II

(Non-legislative acts)

DECISIONS

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))

(notified under document C(2015) 9526)

(Only the Italian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

1. PROCEDURE

(1) From press reports and from the websites of the bank Tercas — Cassa di Risparmio della Provincia di Teramo SpA and of the Italian deposit guarantee scheme, the Fondo Interbancario di Tutela dei Depositi ('FITD' or 'the Fund'), the Commission learnt that the FITD had taken steps to support the bank.

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

(3) By letter dated 27 February 2015 ('the 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 ('the Treaty') in respect of the aid.

(4) The opening decision was published in the *Official Journal of the European Union* on 24 April 2015 [2]. The Commission invited interested parties to submit their comments on the aid.

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

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

(6) On 22 May 2015, the Commission received comments from two interested parties, namely Tercas — Cassa di Risparmio della Provincia di Teramo SpA and Banca Popolare di Bari SCpA ('BPB').

(7) On the same day, it received comments from the FITD and from the Italian central bank, the Banca d'Italia.

(8) On 9 June 2015, it forwarded those comments to Italy, and gave it the opportunity to reply. Italy informed the Commission that it did not have observations on the comments.

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

2. **BACKGROUND**

2.1. **Tercas**

(10) Tercas — Cassa di Risparmio della Provincia di Teramo SpA is the holding company of a banking group ('Tercas') that operates mainly in the Abruzzo region. At the end of 2011, the main shareholder in the holding company was Fondazione Tercas, which had a 65 % stake at that time.

(11) At the end of 2011, Tercas included Banca Caripe SpA ('Caripe'), a regional bank active mainly in the Abruzzo region, which was acquired by Tercas at the end of 2010, with a 90 % stake, and was consolidated in Tercas's financial reports. Tercas had capital of EUR 50 million and reserves of EUR 311 million.

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

(13) On 17 April 2012, after conducting an inspection of Tercas ([3]), the Banca d'Italia recommended that the Italian Minister for Economic Affairs and Finance should put Tercas under special administration pursuant to Article 70 of the Italian Banking Act (the *Testo Unico Bancario*).

(14) On 30 April 2012, the Minister for Economic Affairs and Finance made an order putting Tercas under special administration ([4]). The Banca d'Italia appointed a special administrator (*commissario straordinario*) to ascertain the situation, correct irregularities and promote solutions in the interests of depositors.

(15) In the search for a solution to Tercas's difficulties the special administrator assessed various possibilities. Initially the administrator considered two options in which Tercas would be recapitalised either by Fondazione Tercas (Tercas's main shareholder) or by Credito Valtellinese (a shareholder with a 7,8 % stake), but then discarded them.

(16) In October 2013, in agreement with the Banca d'Italia, the special administrator entered into contact with BPB, which manifested an interest in injecting capital into Tercas, subject to a due diligence inquiry into the assets of Tercas and of Caripe and on condition that Tercas's negative equity was covered in full by the FITD.

(17) On 25 October 2013, on the basis of Article 29 of the FITD's constitution (*Statuto*), the special administrator asked the FITD to provide support worth up to EUR 280 million in the form of a recapitalisation to cover Tercas's negative equity at 30 September 2013 and a commitment by the FITD to acquire impaired assets.

([3]) The Banca d'Italia conducted an inspection of Tercas between 5 December 2011 and 23 March 2012. It identified numerous irregularities and widespread anomalies concerning (1) the management and governance of the bank, (2) the internal audit function, (3) the credit process, and (4) the disclosure of information to the governing bodies and the supervisory body.

([4]) On grounds of serious administrative irregularities and serious violations of legislation.

(18) At a meeting on 28 October 2013 the Executive Committee (*Comitato di gestione*) of the FITD decided to support Tercas, in accordance with Article 96-*ter*(1)(d) of the Banking Act, for an amount up to EUR 280 million. The decision to intervene was ratified by the FITD's Board (*Consiglio*) on 29 October 2013.

(19) On 30 October 2013, the FITD asked the Banca d'Italia for authorisation for that support measure: on 4 November 2013, the Banca d'Italia granted the authorisation. Ultimately, however, the FITD did not put the measure into effect.

(20) A due diligence inquiry into Tercas's assets ended on 18 March 2014 with disagreement between the experts of the FITD and those of the banking group ('BPB') controlled by the holding company Banca Popolare di Bari SCpA. The issue was settled after the parties agreed to arbitration by an arbitrator designated by the Banca d'Italia. The due diligence inquiry disclosed further impairments of assets.

(21) On 1 July 2014, the FITD once again asked the Banca d'Italia to authorise support for Tercas, but on modified terms.

(22) The Banca d'Italia authorised that support, on modified terms ([5]), on 7 July 2014.

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

(24) Losses in Tercas in the period from 1 January 2012 to 31 March 2014 amounted to EUR 603 million. After a complete write-down of the remaining capital of EUR 337 million, Tercas's net equity on 31 March 2014 was therefore negative, and amounted to — EUR 266 million ([6]).

(25) On 27 July 2014, the Tercas shareholders' meeting ([7]) decided:

(1) to partially cover the losses, inter alia, by reducing the capital to zero and cancelling all the ordinary shares in circulation; and

(2) to increase the capital to EUR 230 million, by issuing new ordinary shares to be offered exclusively to BPB; that capital increase took place on 27 July 2014 and was paid for partly by offsetting a EUR 480 million loan granted to Tercas by BPB on 5 November 2013.

(26) In September 2014, Tercas recapitalised its subsidiary Caripe by means of a capital injection of EUR 75 million.

(27) On 1 October 2014 Tercas left special administration, and new management was appointed by BPB.

(28) On 30 September 2014, at the end of the special administration, Tercas had total assets of EUR 2 994 million, customer deposits of EUR 2 198, net performing loans of EUR 1 766 million, provisions for non-performing loans of EUR 716 million, and total tier 1 capital of EUR 182 million ([8]).

(29) In March 2015, BPB subscribed a new increase in Tercas's capital for an amount of EUR 135,4 million (including EUR 40,4 million for its 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 Tercas's capital ratios.

([5]) See recital 38.
([6]) The figures given in this recital refer only to Tercas — Cassa di Risparmio della Provincia di Teramo SpA, and not to the whole Tercas group.
([7]) Minutes of shareholders' meeting, *repertorio n. 125.149, raccolta n. 28.024 del 29 luglio 2014*, notary Vicenzo Galeota.
([8]) See footnote 6.

2.2. **BPB**

(30) Banca Popolare di Bari SCpA is the holding company of the banking group BPB. BPB operates mainly in the south of Italy. At the end of 2013, BPB had a balance sheet total of EUR 10,3 billion, customer loans of EUR 6,9 billion, customer deposits of EUR 6,6 billion, 247 branches and 2 206 employees, a tier 1 capital ratio of 8,1 % and a total capital ratio of 11 %.

(31) In December 2014, BPB carried out 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 BPB's capital ratios, which had been affected by the acquisition of Tercas.

2.3. **The Italian deposit guarantee scheme and the FITD**

(32) Under Directive 94/19/EC of the European Parliament and of the Council ([9]), which was applicable at the time when the FITD intervention in relation to Tercas took place, no credit institution may take deposits unless it is a member of an officially recognised deposit guarantee scheme ([10]). According to Article 96 of the Italian Banking Act, 'Italian banks shall be members of a deposit guarantee scheme established and recognised in Italy. Mutual banks (*banche di credito cooperativo*) shall be members of the deposit guarantee scheme established within their network' ([11]).

(33) There are currently two deposit guarantee schemes established in Italy:

(1) The FITD, which was recognised as a deposit guarantee scheme on 10 December 1996, is a mandatory consortium ([12]) formed under private law. To date, it is the only established and recognised Italian deposit guarantee scheme whose membership is open to banks other than mutual banks ([13]). According to Article 2 of the FITD's constitution, approved by the Banca d'Italia: 'Italian banks shall be members of the Fund, with the exception of mutual banks'.

(2) The Fondo di Garanzia dei Depositanti del Credito Cooperativo is a statutory deposit guarantee scheme whose membership is open only to mutual banks, which are required to be members.

(34) Under Article 96-*bis* of the Banking Act and Article 29 of the FITD's constitution, the FITD may under certain conditions take measures to support members that are subject to special administration.

(35) Such measures are financed *ex post,* by mandatory contributions provided by the member banks. The amount of the individual contribution is determined under the relevant provisions of the FITD's constitution ([14]) in proportion to the guaranteed deposits held by each bank. Contributions are not entered directly in the FITD's balance sheet, but in a separate account for the particular support measure.

(36) Decisions on support measures are taken by the two governing bodies of the FITD:

(1) First there is the Board ([15]), which decides by absolute majority of the members present at the meeting when the decision is taken. The Chairman of the Board is appointed by the members of the Board. The ordinary

([9]) 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).
([10]) Article 3(1) of the Directive.
([11]) 'Le banche italiane aderiscono a uno dei sistemi di garanzia dei depositanti istituiti e riconosciuti in Italia. Le banche di credito cooperative aderiscono al sistema di garanzia dei depositanti costituito nel loro ambito'.
([12]) The FITD presents itself as a mandatory consortium (*consorzio obbligatorio*) on its website.
([13]) Mutual banks cannot become members of the FITD. They must be members of the Fondo di Garanzia dei Depositanti del Credito Cooperativo, the deposit guarantee scheme established within the mutual bank network.
([14]) See Article 25 of the FITD's constitution, and Articles 9 to 14 of the Annex to it.
([15]) See Articles 3 to 15 of the FITD's constitution (*Statuto*).

members are selected in proportion to the guaranteed deposits held by each bank, thus favouring larger contributors, but ensuring that smaller banks are also represented ([16]). The ordinary members of the Board, currently 23, are for the most part representatives of the largest member banks ([17]); at present there are two representatives each from Unicredit, Intesa Sanpaolo and Monte dei Paschi di Siena. The Chairman of the Associazione Bancaria Italiana (ABI) is also a member of the Board.

