2024/2033

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COMMISSION DECISION (EU) 2024/2033

of 21 September 2023

on measure SA.39451 (2015/C) (ex 2015/NN) implemented by Italy for Banca Tercas

(notified under document C(2024) 6281)

(Only the Italian version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108(2), first subparagraph, thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1), point (a), thereof,

Having called on interested parties to submit their comments pursuant to those provisions ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) The Commission learnt from the press and from the websites of the bank Tercas-Cassa di Risparmio della Provincia di Teramo S.p.A ('Tercas') and of the Italian deposit guarantee scheme ('DGS'), the *Fondo interbancario di tutela dei depositi* ('FITD'), that the FITD had intervened in support of that bank ('the FITD support intervention').

(2) On 8 August and 10 October 2014, the Commission requested information from Italy. Italy replied to that request on 16 September and 14 November 2014.

(3) By letter dated 27 February 2015 ('opening decision'), the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the measures concerned.

(4) The opening decision was published in the *Official Journal of the European Union* ([2]). The Commission invited interested parties to submit their comments on the measures concerned.

(5) On 2 April 2015, the Commission received comments from Italy.

(6) On 22 May 2015, the Commission received comments from two interested parties, namely Tercas and Banca Popolare di Bari S.C.p.A. ('BPB').

(7) On the same day, the Commission received comments from the Bank of Italy ('BOI') and the FITD.

(8) On 9 June 2015, the Commission forwarded the comments referred to in recitals (6) and (7) to Italy, which was given the opportunity to react. Italy informed the Commission that it did not have observations on those comments.

(9) On 13 August and 17 September 2015, two meetings were held between the Commission and Italy and the interested parties. At those meetings Italy developed the arguments set out in its earlier official communications.

([1]) OJ C 136, 24.4.2015, p. 17.
([2]) See footnote 1.

(10) By Commission Decision (EU) 2016/1208 ([3]), the Commission concluded that the measures adopted by the FITD in favour of Tercas amounted to State aid that is incompatible with the internal market and ordered the recovery of that aid.

(11) On 4 March, 29 April and 1 May 2016, Italy, BPB and the FITD, supported by the BOI, lodged actions before the General Court seeking the annulment of Decision (EU) 2016/1208.

(12) By its judgment of 19 March 2019 in joined cases T-98/16, T-196/16 and T-198/16 ([4]), the General Court annulled Decision (EU) 2016/1208.

(13) Further exchanges between the Commission and Italy took place on 20 December 2019, 30 January 2020 and 19 February 2020.

(14) By its judgment of 2 March 2021 in case C-425/19 P ([5]), the Court of Justice dismissed an appeal lodged by the Commission against the judgment in joined cases T-98/16, T-196/16 and T-198/16.

2. **BACKGROUND AND DETAILED DESCRIPTION OF THE MEASURES**

2.1. **Tercas**

(15) Tercas was the holding company in a banking group operating mainly in the Abruzzo region. At the end of 2011, the main shareholder of the holding company was Fondazione Tercas, which at the time had a 65 % stake in the holding company.

(16) At the end of 2011, the group comprised the holding company and Banca Caripe S.p.A. ('Caripe'), a regional bank active mainly in the Abruzzo region that had been acquired by Tercas at the end of 2010 (with a 90 % stake) and had been consolidated in Tercas's financial reports.

(17) At the end of 2011, Tercas had a total balance sheet of EUR 5,3 billion, EUR 4,5 billion of net customer loans, EUR 2,7 billion of customer deposits, 165 branches and 1 225 employees.

(18) On 17 April 2012, after having proceeded to an inspection of Tercas ([6]), the BOI proposed to the Italian Ministry of Economy and Finance to put the bank under special administration in accordance with Article 70 of the Italian Banking Act ([7]) (*Testo Unico Bancario*, 'TUB').

(19) On 30 April 2012, the Italian Ministry of Economy and Finance issued a decree to put Tercas under special administration ([8]). The BOI appointed a special administrator to ascertain the situation, correct irregularities, and promote useful solutions in the interest of the depositors. The special administrator took office on 4 May 2012.

(20) The special administrator of Tercas assessed different options to find a solution to Tercas's difficulties. Initially, the special administrator considered two options to recapitalise Tercas, either through the intervention of Fondazione Tercas (the main shareholder of Tercas) or of Credito Valtellinese (a shareholder with a 7,8 % stake), but then discarded those options.

([3]) 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 L 203, 28.7.2016, p.1).

([4]) Judgment of 19 March 2019, *Italy and others* v *Commission*, T-98/16, T-196/16 and T-198/16, ECLI:EU:T:2019:167.

