effect and that the immediate enforceability of the prohibition on implementation referred to in that provision extends to all aid which has been implemented without being notified (see judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 88 and the case-law cited).

93 Article 108(3) TFEU may therefore be relied on by individuals in order to assert their rights which they derive from its application, in accordance with the case-law cited in paragraph 92 above. As indicated in paragraph 87 above, it is for the purposes of applying the concept of 'State aid' provided for in Article 107(1) TFEU that the Commission was granted the power, under Article 108 TFEU, to decide on the compatibility of State aid with the internal market when examining existing aid, when adopting decisions concerning new or modified aid and when taking action in the event of a failure to comply with its decisions or the obligation to notify. It is on the basis of that provision that the procedure put in place pursuant to Article 108(3) TFEU is liable to affect the rights of individuals, as competitors of the recipients of aid or as beneficiaries themselves.

94 Moreover, the application of Article 107(1) TFEU by the Commission may be contested before the Courts of the European Union by the recipients of the aid, their competitors and the Member States.

95 In the present case, the Commission adopted the Tercas decision in breach of Article 107(1) TFEU, in that the institution concluded, wrongly, that the measures at issue, which had been authorised in breach of Article 108(3) TFEU, constituted State aid (judgment of 2 March 2021, *Commission* v *Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 24). It follows, more specifically, that, in the present case, the application of Article 107(1) TFEU affects the rights of the applicant, as beneficiary of the measures in question, which had been wrongly characterised as State aid and had been recovered.

96 In light of those considerations, Article 107(1) TFEU must be characterised as a rule intended to confer rights on individuals, such as the applicant, within the meaning of the case-law cited in paragraph 80 above.

97 The applicant also replies that the Commission's infringement of Article 107(1) TFEU also entailed an infringement of Article 41 of the Charter and, in particular, a breach of the duty to state reasons in that, without explanation, the institution disregarded the evidence put forward by the interested parties in the course of the investigation, which led to the adoption of the Tercas decision.

98 It must be recalled in that connection that, according to the case-law, the principle of sound administration, where it constitutes the expression of a specific right such as the right to have one's affairs handled impartially, fairly and within a reasonable time, as provided for in Article 41 of the Charter of Fundamental Rights, must be regarded as a rule of EU law whose purpose is to confer rights on individuals (see judgment of 6 June 2019, *Dalli* v *Commission*, T-399/17, not published, EU:T:2019:384, paragraph 200 and the case-law cited).

99 Consequently, it will only be with reference to a specific right that is an expression of the principle of sound administration that the assessment of whether the Commission's conduct was unlawful may be carried out.

100 It is clear from Article 41 of the Charter that the right to sound administration includes, in particular, the obligation for the administration to give reasons for its decisions. Thus, a breach of the duty to state reasons must be regarded as a breach of a rule of EU law intended to confer rights on individuals, for the purposes of the second paragraph of Article 340 TFEU.

– *The existence of a sufficiently serious breach*

101 The applicant states, in the first place, that the mere infringement of Article 107 TFEU can itself suffice to establish the existence of a sufficiently serious breach, given that the Commission's margin of discretion in that context is limited. According to the applicant, the Court of Justice and the General Court, in their respective judgments of 2 March 2021, *Commission* v *Italy and Others* (C-425/19 P, EU:C:2021:154), and of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), confirmed that the Commission had made serious and manifest errors in its assessment 'of the circumstances of law and fact' when applying Article 107(1) TFEU, in disregard of the relevant case-law. That was, therefore, a sufficiently serious breach. The breach was all the more serious since the Commission also failed to fulfil the duty to state reasons incumbent on it.

102 The Commission disputes the applicant's arguments.

103 As regards the condition relating to the unlawful conduct of an institution, only where that unlawful conduct entails a sufficiently serious breach is it capable of causing the European Union to incur non-contractual liability. It must be borne in mind, in that connection, that the decisive test for finding that a breach of EU law is sufficiently serious is whether the institution concerned manifestly and gravely disregarded the limits on its discretion (see, to that effect, judgments of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 43, and of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 30).