(2) The other governing body is the Executive Committee ([18]), which decides by simple majority of the members present at the meeting when the decision is taken. Its members are the Chairman of the Board, the Deputy Chairman of the Board, who also acts as Deputy Chairman of the Committee, and six other members of the Board.

(37) Support measures in the form of financing and guarantees are decided by the Executive Committee ([19]), while the acquisition of equity interests and other technical support has to be decided by the Board, on a proposal from the Executive Committee ([20]).

3. **THE MEASURES**

(38) The FITD support authorised by the Banca d'Italia on 7 July 2014 consists of the following measures:

(1) *Measure 1*: EUR 265 million as a non-repayable contribution to cover Tercas's negative equity.

(2) *Measure 2*: EUR 35 million as a three-year guarantee to cover the credit risk associated with certain exposures of Tercas towards […] ([21]). 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.

(3) *Measure 3*: Up to EUR 30 million as a guarantee to cover additional costs that might arise from the payment of tax on Measure 1. Such tax payments would be necessary if Measure 1 were not to be considered tax exempt under Italian law (*). Under the relevant legislation, the specific tax exemption for support measures taken by the FITD was to be subject to the approval of the European Commission. In the event, the FITD paid out the full amount of EUR 30 million to Tercas before the Commission had taken a decision on the tax exemption.

4. **GROUNDS FOR INITIATING THE PROCEDURE**

(39) In the opening decision, the Commission came to the preliminary conclusion that the measures, which had not been notified, might contain State aid within the meaning of Article 107 of the Treaty, and that there were doubts as to their compatibility with the internal market.

(40) The Commission's preliminary finding was that the support measures to be taken by the FITD were imputable to the Italian State, and that FITD's resources were under public control. The FITD was acting in accordance with a public mandate laid down by the State: the basis for the recognition of the FITD as a mandatory deposit

([16]) *Consiglio*: See Article 12(3) of the FITD's constitution.
([17]) See Article 13(10) of the FITD's constitution. The following are currently represented by one member each: Unicredit, Intesa Sanpaolo and Monte dei Paschi di Siena are 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.
([18]) *Comitato di gestione*: see Articles 16 to 18 of the FITD's constitution.
([19]) Article 17(1)(a) of the FITD's constitution.
([20]) Article 14(1)(e) of the FITD's constitution.
([21]) Article 1(627) and (628) of the 2014 Stability Act (Act No 147/2013): '627. For purposes of the economic and financial reorganisation of banks in special administration, support measures taken by the FITD shall not form part of the revenue of those banks. 628. Paragraph 627 shall take effect only upon authorisation by the European Commission.' (627. 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. 628. L'efficacia delle disposizioni del comma 627 è subordinata all'autorizzazione della Commissione europea.)
(*) Confidential information.

guarantee scheme was the Banking Act, Article 96-*bis* of the Banking Act allowed the FITD to intervene in ways other than reimbursing depositors in the event of a liquidation, and the constitution of the FITD was approved by the Banca d'Italia. In addition, when the FITD intervened in cases other than liquidations, or by other means, it always had to have authorisation by the Italian State via the Banca d'Italia.

(41) On the question whether there was a selective advantage, the Commission observed that the FITD was not acting in the capacity of an operator in a market economy, since it was granting a non-repayable contribution to cover the negative equity, and for the guarantees issued in favour of Tercas it did not charge any fee. The measures permitted Tercas to avoid exiting the market, as it would likely have had to do in the absence of such support.

(42) The Commission came to the preliminary conclusion that the measures were selective, given that they related to Tercas only, and that they distorted competition by preventing Tercas from becoming insolvent and exiting the market. And Tercas was in competition with foreign undertakings, so that trade between Member States was affected.

(43) The Commission considered that if measures 1, 2 and 3 constituted aid they had been granted in breach of the obligations laid down by Article 108(3) of the Treaty.

5. COMMENTS FROM ITALY AND INTERESTED PARTIES

5.1. State resources and imputability to the State

5.1.1. *Observations from Italy* ([22])

(44) Italy submits that the support measures at issue are not of a mandatory nature, since the time, extent and choice of measures are left entirely to the FITD's discretion. Furthermore, those measures are not directly comparable to the mandatory missions laid down by the Banking Act: instead they are directly aimed at achieving a different purpose, or in any case an additional purpose, namely turning around banks in difficulty. Any coincidence of aims with respect to the protection of depositors is purely fortuitous. In that context, the Commission's reference to the judgment in the *Austrian Green Electricity Act* case ([23]) is misplaced. That case concerned a rule establishing a tax exemption, which by definition was of a public nature and hence justified the presumption of imputability of the measure to the State.

(45) Furthermore, Italy claims that the interpretation proposed by the Commission, which is based on a form of presumption that there is State aid in any intervention whatsoever by a deposit guarantee scheme, has no basis in Directive 2014/49/EU of the European Parliament and of the Council ([24]) (which had not been transposed by Italy and for which the transposition deadline had not yet expired at the time of adoption of the measures). The Commission's interpretation of this point has no basis in the 2013 Banking Communication either ([25]). More specifically, under point 63 of the Communication, to establish whether any given decision on the use of deposit guarantee funds is imputable to the State a specific case-by-case assessment has to be carried out, while Article 11 of Directive 2014/49/EU does not impose a general obligation to give prior notice of any measure to be taken by a guarantee fund. Prior notification to the Commission is necessary only if it is established that a support measure constitutes aid following an examination of the specific case.

(46) As regards the imputability of the FITD measure to Italy, Italy bases its analysis on the test of imputability developed in *Stardust Marine* ([26]), which it contends is not satisfied in the case at hand, for the following reasons. First, the FITD is a private-law entity and takes all its decisions through its general meeting and governing bodies, whose membership is composed entirely of representatives of the member banks and which acts in complete

([22]) The Italian public authority that submitted comments to the Commission is the Italian Minister for Economic Affairs and Finance.
([23]) *Austria* v *Commission (Austrian Green Electricity Act)*, Case T-251/11, EU:T:2014:1060.
([24]) Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).
([25]) Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ C 216, 30.7.2013, p. 1).
([26]) *France v Commission*, Case C-482/99, EU:C:2002:294.

independence. The decision-making process for support measures is entirely independent, and there is no provision for the active involvement of the Banca d'Italia or any other public body. The fact that a representative of the Banca d'Italia participates in the meetings of the FITD's governing bodies cannot be construed as an indicator of the Banca d'Italia's active participation in the decision-making process, since the role of the representative is merely that of a passive observer.

(47) Italy further submits that the Banca d'Italia's power to approve the FITD's constitution and amendments thereto, and to authorise the individual measures taken, does not affect the autonomous decision-making of the FITD, since it is limited to a mere *ex post* authorisation by the Banca d'Italia in its capacity as the authority supervising and directing the management of crises pursuant to the Banking Act. The Banca d'Italia's decision is a ratification which is confined to a formal retrospective check on the legality of a private decision that is already complete in every respect. That analysis is confirmed by the facts, and particularly by the Banca d'Italia's order authorising the FITD measure, where the Banca d'Italia acknowledges that it has not carried out any investigation into the merits of the choices made by the FITD. To strengthen that argument, Italy claims that the case at hand bears clear analogies with the *Sicilcassa* case ([27]), where the Commission concluded that the measure did not constitute State aid in view of the decisive participation of private entities.

(48) Italy submits that the evidence referred to by the Commission in the opening decision does not demonstrate interference on the part of the Banca d'Italia in the FITD's decision-making process. First, although a special administrator is appointed by the Banca d'Italia, he or she has no power to directly influence the FITD's decision to grant funding to a bank in difficulty. Instead, the special administrator acts as the manager and legal representative of the bank in special administration, and not on behalf of the Banca d'Italia. In other words, he or she takes over all the private-law powers of the dissolved governing bodies. Second, Italy denies that there is in fact any evidence of interference on the part of the Banca d'Italia. The passage in a memo from the Director-General of the FITD dated 28 May 2014 which mentions that the representative of the Banca d'Italia 'invited the Fund to look for a balanced agreement with BPB to cover the negative equity' has to be understood as expressing a hope, and certainly not a command. Finally, Italy observes that none of the minutes of the decisions taken by the governing bodies of the FITD regarding the action to help Tercas record any positions put forward by the Banca d'Italia that might suggest that it was exercising influence over the Fund.

5.1.2. *Observations from the Banca d'Italia* ([28])

(49) In its comments on the opening decision, the Banca d'Italia denies that the FITD's support measures are imputable to the State, because:

(1) in supporting credit institutions the FITD is not complying with a public policy mandate;

(2) the Banca d'Italia does not decide jointly with the FITD to intervene in support of a given undertaking, either generally or in the case at issue, and does not check to see that the FITD is acting consistently with any public policy mandate given to it;

(3) the case at issue is significantly different from the State aid measures taken by Denmark, Spain and Poland cited in footnote 28 to the opening decision, where the Commission found that the resources used in measures regarding deposit guarantee schemes were at the disposal of the public authorities and the measures were therefore imputable to the State.

