SANTA MARIA
STUDIO LEGALE

ALERT APRIL 2019 No.1

STATE AID TO FINANCIAL INSTITUTIONS:

THE JUDGMENT OF THE GENERAL COURT (EU) IN THE *TERCAS* CASE

On 19 March 2019, the General Court annulled the Commission's decision in the *Tercas* State aid case (Joint Cases T-98/16, T-196/16 and T-198/16) as the Commission failed to prove that the measures taken by the Italian deposit guarantee scheme entailed State resources and were imputable to the Italian State.

Background

In April 2012 the Italian bank Tercas-Cassa di Risparmio della Provincia di Teramo S.p.A. ("**Tercas**") was put under special administration by the Ministry of Economy and Finance on grounds of serious administrative irregularities and financial difficulties. The Bank of Italy appointed a special administrator to ascertain the situation, correct irregularities and promote useful solutions in the interest of the depositors.

In October 2013, Banca Popolare di Bari ("**BPB**") manifested its interest to inject capital in Tercas conditional on the execution of a due diligence on the assets of Tercas and the full covering of Tercas' negative equity by the Italian Deposit Guarantee Scheme ("**FITD**" or the "**Fund**").

The FITD is a private consortium of *all* Italian banks (except for the mutual banks) entrusted with the mandate of reimbursing the deposits in case of liquidation. Both the Italian law and the FITD's Statutes provide that the Fund may also engage in *other* types and forms of intervention ("alternative measures"). In particular, the Fund could intervene in support of member banks placed under special administration if there were reasonable prospects for the bank's recovery and the cost may be presumed to be less than would be incurred by intervention in case of liquidation.

In 2014, after verifying that measures adopted for the benefit of Tercas were economically more beneficial than reimbursement of that bank's depositors, the FITD decided to cover Tercas's negative equity (a non-repayable contribution of Euro 265 million) and to grant it certain guarantees. Those measures were *ex post* approved by Bank of Italy.

By decision of 23 December 2015, the Commission concluded that the measures in question constituted State aid granted by Italy to Tercas under Article 107(1) of the Treaty on the Functioning of the European Union ("**TFEU**") and ordered Italy to recover the aid granted to the Italian bank.

The decision was challenged by BP Bari/Tercas, the Italian Republic and the FITD, supported by Bank of Italy.

The judgment

The General Court upheld the applications lodged by BP Bari and by the other parties and annulled the Commission's decision.

The Treaty provides no complete definition of State aid. The ECJ case-law has made clear that, for a measure to be caught by the prohibition laid down in Article 107(1) TFEU, a number of requirements must all be met, namely that there must be: (i) an intervention *imputable* to the State and (ii) granted through *State resources*, (iii) conferring an advantage which an undertaking could not have obtained under normal market conditions; (iv) favouring certain undertakings or the production of certain goods (and be therefore "selective"); (v) distorting or threaten to distort competition within the internal market and affecting trade between Member States.

According to the General Court, the Commission concluded incorrectly that the measures granted by the FITD to Tercas were imputable to the State and entailed the use of State resources. Thus, *two of the five requirements* under Article 107(1) TFEU *were not* satisfied in the case at stake.

As regards ***imputability***, the General Court makes clear that, for measures adopted by private entities (as the Fund), the Commission cannot confine itself to demonstrate the *unlikelihood* of the absence of influence by the State in the adoption of a certain measure (or control of the latter). Conversely, only a *sufficiently high degree* of intervention by public authorities in the definition and implementation of said measures and their methods of financing allows the Commission to attribute them to the State (see, in particular, paragraphs 89-91 and 69).

In the case at stake, the Commission did not gather enough evidence to conclude that the support measures were taken under the influence or control of the public authorities and that, accordingly, they were, in fact, imputable to the State.

First of all, according to the General Court, the FITD interventions to assist in the restructuring of credit institutions (as that made in Tercas) did not constitute the fulfilment of a public mandate but rather pursued the *private* interests of the banks' members of the consortium (paras 94-106).

Moreover, the Fund acted *independently* from public authorities (paras 107-132). By authorizing, *ex post*, the transaction the Bank of Italy simply checked whether it complied with the regulatory framework for prudential supervision purposes: therefore, the authorization cannot constitute evidence on the basis of which the measure may be imputed to the Italian State. The judges went on to observe that the Bank of Italy does not have the power to *impose* the adoption of certain measure to the Fund, which governing bodies are entirely made up of the member banks.

Furthermore, the representatives of the Bank of Italy who attended the meetings of the FITD's management bodies were mere *observers* and were not involved in the adoption of the decision to award the non-repayable contribution to Tercas.

Finally, the negotiations between BP Bari, the FITD and Tercas special administrator were not influenced decisively by the Bank of Italy. The General Court pointed out, in this regard, that the initiative to address the request to the FITD was taken by BP Bari, which made conditional its recapitalization to the covering by the Fund of Tercas' negative equity (see especially para 131).