([5]) Judgment of 2 March 2021, *Commission* v *Italy and others*, C-425/19 P, ECLI:EU:C:2021:154.

([6]) Between 5 December 2011 and 23 March 2012, the BOI performed an inspection on Tercas. During the inspection, the BOI found numerous irregularities and widespread issues concerning: (i) the management and governance of the bank; (ii) the internal audit function; (iii) the credit process; (iv) the disclosure of information to governing bodies and supervisory body.

([7]) *Decreto legislativo 1° settembre 1993, n. 385 – "Testo unico delle leggi in materia bancaria e creditizia" (Gazzetta Ufficiale della Repubblica Italiana, Serie generale n. 230, 30.9.1993 - Supplemento ordinario n. 92)*. References to the TUB shall be understood as referring to the version applicable at the time of the FITD support intervention.

([8]) On grounds of serious administrative irregularities and serious violations of laws.

(21) In October 2013, the special administrator of Tercas, in agreement with the BOI, had contacts with BPB, which manifested its interest to inject capital in Tercas, conditional on the execution of a due diligence on Tercas's and Caripe's assets and the full covering of Tercas's negative equity by the FITD.

(22) On 25 October 2013, the special administrator of Tercas submitted to the FITD, on the basis of Article 29 of the FITD's statutes ([9]), a request for a support intervention of up to EUR 280 million entailing a recapitalisation to cover the negative equity of Tercas as of 30 September 2013 and a commitment by the FITD to acquire impaired assets.

(23) The Executive Committee of the FITD decided, at their meeting of 28 October 2013, to intervene to support Tercas in accordance with Article 96-ter, paragraph 1, point (d), of the TUB, for an amount of up to EUR 280 million. The intervention was ratified by the FITD board on 29 October 2013.

(24) On 30 October 2013, the FITD requested authorisation from the BOI to implement that support intervention. On 4 November 2013, the BOI granted the authorisation to the FITD. However, the FITD did not ultimately undertake that support intervention.

(25) On 18 March 2014, the due diligence on the assets of Tercas and of Caripe was concluded with a disagreement between the experts of FITD and those of the banking group controlled by the holding company BPB. The issue was settled by an arbitrator chosen on proposal by the BOI. The due diligence disclosed further impairments of assets.

(26) On 1 July 2014, the FITD submitted to the BOI a second request of authorisation to grant a support intervention to Tercas on modified terms.

(27) On 7 July 2014, the BOI authorised that support intervention on modified terms ([10]).

(28) The special administrator of Tercas was authorised by the BOI to call an extraordinary shareholders' meeting on 27 July 2014, which was to decide on the measures to cover the losses which had occurred during the special administration and on a simultaneous capital increase of EUR 230 million reserved to BPB.

(29) Losses in Tercas in the period from 1 January 2012 to 31 March 2014 amounted to EUR 603 million. After the complete write-down of the remaining capital position of EUR 337 million, on 31 March 2014 Tercas's net equity was negative and amounted to EUR -266 million.

(30) On 27 July 2014, the Tercas shareholders' meeting decided ([11]):

(a) to partially cover the losses, *inter alia*, by reducing capital to zero by means of the cancellation of all the circulating ordinary shares;

(b) to increase the capital to EUR 230 million by issuing new ordinary shares that were offered exclusively to BPB. That capital increase was executed on 27 July 2014 and was paid, partially offsetting a EUR 480 million credit of BPB towards Tercas (corresponding to a loan granted by BPB on 5 November 2013).

(31) In September 2014, Tercas recapitalised its subsidiary Caripe with a capital injection of EUR 75 million.

(32) On 1 October 2014, the special administration of Tercas was lifted and new management was appointed by BPB.

(33) At the end of the special administration on 30 September 2014, Tercas had total assets of EUR 2 994 million, EUR 2 198 of customer deposits, net performing loans of EUR 1 766 million, provisions for non-performing loans of EUR 716 million and a total tier 1 capital of EUR 182 million.

([9]) References to the FITD's statutes shall be understood as referring to the version applicable at the time of the FITD support intervention.
([10]) See recital (43).
([11]) Minutes of shareholders' meeting, *repertorio n. 125.149, raccolta n. 28.024 del 29 luglio 2014*, notary Dr Vincenzo Galeota.

(34) In March 2015, BPB subscribed a new capital increase of Tercas for an amount of EUR 135,4 million (of which EUR 40,4 million for the subsidiary Caripe), to cope with additional losses incurred in the fourth quarter of 2014, to cover restructuring costs in 2015 and 2016 and to improve the capital ratios of Tercas.