104 That requirement of a sufficiently serious breach of EU law is intended to avoid the risk of having to bear the losses claimed by the persons concerned obstructing the institution's ability to exercise to the full its powers in the general interest, whether that be in its legislative activity, or in that involving choices of economic policy or in the sphere of its administrative competence, without

however thereby leaving individuals to bear the consequences of flagrant and inexcusable misconduct (see, to that effect, judgment of 23 November 2011, *Sison* v *Council*, T-341/07, EU:T:2011:687, paragraph 34 and the case-law cited).

105 Thus, non-contractual liability of the European Union can arise only if an irregularity is found that would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence (judgment of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraph 43).

106 In particular, it follows from the case-law that the system of rules which the Court of Justice has worked out in relation to the non-contractual liability of the European Union takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question (see judgment of 28 February 2018, *Vakakis kai Synergates* v *Commission*, T-292/15, EU:T:2018:103, paragraph 64 and the case-law cited).

107 It follows from the case-law that, where the institution concerned has only a considerably reduced discretion or even no discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach. That is not the case, however, where the institution has a broad discretion. In such a case, the decisive test for finding that a breach of EU law is sufficiently serious is whether the EU institution or body concerned manifestly and gravely disregarded the limits on its discretion (see, to that effect, judgment of 10 December 2002, *Commission* v *Camar and Tico*, C-312/00 P, EU:C:2002:736, paragraph 54 and the case-law cited).

108 It must also be stated that there is no automatic link between, on the one hand, the fact that the institution concerned has no discretion and, on the other, the classification of the infringement as a sufficiently serious breach (see judgment of 23 November 2011, *Sison* v *Council*, T-341/07, EU:T:2011:687, paragraph 36 and the case-law cited).

109 It must be observed in that connection, first, that the concept of 'State aid', within the meaning of Article 107(1) TFEU, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Courts of the European Union must, in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see, to that effect, judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 111, and of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 87).

110 Second, in a case where the appraisals by the Commission are technical or complex in nature with regard to whether a measure comes within the scope of Article 107(1) TFEU, judicial review is limited (see judgment of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 88 and the case-law cited).

111 Moreover, in determining whether unlawful conduct on the part of an EU institution constitutes a sufficiently serious breach, the Court's analysis is by nature more demanding than that which is required in an action for annulment, when the Court need only, within the limits of the pleas in law put forward by the applicant, examine the lawfulness of the contested decision in order to satisfy itself that the Commission has correctly appraised the different elements which enabled it to declare that the measures in question could be imputed to the State, within the meaning of Article 107(1) TFEU. Accordingly, mere errors of assessment and a failure to put forward

sufficient evidence cannot in themselves be sufficient to give rise to a manifest and grave infringement of the limits imposed on the Commission's discretion (see, to that effect and by analogy, the judgment of 9 September 2008, *MyTravel* v *Commission*, T-212/03, EU:T:2008:315, paragraph 85).

112 It must also be observed that the Court has held that the Commission's capacity to function fully as a regulator of competition, a task entrusted to it by the Treaties, would be compromised if the concept of 'serious breach' were construed as comprising all errors or mistakes which, even if of some gravity, are not by their nature or extent alien to the normal conduct of an institution entrusted with the task of overseeing the application of competition rules, which are complex, delicate and subject to a considerable degree of discretion. On the other hand, the right to compensation for damage resulting from the conduct of the institution becomes available where such conduct takes the form of action manifestly contrary to the rule of law and seriously detrimental to the interests of persons outside the institution and cannot be justified or accounted for by the particular constraints to which the staff of the institution, operating normally, is objectively subject (judgments of 11 July 2007, *Schneider Electric* v *Commission*, T-351/03, EU:T:2007:212, paragraphs 122 and 124; of 9 September 2008, *MyTravel* v *Commission*, T-212/03, EU:T:2008:315, paragraph 40; and of 25 January 2023, *Società Navigazione Siciliana* v *Commission*, T-666/21, not published, EU:T:2023:20, paragraph 95).