(50) As regards the first point, according to the Banca d'Italia, the sole public mandate of deposit guarantee schemes is to reimburse depositors: the last sentence of Article 96-*bis*(1) of the Banking Act, which allows the FITD to intervene in ways other than directly reimbursing covered depositors in the event of liquidation, cannot be construed either as evidence of the imputability to the State of measures taken by the FITD, other than reimbursements of depositors, or as conferring a public mandate on the FITD. That provision merely allows for recourse to other forms of intervention.

([27]) 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 (OJ L 256, 10.10.2000, p. 21).

([28]) The Banca d'Italia submitted its comments as a third party, and accordingly they are not presented together with the comments of Italy in this section. However, since the Banca d'Italia is a public institution, and its conduct is consequently conduct on the part the Member State, so that it does not fall outside of the scope of Article 107 of the Treaty on the basis that it is a constitutionally independent body, references to 'Italy' in the section of this Decision entitled 'Assessment of the measures' include the Banca d'Italia.

(51) The reference in Directive 2014/49/EU to the failure of credit institutions merely indicates that the role of the measures is generally to contain the costs of intervention on the part of deposit guarantee schemes, by avoiding the need to reimburse depositors, and hence preventing bank failures. The fact that Directive 2014/49/EU does not impose a condition requiring that deposit guarantee scheme support measures be notified to the Commission means that the exercise of discretion with respect to such measures does not by itself show that the deposit guarantee scheme has thereby had a public mandate conferred on it.

(52) The Banca d'Italia also submits that Article 29 of the FITD's constitution, under which the FITD may intervene in support of a bank placed under special administration only 'if there are reasonable prospects for recovery and if the costs may be presumed to be less than would be incurred in the event of liquidation', indicates something quite different from the Commission's assertion in the opening decision that Italy chose to allow its deposit guarantee scheme to intervene 'to prevent the failure of a credit institution'.

(53) Finally, the fact that the Banca d'Italia must approve support measures taken by the FITD does not show that the FITD is pursuing an objective in the public interest. To consider otherwise would mean that all banking activities subject to the supervision of the ECB or the Banca d'Italia were activities driven by public policy. In addition, the Banca d'Italia is required to act independently from the State by Article 19 of Council Regulation (EU) No 1024/2013 ([29]).

(54) As regards the second point, the Banca d'Italia exercises supervisory powers only with respect to the objectives of protecting depositors, the stability of the banking system, and sound and prudent management of the banks (Article 5 of the Banking Act). Article 96-*ter*(1)(b) of the Banking Act, which states that the Banca d'Italia 'coordinates the activity of the guarantee schemes by making rules for banking crises and by conducting supervisory activities', merely confers on the Banca d'Italia a general power intended to guarantee that the activities of deposit guarantee schemes are compatible with the exercise of its own supervisory power; that power is exercised only by means of authorisation of the measures taken.

(55) As the Banca d'Italia is required to act independently from the State, the exercise of its powers over the FITD when the FITD takes steps to support a bank cannot be regarded as State control over the use of resources or as being tied to any public mandate. The case at issue is therefore clearly analogous to *Doux Élevage* ([30]).

(56) Moreover, the Banca d'Italia submits that it did not contribute to the design or to the implementation of the FITD's support measures, and that any contact between itself and the FITD prior to formal submission of the FITD's application for Banca d'Italia authorisation cannot be classified as a contribution to those measures. The Banca d'Italia merely provided initial guidance, entirely on the basis of the legislative parameters that would govern the subsequent authorisation procedure.

(57) The fact that the Banca d'Italia 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, so that the special administrator did not act on behalf of the Banca d'Italia.

(58) The Banca d'Italia representative attending the meetings of the FITD Board and Executive Committee sat only as an observer and had no voting rights. The fact that a dispute between the FITD and BPB regarding the scale of Tercas's negative equity was settled by an arbitrator nominated by the Banca d'Italia is irrelevant, because it was the parties, on a fully independent basis and by mutual agreement, that asked the Banca d'Italia to suggest an individual, whom they then proceeded to appoint as arbitrator. BPB would not have agreed to ask the Banca d'Italia to nominate an arbitrator if the Banca d'Italia played a management and strategic role in the FITD.

(59) As regards the third point, the case at issue differs from those cited in recital 44 to the opening decision, in which the Commission found that intervention by a deposit guarantee scheme in the restructuring and liquidation of banks constituted State aid.

([29]) Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

([30]) *Doux Élevage SNC and Another*, Case C-677/11, EU:C:2013:348, in particular paragraph 41.

(60) In the case of the Danish winding-up scheme ([31]), (1) the national legislation regulated the conditions for support measures in detail; (2) the committee responsible for assessing the costs of the various options was appointed by the Minister for Economic Affairs and Finance; (3) the same committee was required to assess whether the purchaser would be able to operate the bank in difficulty and whether the solution was commercially sustainable; (4) the decision made by the deposit guarantee scheme was based on the assessment and recommendation made by that committee; (5) the board of directors of the deposit guarantee scheme was appointed by the Minister for Economic Affairs and Finance; and (6) the agreement between the purchaser bank and the deposit guarantee scheme was to be approved by the Minister.

(61) In the case of the Polish credit unions liquidation scheme ([32]), the incentives provided by the deposit guarantee scheme constituted an integral part of a liquidation scheme for credit unions, which was designed by the Polish authorities and notified to the Commission as State aid. The deposit guarantee scheme was controlled by the government through voting rights on the board of the fund, and in a number of cases the Minister for Finance was entitled to intervene and take direct decisions affecting the functioning of the fund. In addition, the chairman of the board of the fund, who was appointed by the Minister for Finance, had a casting vote in the event of a tie.

(62) As for the decision on the restructuring of CAM and Banco CAM in Spain ([33]), the Spanish authorities made use of the financial assistance of the Fund for Orderly Bank Restructuring ([34]), a fund dedicated to aid for liquidation and controlled by the State and by the Spanish deposit guarantee fund. The Fund's decision to intervene was not an independent decision by the Fund, but was part of a wider restructuring and rescue operation decided upon and implemented by the Spanish authorities.

5.1.3. *Observations from other interested parties*

(63) First, the other interested parties, namely the FITD, BPB and Tercas, make the general remark that the public character of the resources and imputability to the State are two distinct conditions, both of which must be fulfilled. Hence, resources of private origin cannot be considered public as a result of an assessment that the use of those resources is imputable to the State.

(64) These three interested parties submit that the Commission erred in stating that deposit guarantee schemes are extremely likely to provide State aid, since they act under a public mandate and remain under the control of the public authorities. They point out that in the 2013 Banking Communication there is no mention of deposit guarantee schemes constituting State aid, that Directive 94/19/EC says nothing on the compatibility with the State aid rules of measures taken as an alternative to reimbursement of depositors, and that Directive 2014/49/EU takes a neutral position with regard to the compatibility of such measures with the State aid rules.

(65) These interested parties consider that the Commission came to the preliminary conclusion that the action taken by the FITD was imputable to the State on the mere ground that such action was required by law, while in *PreussenElektra* ([35]) and *Doux Élevage* ([36]) the Court of Justice expressly ruled that the fact that a measure was imposed by national law was not capable of conferring upon it the character of State aid. In the case of the *Austrian Green Electricity Act* ([37]), the General Court took into account many additional elements which indicated the pervasive influence and control of the State over ÖMAG, the public limited company in charge of controlling the measure at issue.

(66) These interested parties consider that a correct reading of the Italian legislation and of the FITD's decision-making mechanisms for support measures *aimed at averting* irreversible bank crises shows the insubstantial nature of the evidence cited by the Commission in support of its preliminary conclusion that the action taken by the

([31]) Commission Decision of 1 August 2011 in case SA.33001 (11/N) — Denmark — Part B — Amendment to the Danish winding-up scheme for credit institutions (OJ C 271, 14.9.2011, p. 1).
([32]) Commission Decision of 18 February 2014 in case SA.37425 (2013/N) — Poland — Credit unions orderly liquidation scheme (OJ C 210, 4.7.2014, p. 1).
([33]) Commission Decision of 30 May 2012 in case SA.34255 (12/N) — Spain — Restructuring of CAM and Banco CAM (OJ C 173, 19.6.2013, p. 1).
([34]) Fondo de Restructuración Ordenada Bancaria
([35]) Case C-379/98, EU:C:2001:160, in particular paragraphs 61 et seq.
([36]) See footnote 30.
([37]) See footnote 23.

FITD responds to a public mandate. They base their argument on the fact that Article 96-*bis* of the Banking Act provides only that guarantee schemes 'may engage in other types and forms of intervention.' [38]. The measures are not mandatory, which severs the link between the FITD's action and the mission set out in its constitution.

(67) The three interested parties point out that forms of action other than the reimbursement of depositors have been available since the establishment of the FITD in 1987, prior to the entry into force of Article 96-*bis* of the Banking Act.

(68) The FITD argues that it is a private-law entity controlled and managed by its member banks, and that it acts as a vehicle for measures that are directly attributable to the member banks using resources that continue to belong to the member banks. Moreover, the decision to support Tercas was taken by the FITD's governing bodies, which are made up entirely of representatives of the member banks. The documentary evidence shows that the FITD's governing bodies carefully assessed the possible alternatives and the application of the least-cost requirement in order better to protect the interests of member banks by reducing the costs and risks of the intervention.