2.2. **BPB**

(35) BPB was the holding company of a banking group operating mainly in the south of Italy. As of the end of 2013, BPB had a total balance sheet size of EUR 10,3 billion, EUR 6,9 billion of customer loans, EUR 6,6 billion of customer deposits, 247 branches and 2 206 employees, a tier 1 capital ratio of 8,1 % and a total capital ratio of 11 %.

(36) In December 2014, BPB executed a capital increase of EUR 500 million, comprising the issuance of new shares up to EUR 300 million, and the issuance of a tier 2 subordinated loan of up to EUR 200 million. The capital increase served to reinforce the capital ratios of BPB, which had been affected by the acquisition of Tercas.

2.3. **The Italian DGS framework and the FITD**

(37) According to Directive 94/19/EC of the European Parliament and of the Council ([12]), which was applicable at the time of the FITD support intervention, a credit institution cannot take deposits unless it is a member of an officially recognised DGS ([13]). According to Article 96, paragraph 1, of the TUB, 'Italian banks shall be members of one of the deposit guarantee schemes established and recognised in Italy. Cooperative credit associations [banche di credito cooperativo] shall be members of the deposit guarantee scheme established within their field' ([14]).

(38) At the time of the FITD support intervention, two DGS were established in Italy:

(a) the FITD, a mandatory consortium formed under private law, the only established and recognised Italian DGS whose membership was open to banks which were not cooperative credit associations. According to Article 2 of the FITD's statutes, approved by the BOI, 'Italian banks shall be members of the Fund with the exception of cooperative credit associations';

(b) Fondo di Garanzia dei Depositanti del Credito Cooperativo, a statutory DGS whose membership was only open to, and was mandatory for, cooperative credit associations.

(39) Pursuant to Article 96-bis of the TUB and Article 29 of the FITD's statutes, the FITD could undertake support interventions in favour of members that were subject to special administration under certain conditions.

(40) Such interventions were financed ex post by contributions of the member banks. The amount of the individual contributions was determined in accordance with the relevant statutory provisions ([15]) in proportion to the amount of covered deposits held by each bank. Contributions were not recorded directly into the balance sheet of the FITD, but were recorded in separate accounts for each intervention concerned.

([12]) Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ L 135, 31.5.1994, p. 5).

([13]) Article 3(1) of Directive 94/19/EC.

([14]) 'Le banche italiane aderiscono a uno dei sistemi di garanzia dei depositanti istituiti e riconosciuti in Italia. Le banche di credito cooperativo aderiscono al sistema di garanzia dei depositanti costituito nel loro ambito'.

([15]) Article 25 of the FITD's statutes, and Articles 9 to 14 of the annex to the FITD's statutes.

(41) Decisions to undertake support interventions were taken by the two governing bodies of the FITD:

(a) the Board ([16]), which decided by absolute majority of members present at the meeting where the decision was taken. The President of the Board was appointed by the members of the Board. The ordinary members of the Board were selected in proportion to the amount of covered deposits held by each bank, thus favouring larger contributors, but ensuring that smaller banks were also represented ([17]). The ordinary members of the Board, at the time 23, were mostly representatives of the largest member banks ([18]) with two representatives from Unicredit, Intesa Sanpaolo and Monte dei Paschi di Siena. The President of Associazione Bancaria Italiana (ABI) was also a member of the Board;

(b) the Executive Committee ([19]), which decided by majority of members present at the meeting where the decision was taken. Its members were the President of the Board, the Deputy President of the Board who also acted as Deputy President of the Committee and six other members of the Board.

(42) For support interventions in the form of financing and guarantees, the Executive Committee was empowered to take decisions ([20]), whilst for acquisition of equity interests and other technical support the Board decided upon proposal of the Executive Committee ([21]).

2.4. **The investigated measures**

(43) The FITD support intervention authorised by the BOI on 7 July 2014 entailed the following measures ('measures taken by the FITD'):

(a) measure 1: EUR 265 million as a non-repayable contribution to cover the negative equity of Tercas;

(b) measure 2: EUR 35 million as a guarantee (for up to three years) to cover the credit risk associated with certain exposures of Tercas. Those exposures (two bullet loans maturing on 31 March 2015) were fully repaid by the debtors at maturity and hence the guarantee expired without being triggered;

(c) measure 3: up to EUR 30 million as a guarantee to cover additional costs arising from tax payments on measure 1. Such tax payments would have been necessary if measure 1 had not been tax-exempted under Italian law. That specific tax exemption for intervention measures by the FITD, according to the relevant Italian law, would have been subject to the approval of the European Commission ([22]). The FITD paid out the full amount of EUR 30 million to Tercas at a point in time when the Commission had not decided on that exemption.