113 It is in light of those observations that the nature of the Commission's infringement in the present case must be assessed, and in particular the gravity thereof. In that connection, account must be taken of the complexity of the situations to be regulated (see, to that effect, judgment of 16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraph 161).

114 In the present case, it is clear from the judgments of 2 March 2021, *Commission* v *Italy and Others* (C-425/19 P, EU:C:2021:154), and of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), that, on adopting the Tercas decision, the Commission failed to apply the concept of 'intervention by the State or through State resources' correctly.

115 Both the General Court and the Court of Justice held that the unlawfulness of the Tercas decision arose from a conceptual error resulting from confusion between the condition relating to the imputability of a measure to the State and that relating to State resources (judgments of 2 March 2021, *Commission* v *Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 63, and of 19 March 2019, *Italy and Others* v *Commission*, T-98/16, T-196/16 and T-198/16, EU:T:2019:167, paragraph 70). That unlawfulness also arose from the Commission's failure to set out and substantiate sufficient evidence capable of establishing that the aid measure under consideration could be imputed to the State (judgments of 2 March 2021, *Commission* v *Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 67, and of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167, paragraphs 87 to 90). In conclusion, it was held that the Commission had erred in its assessment of the evidence which it took into account and had not proven to the requisite legal standard that the Italian public authorities were involved in the adoption of the measure in question, or, consequently, that it could be imputed to the State, for the purposes of Article 107(1) TFEU.

116 Even though the General Court and the Court of Justice have acknowledged that the Commission infringed Article 107(1) TFEU, that infringement was not, for that reason alone, necessarily 'sufficiently serious' within the meaning of the case-law cited in paragraphs 106 and 107 above. The error which the Commission made, and which was established in the judgments of 2 March 2021, *Commission* v *Italy and Others*, (C-425/19 P, EU:C:2021:154), and of

19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), is not in itself sufficient to constitute a sufficiently serious breach, within the meaning of the case-law cited in paragraph 107 above.

117 It must be observed in that connection that, in determining whether an aid measure taken by a public undertaking may be imputed to the State, the Commission must take into account a set of indicators arising from the circumstances of the case and the context in which that measure was taken (see judgment of 17 September 2014, *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraph 32 and the case-law cited).

118 The error of assessment which the Commission made arose from its analysis of the information on which it had relied in order to establish that the Italian authorities had exercised substantial public control in establishing the measures adopted by the FITD for the benefit of Tercas.

119 Before adopting the Tercas decision, it was incumbent on the Commission, as is clear from paragraphs 68 and 69 of the judgment of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), to have a set of indicators, arising from the circumstances of the case, to establish the degree of involvement of the public authorities in granting the measures at issue, which had been provided by a private entity.

120 It must be observed that the Commission had had to apply the concept of 'State aid' within the meaning of Article 107(1) TFEU in a particularly complex legal and factual context, one where the aid measures were granted by a private entity, and had accordingly assessed the circumstances and information which supported the inference that the measure could be imputed to the State, the factual and legal context of the national measures addressed in the Tercas decision, the involvement of State representatives at the various stages of the intervention and the public mandate with which the FITD had been entrusted.

121 The fact that, in those complex legal and factual circumstances, the Commission had not, in the Courts' judgment, proved to the requisite legal standard in the Tercas decision, the involvement of the Italian public authorities in the adoption of the measure at issue or, consequently, that that measure could be imputed to the State, for the purposes of Article 107(1) TFEU, (judgments of 2 March 2021, *Commission* v *Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 84, and of 19 March 2019, *Italy and Others* v *Commission*, T-98/16, T-196/16 and T-198/16, EU:T:2019:167, paragraph 132), is not sufficient for that error of assessment to be characterised as a manifest and grave disregard for the limits on the Commission's discretion.