(69) The FITD contends that its governing body decided in its own discretion whether, when and how to take support measures, the only requirement being that the action must be less costly than reimbursing depositors. When it takes support measures the FITD does not act under any public mandate. The FITD's constitution is fully in line with the legislation governing the sector, even in so far as it does not provide for any form of alternative action or expressly prohibits any such action. No public body can oblige the FITD to intervene, and the Banca d'Italia's subsequent authorisation is intended only to ensure verification that the action taken for the beneficiary bank is appropriate from the viewpoint of prudential supervision and that it is compatible with the need to protect depositors and with the stability of the banking system.

(70) In addition, the three interested parties point out that according to its constitution membership of the FITD is not mandatory, and that banks can choose to establish an alternative deposit guarantee scheme to which to belong. They point to the existence of a deposit guarantee scheme, the Fondo di Garanzia dei Depositanti del Credito Cooperativo, specifically for mutual banks [39], which are not members of the FITD.

(71) These interested parties submit that there is no interference by the State either with the appointment of the members of the FITD's governing bodies or with its decision-making (the fact that the Banca d'Italia participates as an observer, without voting rights, does not affect the independent decision-making of the FITD). They argue that, in its decision on the rescue of the Danish bank Roskilde [40], the Commission found that a body that had provided a guarantee took its decisions independently, before concluding that no State resources were involved where a guarantee was granted to a bank in crisis by an association made up of domestic banks, and funded solely by them, for the purpose of supporting financial institutions. Referring to *EARL Salvat père et fils* [41], the three interested parties take the view that there can be State aid only if the State is present in the decision-making bodies of the organisation and is in a position to impose its own decisions.

(72) The three interested parties submit that the FITD is a body representing the interests of its member banks, and that the powers assigned to the Banca d'Italia in respect of the FITD's actions merely permit the Banca d'Italia to pursue its general supervisory aims, and specifically to monitor the sound and prudent management of the entities it supervises and to protect depositors' interests. Given the general nature of the Banca d'Italia's task of coordinating the activities of deposit guarantee schemes via the rules on banking crises and its own supervisory activities, that task cannot serve as evidence that the resources of the FITD are under the constant control of the State.

(73) The fact that the Banca d'Italia appoints a special administrator for a bank in crisis does not indicate a link with the public sphere, because the legal basis of that power (Article 70 *et seq*. of the Banking Act) is essentially technical in nature, and its rationale and foundation lie in the specific features of the sector. Moreover, mere indications that a measure pursues objectives in the public interest are not enough to show that it constitutes State aid [42].

[38] Emphasis added.
[39] *Banche di credito cooperativo*.
[40] Commission decision of 31 July 2008 in case NN 36/08 — Denmark — Roskilde bank A/S (OJ C 238, 17.9.2008, p. 5).
[41] *EARL Salvat père & fils* v *Commission*, Case T-136/05, EU:T:2007:295, paragraph 154.
[42] Opinion of Advocate General Wathelet in *Doux Élevage*.

(74) The Banca d'Italia's power to authorise individual measures under Article 96-*ter*(1)(d) of the Banking Act and Article 3(2) of the FITD's constitution does not strip the FITD of its independent judgment as to whether to take alternative measures and, if so, as to their timing, amount and form. The Banca d'Italia's *authorisation* of the FITD's actions is merely an *ex post* check on decisions taken independently by the FITD, carried out to ensure the safeguard of the general interest for which the Banca d'Italia is responsible.

(75) The three interested parties also refer to the Commission decision on the aid to Banco di Sicilia and Sicilcassa ([43]), where the Commission concluded that the intervention of the FITD in favour of those banks did not constitute State aid, without considering the role of the Banca d'Italia in respect of the activities of the FITD.

(76) The three interested parties submit that, as in *Doux Élevage*, public supervision of the FITD does not go beyond the exercise of a mere formal verification of the validity and the lawfulness of the FITD's behaviour; it does not extend to verification of political appropriateness or of compliance with policy pursued by the public authorities: as in *Doux Élevage*, the FITD itself decides how to use its resources. Similarly, in the *Pearle* case ([44]), the Dutch government confirmed that the bye-laws adopted by bodies such as HBA, which imposed levies that were at issue in that case, required the approval of the public authorities.

(77) The FITD points out that the special administrator, although appointed by the Banca d'Italia, is not a representative of the supervisory authority. The special administrator operates with broad discretion and on his or her own initiative. He or she can only request action on the part of the FITD, which is in no way bound by the request and remains free to take alternative measures in the best interest of its member banks. In the case at issue, the special administrator did not replace the general meeting of the bank, which was the only body empowered to approve operations of an exceptional nature. Furthermore, the authorisation of the Banca d'Italia is issued only after the FITD has taken its own independent decision to intervene. That authorisation is part of the normal supervisory role of the Banca d'Italia. The Banca d'Italia representative attending the meetings of the FITD Board and Executive Committee sits only as an observer, without voting rights.

(78) The arbitrator in the dispute between the FITD and BPB regarding the amount of Tercas's negative equity was appointed not by the Banca d'Italia, but by the parties themselves (the FITD and BPB), on the Banca d'Italia's recommendation. Moreover, the appointment of an arbitrator was intended to resolve the dispute at issue; any decision concerning the cost-effectiveness of the measures from the point of view of member banks remained entirely a matter for the FITD.

(79) The cases cited by the Commission concerning deposit guarantee schemes are not comparable to the case at issue. The three interested parties put forward the same arguments as Italy in that respect, adding that the cases of the Danish winding-up scheme and the Polish credit unions liquidation scheme concerned measures taken by guarantee schemes in connection with the liquidation of banks, and not measures taken for preventive purposes, aimed at the banks' long-term recovery.

5.2. **Advantage**

5.2.1. *Observations from Italy*

(80) Italy submits that the Commission is applying the market economy operator principle as developed in the context of the most recent bank restructuring cases (the 'burden-sharing test'), overlooking the fact that a burden-sharing test is irrelevant for assessing the rationality of the behaviour of a private entity, because it aims primarily at protecting the interests of the general public (all taxpayers) and not the specific interests of those directly exposed to the failing bank (such as the FITD). Besides, the FITD complied with the principle of least cost. In deciding to intervene in order to support Tercas, the FITD sought the solution which was least onerous financially for its member banks on the basis of the opinion of a reputable consultancy firm and long discussions on the Board and the Executive Committee.

(81) Italy submits that when the Commission compared the reorganisation of Tercas with the alternative scenario of liquidation, it did not refer to the correct figures. The comparison between the recovery measure and the

([43]) See footnote 27.
([44]) *Pearle and Others*, Case C-345/02, EU:C:2004:448.

liquidation scenario should be made after deducting the […] position, the risk of which was not evaluated in the estimate of the cost of liquidation. That deduction leads to a commitment not exceeding EUR 295 million for the rescue operation, whereas the estimated cost of the liquidation scenario was EUR 333 million. Italy concludes that the actual difference between the two scenarios was almost EUR 40 million, and not EUR 3 million, as stated in the preliminary view put forward by the Commission in the opening decision.

(82) Italy considers that the FITD's action is in any event in line with the market economy operator principle. First, the FITD could not have required Tercas to impose burden-sharing on subordinated creditors beyond the contractual terms of individual loans, which provide for write-off only in the event of liquidation. Second, imposing burden-sharing on subordinated creditors would not have reduced the costs to the FITD's member banks in any way. The Commission was wrong to take the view that in the event of a compulsory administrative winding up (*liquidazione coatta amministrativa*) of Tercas the costs to the member banks, and consequently to the FITD, would have been minimised if subordinated creditors had been made to bear some of the losses. On the basis of the evidence in the minutes of the meetings of the FITD Board and Executive Committee, Italy contends that the measures ultimately taken by the FITD avoided the risk of possible legal actions arising out of losses suffered by subordinated creditors. Italy observes that the FITD's action also avoided the negative impact on the reputation of the banking system which would have resulted from a failure to pay back subordinated loans in the event of a compulsory administrative winding up of Tercas.

(83) Therefore, in Italy's view, the FITD's decision not to involve subordinated bondholders was reasonable, was in line with the market economy operator principle, and was such as to prevent the FITD and its member banks from being exposed to further costs.

5.2.2. *Observations from the Banca d'Italia*

(84) The Commission received no comments from Banca d'Italia on the selective advantage of the measures taken.

5.2.3. *Observations from other interested parties*

(85) With regard to the economic soundness of the measures in terms of the market economy operator principle, the three other interested parties submit that the action taken was a rational and sound choice for private undertakings such as the FITD and its member banks. According to those parties the present case has obvious similarities to the *Sicilcassa* case, where the Commission concluded that the measures at issue did not constitute State aid in view of the decisive participation of private entities. As in the *Sicilcassa* case, the FITD here acted as guarantor for the reimbursement of depositors in accordance with the legislation on deposit guarantee schemes; the FITD's actions were decided by the same governing bodies on the basis of the same criteria, and the Banca d'Italia performed the same functions. They observe that there are no longer any banks under public control in Italy, so that all of the FITD's members are private banks. The FITD can consequently operate only as a private entity.