As regards the separate requirement of ***private resources***, the General Court argues that the evidence brought by the Commission did not demonstrate that the funds used by the FITD to finance the intervention were *under public control* and therefore *available* to the competent national authorities. To

this end, the Luxembourg Court emphasized, *inter alia*, that (i) the FITD did not act in the pursue of a public mandate; (ii) the intervention was requested by BP Bari and (iii) the fact that the contributions to the FITD measures alternative to reimbursing depositors may be seen as *de facto* mandatory is the result of a statutory option freely accepted by the members of the consortium.

Concluding remarks

The General Court emphasizes the necessity to "keep separate" the analysis of the two cumulative criteria of "imputability" and "State resources". According to the ruling, in the Tercas decision the Commission did not even try to "clearly distinguish" such criteria (paragraph 70).

With respect to the requirements mentioned above, the General Court makes clear that, for measures adopted by *private entities*, the involvement of the State in the adoption of a measure must be clearly demonstrated and cannot be presumed from certain indicators, as the situation of the former cannot be simply equated to that of *public undertakings*. Indeed, the case law on which the Commission grounded its stance on the public and "mandatory" nature of the Italian deposit guarantee scheme interventions in favour of banks in distress largely relates to public undertakings.[1]

Interestingly, at para 55, the ruling correctly points out that the contested decision not only prevented the FITD from supporting Tercas,[2] but also excluded the possibility of making *other* support interventions in the future, reducing the autonomy of the FITD and of its members (the Italian banks).

Indeed, in the aftermath of the *Tercas* decision, a number of support interventions envisaged by the Italian deposit guarantee schemes to ailing Italian banks were opposed by the Commission on the assumption that they would constitute illegal State aid and in some cases resolution under the BRRD was opened.[3] As rescues were ultimately conducted under less favourable terms for the banks and their creditors than those initially planned, the Italian banks association (ABI) and other players are now considering taking legal action against the Commission to seek compensation. Thus, the relevance of the judgment is not confined to the specific circumstances of the case.

The ruling reveals an increasingly rigorous control, by the EU Courts, on the assessment made by the Commission of the requirements that must exist for a measure to be caught under Article 107 TFEU. In the same vein, other recent examples of Commission decisions annulled by the EU Courts are that relating to the German law on renewable energy of 2012 (on lack of the "State resources" requirement)[4] and that relating to the fiscal aid to Spanish professional football clubs (on the "advantage" requirement).[5]

[1] Case C-482/99 *France v Commission* EU:C: 2002:294 and Case C-472/15, *Sace and Sace BT v. Commission* EU:C:2017:885.
[2] At least in the form initially envisaged.
[3] This is the case of the resolution of Banca Marche, Cassa di Risparmio di Ferrara, Cassa di risparmio della Provincia di Chieti e Banca Popolare dell'Etruria e del Lazio.
[4] Judgment of the Court of Justice of March 28, 2019, *Commission v Germany*, C-405/16 P, where the Court annulled a Commission's decision of November 25, 2014 qualifying as State aid a German law guaranteeing to energy producers from renewable sources prices higher that the market price, by means of a surcharge which was, in practice, passed on final customers. According to the Court of Justice, the funds generated by such surcharge did not constitute State resources since the State did not hold a power of disposal over them.
[5] Case T-865/16, *Fútbol Club Barcelona v Commission* (see Santa Maria Alert No. 1/March 2019 - *Aiuti fiscali alle squadre di calcio spagnole. Annullata la decisione della Commissione UE*).

More generally, from recent case law, it appears that the threshold of proof the Commission has to fulfil in the field of State aid has been somehow raised.[6] A further example of this trend comes from the ECJ judgment in *Montessori*, with respect to the alleged impossibility by the Italian State to recover the fiscal aid granted to non-commercial bodies and to other entities.[7]

Milan, April 1st, 2019

Edoardo Gambaro Francesco Mazzocchi

For questions or clarification on that matter, please contact:

Edoardo Gambaro

edoardo.gambaro@santalex.com

tel. + 39 02 771971

[6] Please see the book edited by Santa Maria law firm, *Competition and State Aid, An Analysis of the EU Practice*, 2° ed. Wolters Kluwer, 2015, p. 6 *et seq*.

[7] In that ruling, following the grounds arisen in our application, the Court of Justice annulled the Commission's decision that allowed the non-recovery of the aid stating that "*the Commission is required to undertake a detailed examination of the difficulties pleaded and the suggested alternative methods of recovery. Only if the Commission finds, following such a detailed examination, that there are no alternative methods […] may that recovery be considered to be objectively and absolutely impossible to carry out*". (para 92 of the judgment in Joined Cases C-622/16 P, C-623/16 P and C-624/16 P).