122 The Commission's unlawful conduct in the present case was not alien to the normal, careful and diligent conduct of an institution entrusted with the task of overseeing the application of competition rules, within the meaning of the case-law cited in paragraph 112 above.

123 Therefore, the Commission did not commit a sufficiently serious infringement of Article 107(1) TFEU.

124 Moreover, the applicant's argument alleging infringement of Article 41 of the Charter, and breach of the duty to state reasons in particular, must be rejected, since it has provided no specific evidence in that regard and it is not apparent from the contested decision or judgments of 2 March 2021, *Commission* v *Italy and Others*, (C-425/19 P, EU:C:2021:154), and of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), that the Commission disregarded, without explanation, the evidence and

arguments put forward by the parties to the investigation. The fact that the Commission arrived at different conclusions from those propounded by the applicant cannot lead to a finding of breach of the duty to state reasons. Accordingly, it must be concluded that it did not commit a sufficiently serious breach of Article 41 of the Charter either.

125 Therefore, the condition relating to the existence of a sufficiently serious breach is not satisfied and, consequently, it must be held that that first condition for finding the European Union to be liable is not met.

The existence of a causal link

126 The Court considers it appropriate also to examine the condition relating to the existence of a sufficiently direct causal link between the alleged unlawful conduct of the Commission and the alleged damage.

127 The applicant argues that customer confidence began to wane on account of the uncertainty, in the minds of its customers, as to its ability to complete the take-over of Tercas successfully. According to the applicant, the decisive causal link, given also the absence of other possible concomitant factors, is the Tercas decision, which introduced an element of discontinuity into the project for the integration of Tercas and Caripe set out in the business plan for 2015 to 2019, as was confirmed by the technical reports which it submitted as annexures.

128 It is apparent from those technical reports that, whereas customers had once had a good deal of confidence in the bank's soundness, in the months that followed the adoption of the Tercas decision, there was a loss of deposits and customers that became apparent over time. That phenomenon was out of step not only with the increase in direct deposits with the applicant in the previous period, but also with market trends for Italian banks over the same period.

129 In addition, the applicant states that, by contrast with the case that gave rise to the judgment of 30 June 2021, *Fondazione Cassa di Risparmio di Pesaro and Others* v *Commission* (T-635/19, EU:T:2021:394), the Commission made it impossible to implement its business plan for 2015 to 2019, which had already been approved by the national authorities at the time when the Tercas decision was adopted. That resulted in a precarious and uncertain situation in that, as a result of the Tercas decision, neither the national authorities nor the bank were in a position to take the project forward as planned, since they no longer had any room for manoeuvre.

130 The applicant adds that no other factors, such as the reform of people's banks instituted in response to problems relating to the governance and to the structure of the banking system and which affects legal form and governance, the imposition of penalties on its directors, the involvement of its directors in criminal proceedings, the losses recorded in the 2015 balance sheet and the state of insolvency of Tercas, had any effect on the alleged damage. Similarly, the document drawn up by the Bank of Italy, which the Commission presented, establishes that the damage suffered by the applicant may be attributed to the Tercas decision.

131 The Commission disputes the applicant's arguments.

132 As regards the condition under the second paragraph of Article 340 TFEU relating to a causal link, it is clear from the case-law that that condition concerns a sufficiently direct causal nexus between the conduct of the EU institutions and the damage, the burden of proof which rests on the applicant, so that the conduct complained of must be the determining cause of the damage (see

judgment of 5 September 2019, *European Union* v *Guardian Europe* and *Guardian Europe* v *European Union*, C-447/17 P and C-479/17 P, EU:C:2019:672, paragraph 32 and the case-law cited).