(86) The three interested parties have reviewed earlier cases of alternative measures taken by the FITD ([45]) and their economic rationale, including cases during the period when participation in a deposit guarantee scheme was purely voluntary. Private undertakings have chosen to join the deposit guarantee scheme even when they were not legally bound to do so. The interested parties reject the thesis that a market economy operator *would not be exposed to the costs of reimbursing depositors*, and would not issue *non-repayable* contributions or guarantees not subject to a premium, as the Commission stated in the opening decision.

(87) Furthermore, the three interested parties stress that the behaviour of the FITD and its member banks should be assessed not in abstract terms, by referring to a hypothetical non-regulated scenario, but rather on the basis of the regulatory framework in which they operate. If, as in the present case, the obligation under the regulatory framework to repay deposits up to a certain threshold means that the least costly measure for member banks is to cover the negative equity, then covering the negative equity is the most rational choice from the point of view of a private operator in a market economy.

([45]) *Banca di Girgenti, Banca di Credito di Trieste SpA — Kreditna Banka (BCT)* and *Cassa di Risparmi e Depositi di Prato*.

(88) These three interested parties dispute the Commission's argument that the costs of reimbursing depositors in the event of a compulsory administrative winding up of Tercas are not to be taken into account in the application of the market economy operator principle, since they arise from obligations imposed on the FITD as a deposit guarantee scheme required to protect depositors in the public interest. They argue that in the case of the resolution of Banco Espírito Santo in Portugal ([46]) the Commission considered that for the purpose of applying the market economy operator principle the costs of reimbursing depositors in the event of liquidation should be included. Moreover, the Commission could not compare the case at issue with the Court of Justice's ruling in *Land Burgenland* ([47]), as the Court there distinguished between measures imputable to the State acting in its capacity as a shareholder and those where the State acted as a public authority.

(89) The three interested parties observe that the measures were designed on the basis of the least-cost criterion, and that a reputable auditing and advisory firm was engaged to help to identify the least costly and risky solution for the member banks. On that basis, the FITD designed a set of measures which enabled it to reduce costs for member banks significantly, to avoid the risks of a liquidation, and to prevent the possible negative externalities that would be generated by a compulsory administrative winding up of Tercas.

(90) As to the estimation of whether the total cost of the support measures for the FITD was lower than in the case of a liquidation of Tercas, these three interested parties submit that the cost of the guarantee to cover the credit risk of the bullet loans to […] should not have been included in the Commission's cost assessment for the support measure. It was not included in the estimated cost to be borne by the FITD in the event of a liquidation of Tercas. The Commission's calculation that the cost savings achieved by the action taken amounted to only EUR 3 million is accordingly erroneous. In the […] report, which identified the least costly and least risky solution for the FITD and its member banks, the estimated costs of compulsory administrative winding up did not include the risk associated with the […] loans, which amounted to approximately EUR 35 million. To compare correctly the two scenarios of depositor reimbursement and alternative action, 'the comparison between the recovery measure and the liquidation scenario should be made after deducting the […] position, the risk of which was not evaluated in the estimate of the cost of liquidation' ([48]). The resulting comparison is between a commitment 'not exceeding EUR 295 million for the rescue operation and an estimated cost of EUR 333 million in case of liquidation' ([49]). Therefore, the three interested parties submit that the actual difference between the two scenarios is at least EUR 38 million. That position is confirmed in their view by the fact that the loans covered by the FITD guarantee were indeed repaid to Tercas ([50]). The FITD made no payment in respect of the EUR 35 million guarantee, which the Commission was wrong to include in its calculation of the cost of the intervention.

(91) For the purpose of evaluating the lowest cost, likewise, the amount of EUR 30 million accruing from the tax exemption should not be included in its entirety among the costs. The FITD would incur that cost only if the Commission were not to authorise the tax measure.

(92) The three interested parties refer to an estimated EUR 1,9 billion expense in the event of liquidation, only part of which could have been recovered (calculated in the […] report at EUR 1,5 billion). They argue that the EUR 1,9 billion in deposits that in the event of liquidation would not have been covered by the deposit repayment scheme would have created a risk of contagion of the member banks and the banking system in general. Such a risk might have had 'potentially enormous' legal and reputation implications. They also contend that if Tercas had been put into compulsory winding up the prospects of recovering some part of the initial cost, estimated at EUR 1,9 billion, could have been further compromised by compensation claims brought by subordinated creditors.

(93) The […] report on the basis of which the FITD calculated the lowest cost was based on the accounting situation at 31 December 2013; but the three interested parties say that BPB presented an updated assessment of the impact of the liquidation scenario on the FITD at 31 July 2014, i.e. the date on which the extraordinary shareholders' meeting for the recapitalisation of Tercas was held, which is the date when the support measures were defined formally. The estimated cost under that updated assessment is EUR [350-750] million. The difference between it and the estimate in the report based on the situation at 31 December 2013 is due to the

([46]) Commission decision of 3 August 2014 in case SA.39250 (2014/N) — Portugal — Resolution of Banco Espírito Santo SA (OJ C 393, 7.11.2014, p. 1), recitals 75-77.

([47]) *Land Burgenland and Others* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 60.

([48]) Minutes of the FITD's Executive Committee meeting of 30 May 2014, p. 4; Report of the FITD Director-General of 28 May 2014, document No 7/2014, p. 5.

([49]) See Report of the FIDT Director-General of 28 May 2014, document No 7/2014, p. 5.

([50]) See communication from Tercas to the FITD, 1 April 2015

reclassification of accounting positions recorded as 'performing' at 31 December 2013 and 'non-performing' at 31 July 2014, and to the increased volume of deposits which the FITD would have been required to repay.

(94) These other interested parties reject the Commission's argument that the purported cost of the support measures to the FITD could have been further reduced by writing down the subordinated debt. At the date on which the FITD decided to intervene, the option of bailing in the subordinated debt was not legally feasible. The Italian legislation provided for debt to be written down only in the case of compulsory administrative winding up. Had such a bail-in been attempted, the FITD's members would have incurred huge expense immediately, with no certainty of recovery. Disputes with subordinated debt holders would have increased the cost of the liquidation proceedings and the costs for the FITD's members due to the decrease in the value of the assets being liquidated. The subsequent spill-over effect would have a negative impact on customers' confidence, and on the reputation and stability of the banking system itself. Moreover, the three interested parties contend that the majority of Tercas's subordinated creditors was made up of individual savers and deposit holders, and that the special administrator had already adopted the only possible burden-sharing measure vis-à-vis subordinated creditors, which consisted in postponing coupon payments on the bonds held by Banco Popolare Sc.

(95) Finally, these other interested parties argue that the […] report, in its analysis of the least cost, chose a valuation scenario which was not the most pessimistic. The estimated cost of liquidation was based on (a) the possibility of finding a party willing to purchase some of the branches even in the event of a liquidation, and (b) the dismissal of staff not transferred elsewhere with a severance payment of 12 months' salary to each employee. The […] report, used by the FITD as the basis for its decision to intervene, was based on an intermediate scenario, but other worse-case scenarios had also been considered.

(96) Moreover, it should be presumed that the FITD's intervention did not confer any advantage on Tercas, as it occurred alongside the injection of capital into Tercas by BPB, which was concurrent, significant and comparable to the FITD's action.

(97) In light of those considerations, the action taken should be considered to be the less costly and risky solution for the FITD's member banks.

5.3. **Compatibility**

5.3.1. *Observations from Italy*

(98) The Commission received no comments from Italy on the compatibility of the measures.

5.3.2. *Observations from the Banca d'Italia*

(99) The Commission received no comments from the Banca d'Italia on the compatibility of the measures.

5.3.3. *Observations from other interested parties*

(100) The three other interested parties submit that even if the measures did constitute State aid, they would be compatible with the internal market. They take the view that Tercas's restructuring plan will allow it to restore its long-term viability, that the FITD's action is limited to the minimum necessary, and that the measures limit any potential impact on the competitive structure of the market.

(101) As regards the restoration of long-term viability, these three interested parties submit that the special administrator acted to remedy deficiencies in Tercas's organisation and internal control system. He focused his attention on management anomalies (credit, equity investments, disputes) and on the correct valuation of the associated risks (doubtful outcomes, write-downs, provisions). He carried out a gradual deleveraging in order to offset the

substantial decrease in funding due to the reduction in the customer base. He rationalised structures (review of the business model with closure of certain branches, staff downsizing plan, simplification of organisational structures, reduction of administrative expenses) to achieve significant cost containment on a structural basis. Tercas's recapitalisation by the FITD and BPB was the best way to remedy the liquidity shortage rapidly. BPB took upon itself the business risk associated with the recovery of Tercas, injecting significant financial and other resources to ensure the success of its business plan.

(102) BPB also argues that it developed an intervention strategy based on improvements in lending and deposit margins ([51]), cost rationalisation ([52]), development of group synergies, careful monitoring of credit quality, optimisation of the management of impaired receivables by selling *non-performing loans*, strengthening of liquidity profiles ([53]) and deployment of management resources. The structural elements of the recovery plan were developed within BPB's business plan for 2015-2019. Those elements show a coherent sequence of actions directed at restoring Tercas's profitability; the absence of a detailed restructuring plan should not prevent the Commission from making a positive assessment of 'general programmes' that follow a 'coherent direction' ([54]).

(103) The intervention was limited to the minimum necessary (1) for the reasons set out in recitals 90 to 93 above; (2) because it was the only feasible option; and (3) because the FITD contributed only partly to resolving the negative equity and restoring minimum capital ratios. The three interested parties submit that given the size of Tercas's losses, there were no less costly alternatives to the takeover of Tercas by BPB, despite the special administrator's efforts to find other purchasers ([55]). The effort to keep the cost to the minimum necessary is also confirmed by the fact that in order to reach an agreement as to the actual amount of Tercas's negative equity the parties resorted to arbitration, which resulted in a reduction of the total sum demanded by BPB from EUR [300-800] million to EUR 265 million.