2.5. **Decision (EU) 2016/1208**

(44) In Decision (EU) 2016/1208, the Commission concluded that the measures taken by the FITD entailed unlawful State aid to Tercas and ordered the immediate and effective recovery of that aid.

([16]) Articles 3 to 15 of the FITD's statutes.
([17]) Article 12(3) of the FITD's statutes.
([18]) Article 13(10) of the FITD's statutes. At the time, Unicredit, Intesa Sanpaolo and Monte dei Paschi di Siena were represented by two members each. Credem, Credito Valtellinese, BNL, Deutsche Bank, Cariparma, Veneto Banca, CheBanca, BPM, Banco Desio e della Brianza, UBI, Banca di Credito Popolare Torre del Greco, Cassa di Risparmio di Rimini, Banca Popolare Pugliese, Unipol Banca, Banco Popolare, Banca Popolare dell'Emilia-Romagna and banca del Piemonte were represented by one member each.
([19]) See Articles 16, 17 and 18 of the FITD's statutes.
([20]) Article 17(1), point (a), of the FITD's statutes.
([21]) Article 14(1), point (e), of the FITD's statutes.
([22]) According to Article 1, paragraph 627, of 'Legge 7 dicembre 2013, n. 147 – 'Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (Legge di stabilità 2014)' ('Law 147/2013'), 'Ai fini del riassetto economico e finanziario dei soggetti in amministrazione straordinaria, gli interventi di sostegno disposti dal Fondo interbancario di tutela dei depositi non concorrono alla formazione del reddito dei medesimi soggetti'. According to Article 1, paragraph 628, of Law 147/2013, 'L'efficacia delle disposizioni del comma 627 è subordinata all'autorizzazione della Commissione europea'.

(45) When assessing, in particular, in Decision (EU) 2016/1208, the imputability to Italy of the measures taken by the FITD, the Commission recalled that the Court of Justice had clarified in its *Stardust Marine* judgment ([23]) that imputability to the State of an aid measure taken by a *prima facie* independent body, which does not itself form part of the State, can be inferred from a set of indicators arising from the circumstances of the case. One such indicator is that the body in question cannot take the contested decision without taking into account the requirements or directives of the public authorities before taking the decision allegedly involving State aid. Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State (recitals (115) and (116) of Decision (EU) 2016/1208).

(46) On that basis, the Commission considered that it could be inferred, *inter alia*, from the following elements, taken together as a whole, that the measures taken by the FITD were imputable to Italy:

(a) the FITD was entrusted by law with a public mandate, namely protecting savings and depositors, which was reflected in various forms of intervention. The TUB provisions, which enabled FITD to use the resources collected from member banks for different types of support interventions, such as in the case under consideration, had to be read as an expression of that public mandate (recitals (117) to (121) of Decision (EU) 2016/1208).

Although the FITD was a consortium governed by private law, the mere fact that it was constituted in the form of a body under ordinary law could not be regarded as sufficient to exclude that a measure taken by such a body could be imputable to the State. The autonomy that an undertaking enjoys in principle does not prevent the involvement of the State in practice (recital (122) of Decision (EU) 2016/1208).

In any event, Union and national legislation gave the BOI the authority and the means to ensure that all interventions by the FITD acting as a DGS recognised under the TUB complied with its public mandate and contributed to the protection of depositors. Thus, the BOI had to approve any such intervention by the FITD on its merits, assessing whether it complied with its public mandate under the TUB (recitals (123) and (124) of Decision (EU) 2016/1208);

(b) the BOI had wide-ranging powers over the FITD under the TUB and the Italian public authorities enjoyed various powers as regards the adoption of measures such as those under consideration, which could only take place for banks under special administration. They had the power of initiating those measures, through the request of a special administrator (a public official appointed and supervised by the BOI), and of influencing them, in the light of the BOI's power to authorise them in substance and the presence of public authorities in all relevant decisional meetings, where they were able to voice concerns (recitals (127) to (130) of Decision (EU) 2016/1208);

(c) the Italian public authorities exercised the powers available to them in the context of the adoption of the measures at issue. The relevant documents submitted by Italy showed that the BOI had authorised the measures taken by the FITD having regard to the interests of depositors and clients within the meaning of the relevant provisions of the TUB and, thus, in accordance with specific national public policy provisions. The negotiations between the special administrator of Tercas and BPB were conducted 'in coordination with the BOI'. The BOI further invited the FITD to reach a balanced agreement with BPB (recital (131) of Decision (EU) 2016/1208).

In the light of these elements as well as those referred to in points (a) and (b), the Commission observed that the aims and purposes of the intervention in question were laid down in detail by the FITD's public mandate under the TUB and were controlled in substance by the public authorities (recital (132) of Decision (EU) 2016/1208).