133 More specifically, the damage must flow sufficiently directly from the unlawful conduct, which excludes, in particular, damage which is only a remote consequence of that conduct (judgment of 5 September 2019, *European Union* v *Guardian Europe* and *Guardian Europe* v *European Union*, C-447/17 P and C-479/17 P, EU:C:2019:672, paragraph 135, and order of 12 December 2007, *Atlantic Container Line and Others* v *Commission*, T-113/04, not published, EU:T:2007:377, paragraph 40).

134 It is necessary that the alleged damage was actually caused by the conduct alleged against the institutions. Even in the case of a possible contribution by the institutions to the damage for which compensation is sought, that contribution might be too remote on account of other factors, such as some responsibility resting on others, possibly the applicants, in particular in so far as concerns the decisions taken by the undertakings or other operators concerned subsequently to the unlawful conduct (see, to that effect, judgment of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission*, C-419/08 P, EU:C:2010:147, paragraph 59).

135 It is in the light of those principles enshrined in the case-law that the Court must determine whether the applicant, which bears the burden of proof, in accordance with the case-law cited in paragraph 132 above, has demonstrated the existence of a direct causal link between the conduct of the Commission, namely its adoption of the Tercas decision, and the damage allegedly suffered.

136 In the present case, the applicant claims, essentially, that the Commission's Tercas decision, and in particular the extensive media coverage that ensued, caused customer confidence in it to wane on account of uncertainty surrounding its ability to complete the merger by absorption of Tercas, which caused it to lose deposits and customers (loss of profit) and caused damage to its reputation (non-material damage) and which generated expenditure on measures to mitigate the adverse effects of the Tercas decision (actual damage). That was the result of the Commission's misapplication of the concept of 'State aid', inasmuch as it wrongly considered that, notwithstanding its private nature, the action taken by the FITD for the benefit of Tercas constituted measures imputable to the Italian State and involving State resources.

137 It must be observed at the outset that the applicant draws no distinction between its own customers and those of Tercas and that it has put forward no specific arguments as to whether Tercas's loss of customers and direct deposits could be attributed to the Tercas decision. As regards the damage allegedly suffered, the applicant refers to its own loss of customers and direct deposits as well as those of Tercas and Caripe, without however clarifying the scale of each of them. Moreover, it does not allege that it suffered any economic loss as a result of the recovery of the aid, unlawfully demanded by the Commission.

138 In that connection, in the first place, it is important to note that, although, in the Tercas decision, the Commission wrongly required that the FITD's intervention measures, authorised by the Bank of Italy, for the benefit of Tercas be recovered as State aid, within the meaning of Article 107(1) TFEU, the fact remains that the decisions of the applicant's customers, which caused the alleged damage, were taken on the basis of the assessments and evaluations they made having regard to their own financial interests.

139 The applicant's customers were placed under no obligations by the Tercas decision, since that decision merely entailed the repayment of the aid. Nor did the decision contain anything to portray the applicant as unable to adopt alternative voluntary intervention measures for the benefit of Tercas or to reduce the applicant's credibility or diminish its customers' confidence in it. On the contrary, as soon as the Tercas decision was announced, both the Italian Government and the applicant indicated that voluntary intervention measures for the benefit of Tercas were ready to replace the measures previously envisaged and that, consequently, there would be no adverse effects resulting from them.

140 It must be observed that the circumstances of the present case differ from those of the case which gave rise to the judgment of 8 November 2011, *Idromacchine and Others* v *Commission* (T-88/09, EU:T:2011:641, paragraphs 60 and 65), which also concerned State aid, in which the Court acknowledged the existence of a direct causal nexus, for the reason that no harm would have been done to the applicant's image and reputation if the Commission had not disclosed in the contested decision facts and opinions presenting the applicant, by name, as having been unable to supply products conforming to current standards or to fulfil its contractual obligations.