(104) The costs of intervention were further limited by means of burden-sharing measures. The share capital was reduced to zero, and as a result the shareholders lost the entirety of their investment. In addition, where possible, the payment of the coupons of subordinated bonds was suspended. These other interested parties argue that no other forms of sacrifice on the part of subordinated debt holders were legally feasible, since under the current law the subordinated debt holders could be forced to share losses only in the event of compulsory administrative winding up. But the fact that no further burdens could be imposed on the subordinated debt holders did not result in higher costs for the public finances, since the resources for the intervention came entirely from private parties. Furthermore, sacrificing subordinated debt holders could have generated additional costs and significant risks for the FITD's member banks. Those downsides would have been a consequence of a break-up of Tercas, the risks of legal action brought by Tercas's customers, and the negative impact on Tercas's reputation and the overall stability of the banking system. Finally, the absence of further burdens on subordinated debt holders did not carry any moral hazard, since the costs of covering the negative equity were absorbed entirely by the banking system without any added cost to taxpayers.

(105) The three interested parties submit that the absence of a conversion or writing down of subordinated debt was in line with point 42 of the Banking Communication, which makes clear that contributions from depositors are not a mandatory component of burden-sharing. It was also in line with point 45 of the Communication, which allows an exception to the principle of conversion or writing-down of subordinated debts where 'implementing such measures would endanger financial stability or lead to disproportionate results'.

(106) Moreover, the three interested parties submit that the absence or inadequacy of a return is acceptable where, as here, it is offset by an in-depth and broad restructuring and is justified by the search for a purchaser for the bank in crisis.

([51]) […].

([52]) […].

([53]) […]

([54]) BPB refers to the Commission's position in *BP Chemicals* v *Commission*, Case T-11/95, EU:T:1998:199, according to which the 'formulation of a restructuring plan is not a static exercise' (paragraph 105 of the judgment). Likewise, BPB submits that some recent Commission decisions confirm that the failure to submit a restructuring plan promptly does not prevent a decision finding that a given measure is compatible with the internal market. See Commission decision of 13 February 2014 in case SA.36663 (2014/NN) — Spain — Support measure for SGR (OJ C 120, 23.4.2014, p. 1), and Commission Decision (EU) 2015/1092 of 23 July 2014 on the State aid SA.34824 (2012/C), SA.36007 (2013/NN), SA.36658 (2014/NN), SA.37156 (2014/NN), SA.34534 (2012/NN) implemented by Greece for National Bank of Greece Group related to: Recapitalisation and restructuring of National Bank of Greece S.A., Resolution of First Business Bank S.A. through a transfer order to National Bank of Greece S.A., Resolution of Probank S.A. through a transfer order to National Bank of Greece S.A., Resolution of Cooperative Bank of Lesvos-Limnos, Cooperative Bank of Achaia, and Cooperative Bank of Lamia (OJ L 183, 10.7.2015, p. 29).

([55]) See the application from the special administrator seeking intervention on the part of the FITD, 25 October 2013, p. 3; the 'lack of alternative solutions' to the transaction proposed by BPB was also acknowledged in the minutes of the FITD's Executive Committee meeting of 28 October 2013, p. 4.

(107) Furthermore, the intervention does not distort the internal market, given that:

(1) Tercas's operations were small in size and limited in their geographical reach;

(2) BPB was the only operator to express a real interest in injecting capital into Tercas, and the Commission has held that the sale of a failing bank, whose activity is the beneficiary of the alleged aid, to a private market player in the framework of an open sale process constitutes a form of mitigation of potential distortions of competition ([56]);

(3) Tercas's restructuring plan was sufficiently far-reaching, and provided for the integration of Tercas into BPB.

(108) The transfer of Tercas to BPB was the only feasible option to overcome the issues addressed by the Italian supervisory authority and prevent possible distortion of competition. Furthermore, the restructuring transaction required a complete recapitalisation of Tercas and a significant increase in BPB's capital.

(109) Finally, relying on the Commission's earlier decisions ([57]), these other interested parties claim that the recapitalisation of Tercas, and its incorporation into BPB following the unremunerated coverage of its negative equity by the FITD, can be considered to be justified on the ground that they were necessary in order to ensure the transfer of the company's assets and to implement deep and extensive restructuring of the bank. In the case at hand, no option that was capable of overcoming Tercas's deep crisis would have ensured a return. Had the FITD demanded a return Tercas's equity position would have worsened, thus increasing the cost to the purchasing bank.

6. ASSESSMENT OF THE MEASURES

6.1. Existence of State aid

(110) Article 107(1) of the Treaty states that '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.' All these conditions must be fulfilled; in what follows the Commission will assess whether they are met in the case of the measures taken by the FITD.

(111) The tax exemption scheme mentioned in recital 4 to the opening decision was not notified by Italy. On the basis of the information currently available to the Commission, it was not applied in the case at issue. Hence the tax exemption scheme falls outside the scope of the present Decision.

6.1.1. *State resources and imputability to the State*

(112) The Court of Justice has repeatedly confirmed that all financial means by which the public authorities may actually support undertakings fall under State aid control, irrespective of whether or not those means are permanent assets of the public sector. Compulsory contributions that are imposed, managed and apportioned in accordance with the law or other public rules imply the presence of State resources, even if they are not administered by the public authorities ([58]). The mere fact that resources are financed by private contributions does not prevent them from being of a public character. The relevant factor is not the immediate origin of the resources but the degree of intervention of the public authority in defining those measures and their methods of financing ([59]).

([56]) See footnote 31.

([57]) Commission Decision of 27 March 2012 in case SA.26909 (2011/C) — Portugal — *Banco Português de Negócios (BPN)*, paragraphs 247 and 248; Commission Decision of 18 February 2014 — *Poland — Credit unions orderly liquidation scheme*, cited above, paragraph 65; Commission Decision of 30 May 2012 — *Spain — Restructuring of CAM and Banco CAM*, cited above, paragraph 113, see also paragraphs 119 and 120.

([58]) *Italy* v *Commission*, Case 173/73, EU:C:1974:71, paragraph 16; *Compagnie Commerciale de l'Ouest* v *Receveur principal des douanes de La Pallice-Port*, Joined Cases C-78/90 to C-83/90, EU:C:1992:118, paragraph 35; *Essent Netwerk Noord and Others*, Case C-206/06, EU:C:2008:413, paragraphs 58-74; *Elliniki Nafpigokataskevastiki and Others* v *Commission*, Case T-384/08 EU:T:2011:650, paragraph 87.

([59]) *France* v *Commission*, Case T-139/09, EU:T:2012:496, paragraphs 63 and 64.

(113) Moreover, as the Court of Justice pointed out in *Ladbroke* ([60]), *Stardust Marine* and *Doux Élevage*, resources that remain under public control and are therefore available to the public authorities constitute State resources.

(114) In *Doux Élevage*, the activities of an inter-trade organisation were financed out of resources raised by levies made mandatory by the State: the Court of Justice held that it could not be concluded that the organisation's activities were imputable to the State. The Court observed that the objectives pursued in the use of the resources had been determined entirely by the organisation, and that the mandatory nature of the levies in that case was not 'dependent upon the pursuit of political objectives which are specific, fixed and defined by the public authorities'. The State merely checked the validity and lawfulness of the inter-trade organisations levying of contributions, i.e. the procedural framework, and had no power to influence the administration of the funds.

(115) In the case-law of the Union courts, therefore, a measure is imputable to the State and financed through State resources where a set of indicators show that under the national legislation the State exercises control and influence to ensure that the use of the resources of a private body fulfils a public policy objective with which that body is entrusted.

(116) In *Stardust Marine* the Court of Justice also held that the imputability to the State of an aid measure taken by a body that was prima facie independent, and did not itself form part of the State, could be inferred from a set of indicators arising from the circumstances of the case. One such indicator would be that the body in question could not take the decision allegedly involving State aid without taking account of the instructions or directives of the public authorities. Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by an undertaking was imputable to the State.

(117) With regard to the measures in respect of which the Commission opened the formal investigation procedure in the present case, it should be recalled that in Directive 94/19/EC the Union legislature introduced deposit guarantee schemes with the policy objective of preserving and increasing 'the stability of the banking system' ([61]) and gave them a mandate to protect depositors ([62]). Directive 94/19/EC requires Member States to introduce one or more deposit guarantee schemes, which are to reimburse depositors in the event that a credit institution fails. On the possibility of other forms of intervention Directive 94/19/EC is silent, so that Member States retain discretion on whether to allow deposit guarantee schemes to go beyond a pure reimbursement function and to use the available financial resources in other ways.

(118) The situation remains unchanged under Directive 2014/49/EU, which is, however, more explicit as to the nature of such alternative measures. They must have the aim of preventing the failure of the credit institution with a view to avoiding not only 'the costs of reimbursing depositors', but also 'the costs of the failure of a credit institution to the economy as a whole' and 'other adverse impacts', such as an 'adverse impact on financial stability and the confidence of depositors' ([63]).