([23]) Judgment of 16 May 2002, *France* v *Commission*, C-482/99, ECLI:EU:C:2002:294.

(47) The Commission concluded on that basis that the content, compass and object of the measures under consideration were such that the above-mentioned elements demonstrated that an absence of involvement of the public authorities in their adoption was unlikely and there were sufficient indicators to show that those measures were imputable to the State and financed through State resources. Even if it was possible in principle that, taken individually, certain of the above-mentioned elements might in themselves be insufficient to conclude that the measures were imputable to the State, taken as a whole, that set of indicators showed the imputability of the measures to Italy (recitals (143), (144) and (145) of Decision (EU) 2016/1208).

2.6. **Summary of relevant Court proceedings**

2.6.1. *Annulment of Decision (EU) 2016/1208 by the General Court: the judgment in joined cases T-98/16, T-196/16 and T-198/16*

(48) By its judgment in joined cases T-98/16, T-196/16 and T-198/16, the General Court annulled Decision (EU) 2016/1208 on the ground that the first condition to be satisfied in order for aid to be classified as 'State aid' for the purposes of Article 107(1) TFEU, namely that that aid is granted by the State or through State resources, was not met.

(49) As regards, specifically, the imputability to Italy of the measures taken by the FITD, after analysing the evidence on which the Commission relied, the General Court found that the Commission had not proven to the requisite legal standard that the Italian public authorities were involved in the adoption of those measures or that they were imputable to the State within the meaning of Article 107(1) TFEU ([24]).

(50) In particular, the General Court assessed the scope of the public mandate conferred on the FITD and its autonomy when adopting the measures.

(51) The General Court found that the measures taken by the FITD were principally aimed at furthering the private interests of the FITD's member banks and that, while those private interests might coincide with the public interest, this did not in itself offer an indication as to the possible involvement of the public authorities in the adoption of a measure ([25]). The General Court further stated that the measures taken by the FITD did not give effect to a public mandate conferred by Italian law, contrary to what the Commission had considered in Decision (EU) 2016/1208. The public mandate conferred on the FITD consisted solely in reimbursing depositors, as a DGS, in cases where a member bank of the FITD was the subject of compulsory liquidation ([26]).

(52) The General Court, moreover, stated that no factors relating to how the FITD was organised linked the FITD to the Italian public authorities and the Commission had not proven the involvement of the Italian public authorities in the adoption of the measures in question ([27]).

(53) In that respect, the General Court held, first, that the BOI's authorisation of the measures taken by the FITD for the benefit of Tercas was not an indicator which enabled the measures at issue to be imputed to Italy, since, in that respect, the State was merely monitoring the compliance of the measures with the regulatory framework for the purposes of prudential supervision ([28]). Second, the General Court considered that the presence of the BOI representatives at the meetings of the governing bodies of the FITD did not constitute sufficient evidence that the measures were imputable to the State, since those representatives were merely observers with no voting rights and could not offer advice ([29]). Third, the General Court held that the Commission had not adduced evidence proving that the BOI had influenced decisively the negotiations that had taken place between, on the one hand, the FITD and, on the other hand, BPB and the special administrator, and that the BOI had used its contacts with the FITD in order to decisively influence the content of the measures in question. The General Court found that those contacts had merely allowed the BOI to be informed of developments in its capacity of competent supervisory authority and had not had an impact on the FITD's decision to adopt measures for the benefit of Tercas ([30]). Finally, the General

([24]) Judgment in joined cases T-98/16, T-196/16 and T-198/16, paragraph 132.
([25]) *Ibid*, paragraphs 96 to 99.
([26]) *Ibid*, paragraphs 100 to 106.
([27]) *Ibid*, paragraphs 113 and 132.
([28]) *Ibid*, paragraphs 115 to 120.
([29]) *Ibid*, paragraphs 121 to 124.
([30]) *Ibid*, paragraphs 125, 126 and 127.

Court held that the role played by the special administrator in that process could not put into question the FITD's autonomy in deciding whether to intervene. Moreover, the evidence adduced did not demonstrate that the request submitted by the special administrator for the FITD to intervene had been the result of instructions being given by the BOI ([31]).

(54) In the light thereof, the General Court found that the Commission had not proven to the requisite legal standard that the Italian public authorities had been involved in the adoption of the measures taken by the FITD, or, consequently, that those measures were imputable to the State within the meaning of Article 107(1) TFEU.

(55) The judgment in joined cases T-98/16, T-196/16 and T-198/16, which annulled Decision (EU) 2016/1208, was appealed by the Commission.