141 With particular reference to the alleged non-material damage, the Court would add that the applicant has failed to demonstrate that the Tercas decision had any adverse consequences on its reputation. It merely states that that is the case without providing further details. However, the press articles it has presented inform the public that the effects of the Tercas decision would be offset by voluntary intervention measures.

142 In the second place, the argument that the loss of customers and direct deposits coincided in time with the Tercas decision is incapable of proving the existence of a direct causal link. The table set out in one of the technical reports provided by the applicant shows that, over the course of the period considered in the report, May 2015 to May 2016, there was a gradual decrease in direct deposits and a sharp fall from January 2016 onwards.

143 Nonetheless, as the Commission points out, several factors could have caused that decline in confidence on the part of the applicant's customers, which makes it difficult to determine whether the Tercas decision was the direct cause of the damage alleged by the applicant.

144 First of all, it is apparent from the report of the Bank of Italy presented by the Commission that the applicant's poor results for the 2015 financial year, published in April 2016 – together with the reform of people's banks provided for by Law No 33 of 24 March 2015 (Legge n. 33 del 24 marzo 2015, Conversione in legge, con modificazioni, del decreto-legge 24 gennaio 2015, n. 3, recante misure urgenti per il sistema bancario e gli investimenti) (Law No 33 of 24 March 2015 Converting into Law, with Amendments, Legislative Decree No 3 of 24 January 2015 on Urgent Measures for the Banking System and Investments) (GURI No 70 of 25 March 2015, Ordinary Supplement No 15)), which required the applicant to become a company limited by shares – led the shareholders, when approving the 2015 balance sheet, to reduce the unit value of the shares from EUR 9.53 to EUR 7.50, which, according to the Bank of Italy report provided by the Commission, provoked discontent among customers. It must be observed in that connection that the Tercas decision, adopted in December 2015, cannot have had any effect on the operating profit for the year 2015. Moreover, it is clear from that Bank of Italy report that, from 2014, the year in which the applicant acquired Tercas, until 2015, the applicant's financial indicators only deteriorated.

145 Second, it is clear from the decisions of the Commissione Nazionale per le Società e la Borsa (National Companies and Stock Exchange Commission, Italy) (Consob), which the Commission produced to the Court, that, between November 2014 and June 2015, in the context of the capital increases that took place, the applicant failed to inform investors of the method used and set the share price at a higher level than that set by the expert appointed to determine the share price, with the result that directors of the applicant were made the subject of administrative penalties and criminal investigations, beginning in 2017.

146 Third, as the Commission has pointed out, it must be observed that the fact that Tercas was in difficulty, for which reason, in October 2013, negotiations were entered into with the applicant, which subscribed to a capital increase in Tercas (judgment of 2 March 2021, *Commission* v *Italy and Others*, C-425/19 P, EU:C:2021:154, paragraphs 15 and 20), may have had an effect on the relationship of trust between the applicant and its customers. Between December 2014 and December 2015, that is to say prior to the adoption of the Tercas decision but after the applicant's acquisition of that bank, the applicant had already lost 4.9% of its direct deposits.

147 It must be observed in that connection that the applicant's acquisition of Tercas took place in July 2016 and that the most significant withdrawals of direct deposits occurred between July and September 2016. Consequently, the merger too might have had an effect on the relationship of trust between the applicant and its customers.

148 Fourth, the applicant has failed to explain why the Tercas decision prevented it from attracting new customers, even though the voluntary intervention for the benefit of Tercas which replaced that of the FITD, which was not authorised by the Tercas decision, had already been decided upon in February 2016, two months after the Tercas decision.

149 Fifth, in so far as concerns the actual damage, and in particular the expenditure generated by the measures to mitigate the allegedly adverse effects of the Tercas decision, that cannot be attributed directly to the Tercas decision. That expenditure in fact resulted from management decisions taken by the applicant. Moreover, even if those measures were a direct consequence of the loss of customers and deposits, it follows from the foregoing that it has not been demonstrated that the Tercas decision was the decisive cause of that alleged damage.