(119) Under Directive 2014/49/EU Member States may allow deposit guarantee schemes to be used in order to preserve the access of depositors to the deposits covered, both in an initial, going-concern phase and in the context of domestic insolvency proceedings ([64]). The Commission would point out that, contrary to the position of the other interested parties mentioned in recital 79, alternative measures taken by a deposit guarantee scheme may constitute aid irrespective of whether they are aimed at preventing the failure of a credit institution or whether they are taken in connection with a liquidation.

(120) The protection of savings and depositors has a specific position in Italian national law: under Article 47 of the Italian Constitution, 'The Republic … shall protect savings in all their forms' ([65]). The Banca d'Italia is a body established under public law, and for that reason alone its behaviour is imputable to the Member State, and does

([60]) *France* v *Ladbroke Racing and Commission*, Case C-83/98 P, EU:C:2000:248, paragraph 50: 'even though the sums involved … are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State aid'.

([61]) See, inter alia, recitals 1 and 16 to Directive 94/19/EC.

([62]) See Article 3 and recitals 1, 2, 3, 11, 12, 15, 16, 20, 21, 24 and 25 to Directive 94/19/EC.

([63]) See, inter alia, recitals 3, 4 and 16 to Directive 2014/49/EU.

([64]) See Article 11(3) and (6) of Directive 2014/49/EU.

([65]) 'La Repubblica … tutela il risparmio in tutte le sue forme'.

not fall outside the scope of Article 107 of the Treaty on the ground that it is constitutionally independent [66]; it has the task of safeguarding the stability of the Italian banking system [67] and protecting depositors [68].

(121) In view of the foregoing, Article 96-*bis* of the Banking Act has to be read as a specific definition of the public mandate of protecting depositors that applies to deposit guarantee schemes recognised in Italy. By including the last sentence in Article 96-*bis*(1), according to which deposit guarantee schemes 'may engage in other types and forms of intervention' in addition to repayment of depositors, the Italian authorities have chosen to allow their recognised deposit guarantee schemes to use the resources collected from member banks for different types of action. Article 96-*bis* of the Banking Act is therefore the basis for recognition of the FITD as a mandatory deposit guarantee scheme in Italy, and at the same time grants the FITD the power to take support measures.

(122) From that perspective the fact that the FITD is organised as a consortium under private law [69] is irrelevant, as the mere fact that a body is constituted under ordinary law cannot be regarded as sufficient to exclude the possibility of an aid measure taken by such a body being imputable to the State, as the Court of Justice held in *Stardust Marine*. The FITD's objectives — pursuit of the common interests of its members by strengthening the safety of deposits and the protection of the reputation of the banking system — clearly coincide with the public interest. But that does not necessarily mean that the undertaking could have taken its decision without taking into account the requirements of the public authorities. Moreover, it is not necessary that the State's influence should result from a legally binding act of a public authority. The autonomy that the undertaking in principle enjoys does not prevent the practical involvement of the State.

(123) In any event, Union and Italian legislation gives the Banca d'Italia the authority and the means to ensure that all actions taken by the FITD as a deposit guarantee scheme recognised under the Banking Act comply with that public policy mandate and contribute to the protection of depositors. This is made clear in the introductory sentence of Article 96-*ter*(1) of the Banking Act, where the list of all the powers exercised by the Banca d'Italia with respect to Italian deposit guarantee schemes is preceded by a statement that those powers are to be exercised 'having regard to the protection of depositors and the stability of the banking system'.

(124) In view of that evidence, and by contrast with *Doux Élevage*, where the object of the *ex post* approval by the public administration was purely procedural in nature, the Banca d'Italia has to approve every intervention by the FITD on its merits, assessing whether it complies with the FITD's public mandate under the Banking Act.

(125) Italy has affirmed that if this line of reasoning were to be followed prudential supervision of banks would have to be considered to be the exercise of public control, and the banks' resources would consequently have to be considered public resources (recital 53); this is clearly immaterial. The Commission will merely observe that the supervision of banks carried out by the Banca d'Italia does not serve to verify compliance with a public policy mandate that is entrusted to the supervised banks.

(126) The precedence of the public mandate and the related public controls are recognised in the constitution of the FITD [70], according to which all support measures must comply with the concurrent conditions that there must be a reasonable prospect of recovery and that the cost to the Fund may be presumed to be less than would be incurred by measures taken in the event of liquidation (the 'least-cost principle'). Those concurrent conditions mean that a decision to take support measures is permissible only if it allows the FITD to fulfil its public mandate of protecting depositors. That precedence is corroborated by the requirement of approval by the Banca d'Italia in accordance with the Banking Act.

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[66] See *Air France* v *Commission*, Case T-358/94, EU:T:1996:194, paragraphs 59 to 62, where, the General Court held that the conduct of the French Caisse des Dépôts et Consignations was necessarily attributable to the State on the ground that it was a public-sector body, and added that that conclusion was not undermined by arguments to the effect that the body enjoyed autonomy from the other authorities of the State.

[67] According to the internet site of the Banca d'Italia, 'The law assigns the Bank of Italy responsibility for safeguarding the stability of the national financial system' (L'ordinamento giuridico affida alla Banca d'Italia la responsabilità per la salvaguardia della stabilità del sistema finanziario nazionale) https://www.bancaditalia.it/compiti/stabilita-finanziaria/. The Banca d'Italia is a member of the European Systemic Risk Board, the Financial Stability Board and the Financial Stability Committee of the Eurosystem/European System of Central Banks.

[68] According to the internet site of the Banca d'Italia (section on 'Supervision of the banking and financial system') 'The Bank of Italy is also responsible for the protection of the customers of banks and financial intermediaries, a fundamental part of banking and financial supervision that runs alongside and in tandem with its other supervisory tasks' (Alla Banca d'Italia sono affidati rilevanti compiti in materia di tutela dei clienti degli intermediari bancari e finanziari che rappresenta un elemento costitutivo della supervisione bancaria e finanziaria, affiancandosi ed integrandosi con gli altri obiettivi dell'azione di vigilanza).

[69] Article 1 of the FITD's constitution.

[70] Article 29(1).

(127) In addition, the Banking Act provides the Banca d'Italia with wide-ranging powers over deposit guarantee schemes:

(1) point (d) of Article 96-*ter*(1) of the Banking Act, provides that the Banca d'Italia must 'authorise the interventions of the guarantee schemes';

(2) point (b) of Article 96-*ter*(1) of the Banking Act provides that the Banca d'Italia is to 'coordinate the activity of the guarantee schemes with the rules governing banking crises and with its own supervisory activity' ([71]);

(3) point (a) of Article 96-*ter*(1), of the Banking Act provides that the Banca d'Italia is to 'recognise guarantee schemes, approving their constitutions, provided that the schemes do not have characteristics which could lead to an unbalanced distribution of insolvency risks in the banking system' ([72]);

(4) point (h) of Article 96-*ter*(1) of the Banking Act provides that the Banca d'Italia 'can make rules implementing the rules set out' in Section IV of the Banking Act, on deposit guarantee schemes ([73]).

(128) In addition to the powers over the FITD thus given to the Banca d'Italia by the Banking Act, only banks under special administration qualify for FITD support measures ([74]). A bank is put into special administration, on a proposal from the Banca d'Italia, by an order made by the Ministry of Economic Affairs and Finance. At that stage, according to the FITD's constitution, 'the Fund shall intervene … in cases of special administration of member banks authorised to do business in Italy' ([75]). Only the special administrator of the bank can send the FITD a request for intervention, and the request must then be approved by a meeting of the bank's shareholders. The special administrator is a public official, who represents the public interest and is appointed and supervised by the Banca d'Italia. The Banca d'Italia also has the power to recall or replace the special administrator ([76]), and to give instructions imposing specific safeguards and limitations on the management of the bank ([77]). Intervention on the part of the FITD is thus initiated by a public official under the control of the Banca d'Italia.

(129) Regarding the power to authorise action by deposit guarantee schemes, the Commission observes that the concept of authorisation calls for an administrative act which necessarily precedes the entry into force of the measure to be authorised. Otherwise the exercise of the Banca d'Italia's powers in respect of FITD measures to ensure the stability of the financial system and the protection of depositors would be ineffective. In practice, authorisation has to occur at a stage where the FITD can still reconsider and amend the proposed measure if the Banca d'Italia objects to it. Authorisation cannot be considered as occurring after the FITD's decision to intervene (as suggested by Italy, the FITD, Tercas and BPB ([78])). The fact that the Banca d'Italia participates as an observer in all meetings of the Board and the Executive Committee of the FITD ([79]) is material in that connection (contrary to claims of Italy, the FITD, Tercas and BPB ([80])), as it can be supposed to enable the Banca d'Italia to voice any concerns about planned intervention at an early stage.

([71]) 'The Banca d'Italia, having regard to the protection of depositors and the stability of the banking system … shall coordinate the activity of the guarantee schemes with the rules governing banking crises and with its own supervisory activity' (La Banca d'Italia, avendo riguardo alla tutela dei risparmiatori e alla stabilità del Sistema bancario … coordina l'attività dei sistemi di garanzia con la disciplina delle crisi bancarie e con l'attività di vigilanza).

([72]) 'The Banca d'Italia, having regard to the protection of depositors and the stability of the banking system … shall recognise the guarantee schemes, approving their constitutions, provided that the schemes do not have characteristics which could lead to an unbalanced distribution of insolvency risks in the banking system' (La Banca d'Italia, avendo riguardo alla tutela dei risparmiatori e alla stabilità del Sistema bancario … riconosce i sistemi di garanzia, approvandone gli statuti, a condizione che i sistemi stessi non presentino caratteristiche tali da comportare una ripartizione squilibrata dei rischi di insolvenza sul sistema bancario).