2.6.2. *The Court of Justice's ruling dismissing the Commission's appeal*

(56) By its judgment in case C-425/19 P, the Court of Justice dismissed the appeal lodged by the Commission against the judgment in joined cases T-98/16, T-196/16 and T-198/16.

(57) As regards specifically the imputability to Italy of the measures taken by the FITD, the Court of Justice stated that the General Court had not erred in holding that the evidence put forward by the Commission to demonstrate the influence of the Italian public authorities on the FITD did not allow the measures in question to be imputed to Italy.

(58) The Court of Justice held that the General Court had not required the Commission to meet a higher standard of proof, in relation to the imputability of the measure to the State, solely on account of the fact that the FITD was a private entity, but had drawn the appropriate conclusions from the objective differences between a situation where the entity providing the aid is a public undertaking and that in which that entity is a private entity. The Court of Justice clarified in this respect that the appropriate evidence for demonstrating the imputability of a measure arises from the circumstances of the case and the context in which that measure was taken and that the absence of a link of a capital nature between the entity concerned and the State is relevant in that regard ([32]).

(59) The Court of Justice also pointed out that its case-law on the concept of 'emanation of the State', which was developed with a view to allowing individuals to rely on unconditional and sufficiently precise provisions of a directive that is not transposed or is incorrectly transposed, against organisations or bodies which are subject to the authority or control of the State, cannot be applied to the question whether aid measures are imputable to the State for the purposes of Article 107(1) TFEU ([33]).

(60) In addition, the Court of Justice noted that the General Court had not failed to carry out an overall analysis of the evidence produced by the Commission. It was on the basis of the analysis of all of the evidence on which the Commission had relied, taken in its proper context, that the General Court had found that the Commission had erred in law in taking the view that it had demonstrated that the Italian authorities had exercised substantial public control in establishing the measures taken by the FITD for the benefit of Tercas ([34]).

3. **RELEVANT COMMENTS FROM INTERESTED PARTIES**

(61) Interested parties submitted comments following the adoption of the opening decision. This section summarises only comments related to the assessment of the imputability to the State of the measures in question and therefore does not reflect all comments received.

([31]) *Ibid*, paragraphs 128 to 131.
([32]) Judgment in case C-425/19 P, paragraphs 69 to 73.
([33]) *Ibid*, paragraph 77.
([34]) *Ibid*, paragraphs 80 to 85.

3.1. **Comments from Italy**

(62) As regards the imputability to Italy of the measures taken by the FITD, Italy based its analysis on the test of imputability as developed in the *Stardust Marine* judgment, which it argued is not satisfied in the present case for the following reasons.

(63) First, the FITD is a private law entity and takes all its decisions through its governing bodies, whose members are representatives of its member banks and are fully autonomous. The decision-making process for such support measures was fully independent and there was no provision for the active involvement of the BOI or any other public body. The fact that a representative of the BOI participated in the meetings of the governing bodies of the FITD could not be construed as an indicator of the BOI's active participation in the decision-making process, since the role of the representative was entirely limited to that of a passive observer.

(64) Italy further submitted that the BOI's power to approve the FITD's statutes and amendments thereto as well as to authorise individual interventions did not affect the autonomous decision-making process of the FITD, since it was limited to a mere ex-post authorisation by the BOI in its capacity as the authority supervising and directing the management of crises, pursuant to the TUB. The BOI's decision constituted a ratification decision, which was confined to a formal retrospective check on the legality of a fully finalised 'private' decision. That analysis was confirmed by the facts and particularly by the statement of reasons given in the order by which the BOI authorised the measures taken by the FITD, where the BOI acknowledged that it had not carried out any investigation into the merits of the choices made by the FITD. To strengthen that argument, Italy claimed that the present case bears clear analogies with the *Sicilcassa* case ([35]), where the Commission had concluded that the intervention concerned did not constitute State aid in the light of the decisive participation of private entities.

(65) With regard to the evidence referred to by the Commission in the opening decision, Italy claimed that it did not demonstrate an interference of the BOI in the FITD's decision-making process. According to Italy, the special administrator, despite being appointed by the BOI, had no power to directly influence the FITD's decision to grant funding to a bank in difficulty. Instead, he or she acted as manager and legal representative of the bank in special administration and not on behalf of the BOI, that is to say he or she took over all the private law powers of the dissolved governing bodies. Moreover, Italy disputed that there was an indication of interference of the BOI. The passage in a memo of the Director-General of the FITD dated 28 May 2014 mentioning that the representative of the BOI had invited the FITD to look for a balanced agreement with BPB to cover the negative equity had to be interpreted as a hope and in no case as the setting of an obligation. Furthermore, Italy noted that none of the minutes of the decisions taken by the governing bodies of the FITD as regards the intervention for the benefit of Tercas record any positions put forward by the BOI that might imply an exercise of influence over the FITD.