150 Furthermore, as regards the applicant's argument that the existence of a direct causal link is confirmed by the judgment of 30 June 2021, *Fondazione Cassa di Risparmio di Pesaro and Others* v *Commission* (T-635/19, EU:T:2021:394), it must be observed that there is a factual similarity between the present case and the case which gave rise to that judgment. In that case, the applicants sought to establish non-contractual liability on the part of the European Union under the second paragraph of Article 340 TFEU on the ground that the alleged unlawful conduct of the European Commission – exerting unlawful pressure on the Italian authorities and, in particular, the Bank of Italy – prevented the rescue of Banca delle Marche, in respect of which the applicants were shareholders and subordinated creditors, thus causing them damage. More specifically, the Commission prevented a rescue by the FITD, which led the Italian authorities, in particular the Bank of Italy, as the national competent authority, to initiate a resolution procedure in respect of Banca delle Marche.

151 In that context, the Court held that the position taken by the Commission before the initiation of the resolution procedure in respect of Banca delle Marche was merely procedural in nature, reminding the Italian authorities of the need to give prior notification and not to implement possible aid measures in favour of that bank in particular. The position taken did not concern

either a specific measure – since no measure had yet been clearly defined or notified – or the way in which the Commission would interpret the concept of 'State aid' within the meaning of Article 107(1) TFEU in that regard (judgment of 30 June 2021, *Fondazione Cassa di Risparmio di Pesaro and Others* v *Commission*, T-635/19, EU:T:2021:394, paragraph 56). Accordingly, the Court concluded that the condition relating to the existence of a causal link had not been met.

152 While it is true that, in the present case, the Commission did not confine itself to inquiring as to the compatibility of the intervention envisaged, but in fact adopted the Tercas decision, in which it concluded that the intervention measures in question constituted State aid within the meaning of Article 107(1) TFEU, contrary to the applicant's submission, it is not apparent from the case file that, by adopting that decision, the Commission prevented the business plan for 2015 to 2019 from being implemented.

153 It has been stated, including in a technical report of 9 July 2021 provided by the applicant, that the replacement of that business plan by the business plan for 2016 to 2020 had not been caused solely by the Tercas decision, but was the result of several factors arising in 2015, namely the change in the governance model, whereby the position of Director-General was abolished and replaced by that of managing director, the approval of the reform of people's banks, which entailed a change of legal form into that of a company limited by shares, developments in the regulatory context, chief among which was the creation of a new single supervisory mechanism, a difficult and constantly changing economic and financial landscape and the launch of a process to innovate the economic model.

154 In addition, as regards the alleged damage consisting in the legal fees incurred in connection with the proceedings in the case which gave rise to the judgment of 2 March 2021, *Commission* v *Italy and Others* (C-425/19 P, EU:C:2021:154) and in the case which gave rise to the judgment of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), it is clear from the case-law that those fees are not recoverable losses under Article 340 TFEU (see judgment of 8 November 2011, *Idromacchine and Others* v *Commission*, T-88/09, EU:T:2011:641, paragraphs 98 and 99 and the case-law cited). It is therefore unnecessary to consider whether the condition relating to the causal link is satisfied in so far as those fees are concerned.

155 In the third place, with regard to the evidence placed on the case file, it does not appear from the data set out in the technical reports which the applicant presented that it has adduced sufficient evidence to show that the conduct complained of was the direct and decisive cause of the loss of confidence on the part of its customers and, consequently, the damage alleged under that head.

156 First of all, the technical report of the audit firm is based on three premisses. First, the Tercas decision was probably the sole or, at least, the decisive cause of the alleged damage because it weakened customer confidence in the bank and thwarted the business plan for 2015 to 2019. Secondly, between May 2015 and May 2016, there was a decrease in direct deposits concomitant with the adoption of the Tercas decision. Thirdly, neither the information provided by the applicant nor the open-source documents indicated that there were other events that could have caused the alleged damage. Notwithstanding, that same report asserts that part, and at least 50%, of the losses sustained by the applicant between June and December 2016, the majority thereof, could be attributed to the Tercas decision. However, beside the fact that, as is clear from paragraphs 144 and 145 above, other events could have caused the losses alleged by the applicant, those arguments are no more than general considerations and no evidence is offered to prove that the Tercas decision was the direct and decisive cause of the alleged damage, within

the meaning of the case-law cited in paragraph 133 above. Furthermore, the introduction to the audit firm's technical report states that those analyses are limited to economic, accounting and financial aspects and that no legal analysis of the causal link is offered.

157 Moreover, it is stated in the introduction to that report and repeated several times that the technical analyses were carried out on the basis of documents provided by the applicant or obtained from public sources, namely extracts from the accounts provided by the applicant's board of directors relating to the period from 2015 to 2016, press releases drafted by the applicant, the business plan for 2016 to 2020 and management data communicated by the applicant. The report also states that those analyses did not include any audit of the information on the basis of which they were carried out.

158 Next, the technical report of the university professor states that the applicant enjoyed a very favourable position on the Italian market before the Commission opened its investigation. That investigation, together with the Tercas decision, altered the applicant's image on the market, customer confidence and growth expectations. The Commission's conduct by itself caused a loss of customers and direct deposits, hindered the integration of Tercas and Caripe contemplated in the business plan for 2015 to 2019 and made it necessary to find another solution in order to take the ongoing integration project forward. However, that report also states that the applicant's 2015 balance sheet, relating to the period prior to the Tercas decision, showed a loss of EUR 296 million and that, from the end of 2016 onwards, the Tercas decision was merely one of the causes of the damage allegedly suffered. Consequently, the conclusion that the Tercas decision was the direct and decisive cause of the damage claimed is weakened by the acknowledgment, in the professor's report, of those factors. Furthermore, in the introduction to the report, it is clearly stated that the information on the basis of which it was drawn up had been provided by the applicant, without any audit being carried out, and that the analyses were limited to economic and financial aspects, to the exclusion of legal aspects.

159 Finally, the technical reports mentioned above consequently do no more than take account of the information provided by the applicant itself, without checking that information. They do not analyse the impact of other possible causes of the damage alleged, including the applicant's own conduct, and so they do not suffice, as such, to prove that the damage was a direct consequence of the conduct of the Commission. Thus, those reports do not prove that the Tercas decision was the direct and decisive cause of the damage.

160 Having regard to all the foregoing considerations, the applicant's submission that the alleged unlawful conduct of the Commission caused the loss of deposits and customers, by preventing the business plan for 2015 to 2019 from being implemented, and was the direct cause of the damage which it allegedly suffered cannot be upheld. An overall assessment of the relevant evidence leads the Court to conclude that, even if the Tercas decision played a part in the progressive loss of confidence on the part of the applicant's customers, that loss of confidence was also caused by other factors, and so the decision cannot be regarded as the decisive and direct cause of the alleged damage, within the meaning of the case-law cited in paragraph 134 above.

161 It follows that the applicant has failed to prove the existence of a causal nexus between the alleged unlawful conduct of the Commission and the alleged damage.

162 In the light of the foregoing, it must be held that the conditions for establishing the non-contractual liability of the European Union that relate to the existence of a sufficiently serious breach, on the one hand, and the existence of a causal link between the conduct complained of and the damage alleged, on the other, are not satisfied.

163 Accordingly, the action must be dismissed, without it being necessary to consider the condition for establishing the non-contractual liability of the European Union that actual damage has been suffered.

Costs

164 Under Article 134(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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Banca Popolare di Bari SpA to pay the costs.

da Silva Passos Gervasoni Półtorak

Reine Pynnä

Delivered in open court in Luxembourg on 20 December 2023.

[Signatures]