3.2. **Comments from the BOI** ([36])

(66) In its comments on the opening decision, the BOI disputed that the support intervention of the FITD was imputable to the State as:

(a) the FITD did not fulfil a public policy mandate when supporting credit institutions. The sole public policy mandate of DGSs was to reimburse depositors. Article 96-bis, paragraph 1, last sentence, of the TUB, which allowed the FITD to intervene in other ways than directly paying out covered depositors in liquidation, cannot be construed as an indicator of imputability to the State of FITD's interventions other than reimbursements of depositors or as assigning a public policy mandate to the FITD. That provision merely allowed for recourse to other forms of interventions;

([35]) Commission Decision 2000/600/EC of 10 November 1999 conditionally approving the aid granted by Italy to the public banks Banco di Sicilia and Sicilcassa (notified under document number C(1999) 3865) (OJ L 256, 10.10.2000, p. 21).

([36]) The BOI submitted its comments as a third party, and, as such, they are not presented together with the comments of Italy in this section. However, since the BOI is a public institution whose behaviour as such is that of the Member State and does not fall outside the scope of Article 107 TFEU on the basis that is an independent body, it is also referred to as 'Italy' in the section concerning the assessment of the measures.

(b) the BOI did not decide, either generally or in the case at issue, jointly with the FITD to intervene in support of a given undertaking and did not control that the FITD act consistently with any public policy mandate attributed to it. The BOI only exercised supervising powers having regard to the objectives of protecting depositors, stability of the banking system and sound and prudent management of the bank. Moreover, the BOI submitted that it did not contribute to the design or implementation of the FITD's support intervention and that any contact between itself and the FITD prior to the formal submission of the FITD's application for BOI's approval could not be classified as contribution of the BOI to those measures. The BOI merely provided initial guidance, solely in the light of the legislative parameters that governed the subsequent authorisation procedure. The fact that the BOI had appointed and supervised the special administrator had no bearing on the case at issue, as the tasks and aims of a special administrator's activities do not differ greatly from those of a 'normal' director of a private undertaking in a state of crisis. The special administrator did not act on behalf of the BOI. The BOI representative attending the meetings of the FITD board and executive committee only sat as an observer and had no voting rights. The fact that a dispute between the FITD and BPB as regards the amount of the negative equity of Tercas was settled by an arbitrator appointed by the BOI is irrelevant because it was the parties, on a fully independent basis and by mutual agreement, that had asked the BOI to indicate an individual, whom they then proceeded to appoint as arbitrator;

(c) the case at issue was significantly different from the State aid measures taken by Denmark, Spain and Poland, referred to in footnote 28 of the opening decision, regarding which the Commission had found that the resources used in DGS interventions were available to the public authorities and the interventions were therefore imputable to the State.

3.3. **Comments from other interested parties**

(67) The other interested parties, namely the FITD, BPB and Tercas, submitted that the Commission had erred in stating that DGSs were extremely likely to grant State aid given that they act under a public mandate and remain under the control of the public authorities. They considered that the Commission had come to the preliminary conclusion that the measures taken by the FITD were imputable to the State merely on the ground that such interventions were imposed by law. They referred to Article 96-bis of the TUB, which provided that DGS 'may engage in other types and forms of intervention', and submitted, inter alia, that the non-mandatory character of the FITD's interventions severed the link between the FITD's action and its statutory mission.

(68) The FITD put forward that it was a private law entity, controlled and managed by its member banks, and that it acted as a vehicle for implementing interventions which were directly attributable to them. The governing body of the FITD decided at its full discretion whether, when and how to make support interventions, the only requirement being that the intervention be less costly than reimbursing depositors. The FITD did not act under any public mandate when taking support measures and no public body could oblige it to intervene. The BOI's subsequent authorisation was only given to verify the adequacy of the intervention from the viewpoint of prudential supervision, ensuring that it was compatible with the need to protect depositors and with the stability of the banking system.

(69) In addition, the other interested parties pointed out that membership of the FITD was not mandatory and there was no interference of the State either with the appointment of the members of the FITD's governance bodies or with its decision-making process. The fact that BOI participated as an observer, without voting rights, did not affect the independent decision-making process of the FITD. Referring to the *EARL Salvat père et fils* judgment ([37]), they considered that in order for State aid to be present, the State should be represented in the deciding body of an organisation and able to impose its decisions.

(70) The other interested parties further submitted that the FITD was a body representing the interests of its member banks and that the powers assigned to the BOI in respect to the FITD's actions only allowed it to pursue its general supervisory aims, and more specifically the supervision of sound and prudent management of the supervised entities and the protection of depositors' interests. The fact that the BOI had appointed a special administrator of banks in crisis did not indicate a link with the State. The FITD also pointed out that the special administrator, despite being appointed by the BOI, was not a representative of the supervisory authority. The special administrator operated with broad

([37]) Judgment of 20 September 2007, *EARL Salvat père & fils and others* v *Commission*, T-136/05, ECLI:EU:T:2007:295, paragraph 154.

discretion and on his or her own initiative, and could submit a mere request for intervention to the FITD, which remained free to decide to make alternative interventions in the best interest of its member banks. In the case at issue, the special administrator had not superseded the general meeting of the bank, which was the only body empowered to approve operations of an exceptional nature. As regards the authorisation of the FITD's intervention by the BOI, the FITD submitted that that authorisation had been issued only after the FITD had taken an independent decision to intervene and was part of the normal supervisory role of the BOI. Besides, the BOI representative attending the meetings of the FITD board and executive committee only sat as an observer without voting rights. In addition, as Italy, the other interested parties submitted that the cases referred to by the Commission in the opening decision concerning DGSs were not comparable to the case at issue.

4. **ASSESSMENT OF THE MEASURES**

4.1. **Existence of aid**

(71) In order to ascertain whether a measure constitutes aid within the meaning of Article 107(1) TFEU, the Commission has to determine: (i) whether the measure is granted by the State or through State resources; (ii) whether the measure provides an economic advantage; (iii) whether the measure is capable of distorting competition by selectively favouring certain undertakings or the production of certain goods; (iv) whether the measure affects trade between Member States. All of these conditions must be met in order for a measure to constitute State aid within the meaning of Article 107(1) TFEU.

(72) By means of the judgment in joined cases T-98/16, T-196/16 and T-198/16, the General Court annulled Decision (EU) 2016/1208. Notably, the General Court held that the measures taken by the FITD did not give effect to a public mandate conferred by Italian law, contrary to what the Commission had considered in Decision (EU) 2016/1208. It further assessed the evidence relied upon by the Commission in Decision (EU) 2016/1208, and held that, in the light of that evidence, the Commission had not proven to the requisite legal standard that the Italian public authorities were involved in the adoption of the measures taken by the FITD or that those measures were imputable to the State within the meaning of Article 107(1) TFEU.

(73) That judgment was upheld upon appeal by the Court of Justice, which, by its ruling, sitting as Grand Chamber, clarified its case-law on the imputability to the State of measures granted by an entity governed by private law which is neither an organisation of the State nor a public undertaking.

(74) In particular, as held by the Court of Justice, in a situation in which the entity that provided the aid is a private entity, the appropriate evidence for demonstrating that a measure is imputable to the State differs from that required in a situation where the entity providing the aid is a public undertaking, and the absence of a link of a capital nature between the entity concerned and the State is clearly relevant in that regard. According to the Court of Justice, since such links are missing in a situation of that type, the Commission cannot rely on the existence of links of a capital nature between such an entity and the State. Therefore, in such situations there is an even more stringent requirement for the Commission to set out evidence capable of establishing that the aid measure under consideration had been adopted under the actual influence or control of the public authorities.

(75) The Court of Justice further stated that it was on the basis of the analysis of all of the evidence on which the Commission relied in Decision (EU) 2016/1208, taken in its context, that the General Court concluded that the Commission had not proven to the requisite standard that the measures taken by the FITD were imputable to Italy.

(76) Against this background, since the Commission does not have in its possession any further relevant evidence liable to demonstrate to the requisite legal standard that the measures under consideration had been taken by the FITD under the actual influence or control of the Italian authorities, it has to be concluded that, on the basis of the evidence available to the Commission, those measures are not imputable to Italy.

4.2. **Conclusion**

(77) In the light of the above considerations, the Commission concludes that the evidence in its possession is not sufficient to prove that the measures taken by the FITD involve State aid within the meaning of Article 107(1) TFEU.

5. **CONCLUSION**

(78) The Commission finds that the measures taken by the FITD for the benefit of Tercas in 2014 do not constitute State aid within the meaning of Article 107(1) TFEU.

HAS ADOPTED THIS DECISION:

Article 1

The measures taken by the deposit guarantee scheme of Italy, *Fondo interbancario di tutela dei depositi*, for the benefit of Tercas in 2014 do not constitute aid within the meaning of Article 107(1) TFEU.

Article 2

This Decision is addressed to the Republic of Italy.

Done at Brussels, 21 September 2023.

For the Commission
Didier REYNDERS
Member of the Commission