([73]) 'The Banca d'Italia, having regard to the protection of depositors and the stability of the banking system … shall make rules implementing issue provisions to implement the rules set out in this Section' (La Banca d'Italia, avendo riguardo alla tutela dei risparmiatori e alla stabilità del Sistema bancario … emana disposizioni attuative delle norme contenute nella presente sezione).

([74]) Article 29(1) of the FITD's constitution.

([75]) Article 4 of the FITD's constitution

([76]) Banking Act, Article 71(3).

([77]) Banking Act, Article 72(4): 'The Banca d'Italia, through instructions given to the special administrators and to the members of the supervisory committee, can impose specific safeguards and limitations on the management of the bank. The special administrators and the members of the supervisory committee shall be personally responsible for failure to comply with the instructions given by the Banca d'Italia' (La Banca d'Italia, con istruzioni impartite ai commissari e ai membri del comitato di sorveglianza, può stabilire speciali cautele e limitazioni nella gestione della banca. I componenti gli organi straordinari sono personalmente responsabili dell'inosservanza delle prescrizioni della Banca d'Italia).

([78]) See recitals 47, 56 and 69.

([79]) Article 13(6) and Article 16(1)(d) of the FITD's constitution.

([80]) See recitals 46, 58 and 71.

(130) In summary, the public authorities have the power to initiate action at their request, and by virtue of their power to authorise the substance of the action they influence the action before it is actually decided. Their influence is procedurally embedded further by their presence in all decision-making meetings, where they are able to voice any concerns. Nonetheless, and even though the Banca d'Italia's authorisation must in principle be considered to be *ex ante* rather than *ex post* ([81]), the Commission points out that even *ex post* control can be considered among the set of indicators of imputability referred to in *Stardust Marine*.

(131) The powers available to the public authorities were in fact exercised in connection with the adoption of the support measures at issue:

(1) The documents communicated by Italy to the Commission show that the Banca d'Italia authorised the specific measures for Tercas having regard to the interests of depositors and clients within the meaning of Article 96-*ter*(1)(d) of the Banking Act ([82]). Thus the Banca d'Italia authorised the specific FITD measures in the light of specific provisions of national public law.

(2) The negotiations between BPB and the special administrator of Tercas were conducted 'in coordination with the Bank of Italy' ([83]).

(3) The Banca d'Italia 'invited' the FITD 'to look for a balanced agreement with BPB' to cover Tercas's negative equity, taking account of the possible negative impact of the liquidation of Tercas and its subsidiary Caripe ([84]).

(132) The Commission concludes that in contrast to the situation in *Doux Élevage*, where the Court found that the aims and purposes of intervention were determined entirely by the organisation, in this case the aims and purposes of the intervention are certainly not determined entirely by the FITD. They are laid down in detail by its public mandate under the Banking Act, and in substance they are controlled by the public authorities. The FITD is indeed free not to intervene, but that does not affect the Commission's conclusion regarding the action actually taken by the FITD.

(133) In addition to the substantial public control demonstrated above, the Commission must underline the mandatory nature of the contributions to the FITD resources used in intervention.

(134) As described in Section 2.3, membership of the FITD is mandatory for Italian banks ([85]). In that respect, the reference to the Fondo di Garanzia dei Depositanti del Credito Cooperativo (see recital 70), intended to corroborate the alleged voluntary nature of membership of the FITD, is erroneous, since under the Banking

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([81]) See for example the comment of Irene Mecatti on Articles 96 to 96-*quater* of the Banking Act, in M. Porzio, V. Santoro, F. Belli, G. Losappio and M. Rispoli Farina, *Testo unico bancario, Commentario*, Giuffrè Editore, 2010: 'any intervention by a deposit guarantee scheme must be authorised *in advance* by the Banca d'Italia (Article 96-*ter*(1)(d))' (ogni intervento dei spd deve essere *preventivamente* autorizzato della BI (art. 96-ter, co. 1, lett. d)); the emphasis is the author's.

([82]) See the letters of the Banca d'Italia of 4 November 2013 and 7 July 2014 authorising the FITD to grant the support measures at issue (Annex 8 and 9 to Italy's reply of 14 November 2014 to the Commission's request for information of 10 October 2014).

([83]) Report attached to the minutes of the FITD Board meeting of 30 May 2014, p. 1 (Annex 3.9 to Italy's reply of 14 November 2014 to the Commission request for information of 10 October 2014): 'The evolution of these factors has led to detailed negotiations with the BPB and with the special administrator, in coordination with the Banca d'Italia, with the aim of identifying mechanisms for the Fund's intervention that maximise the effectiveness of the support measures as part of a broader plan for the return of Tercas to long-term viability, on the basis of recapitalisation by BPB' (L'evolversi di tali fattori ha portato ad un articolato negoziato con la BPB e con il Commissario straordinario, in coordinamento con la Banca d'Italia, per l'individuazione di modalità attuative dell'intervento del Fondo volte a massimizzare l'efficacia dell'azione di sostegno nel quadro del più ampio piano di risanamento della Tercas, imperniato su un'operazione di ricapitalizzazione da parte della BPB).

([84]) Report attached to the minutes of the FITD Executive Committee meeting of 30 May 2014, p. 4 (Annex 3.9 to Italy's reply of 14 November 2014 to the Commission request for information of 10 October 2014): 'The Banca d'Italia … invited the Fund to look for a balanced agreement with BPB to cover the negative equity' (La Banca d'Italia … ha invitato il Fondo a ricercare un'intesa equilibrata con BPB per la copertura del deficit patrimoniale).

([85]) Although it is legally possible to withdraw from the FITD, banks have a legal obligation to be members of a deposit guarantee scheme. In addition, as mentioned in recital 33, membership of the FITD is mandatory for Italian non-mutual banks for the following reasons: (1) given that there is no other deposit guarantee scheme available to commercial banks in Italy, membership in the FITD is de facto mandatory; (2) the constitution of the FITD provides for all Italian non-mutual banks to be members.

Act ([86]) Italian mutual banks are required to establish a distinct deposit guarantee scheme within their own network: as a consequence, mutual banks cannot be members of the FITD, and conversely, non-mutual banks cannot be members of the Fondo di Garanzia dei Depositanti del Credito Cooperativo and must be members of the FITD. Hence the provision of the FITD's constitution ([87]) allowing member banks to withdraw their membership, which has been highlighted by the interested parties in their comments (see recital 70), is a mere theoretical possibility that cannot be put into effect, since those banks cannot become members of any other recognised deposit guarantee scheme.

(135) Moreover, the decision to take support measures is taken by the governing bodies of the FITD. Regardless of their individual interests, member banks can neither veto such a decision nor opt out of the measures ([88]), and have to contribute to the funding of the action decided. The fact that such resources are not recorded on the FITD's balance sheet, but in separate accounts, is a mere formality, since the resources are managed directly by the FITD.

(136) This leads the Commission to conclude that the intervention is imputable to the FITD and not to its members, and that the resources used to take measures are the FITD's resources and not the member banks' own.

(137) Therefore, since both membership of the FITD and contributions to support measures decided by the FITD are mandatory, the Commission concludes that in order to operate as a non-mutual bank in Italy it is mandatory under Italian law to contribute to the costs of FITD's support measures. The resources used to finance such support measures are clearly required, managed and apportioned according to the law and other public rules, and consequently have a public character.

(138) Accordingly, the Commission concludes that in the case at issue, both in principle and in practice, the Italian authorities exercise constant control of compliance in the use of the FITD's resources with public objectives, and influence the use of those resources by the FITD.

(139) In particular, given that the public authorities have the formal powers both to request intervention and to approve the substance of the action taken with respect to compliance with the public mandate (recital 126), the Commission concludes that the role of the Banca d'Italia cannot be considered as limited to a purely informative step or a mere formal check of validity and lawfulness ([89]).

(140) In particular, the Court of Justice pointed out in *Doux Élevage* that the mandatory nature of the levies in that case was not dependent upon 'the pursuit of political objectives which are specific, fixed and defined by the public authorities'. But the FITD's actions are indeed dependent upon public objectives that are specific, fixed and defined by the public authorities, and controlled by them, notably the policy objectives of protecting depositors.

(141) The measures at issue are under the supervision of the Banca d'Italia, and consequently they are supervised among other things in the light of the objectives of the Banca d'Italia, including the preservation of the stability of the financial system. Here, the following facts need to be recalled:

(1) the importance of the Banca d'Italia's role in ensuring the stability of the Italian banking system and protecting depositors;

(2) the extensive powers that the Banca d'Italia can exercise to ensure that the FITD takes account of those requirements.

(142) The factors referred to in recitals 127 to 131 above (legislation that makes the organisation subject to tight control, and effective coordination by the Banca d'Italia in order to ensure that the FITD contributes to the achievement of major public objectives) show that the FITD enjoys an exceptional legal status compared to normal private consortia under Italian law, and that its purpose, witnessed by its public mandate, extends clearly beyond, for instance, that of the CIDEF ([90]), which was assessed in the *Doux Élevage* judgment. Such an exceptional status is a valid indicator of imputability under the *Stardust Marine* test.

([86]) Banking Act, Article 96.
([87]) Article 8 of the FITD's constitution.
([88]) Decisions to intervene are decided by the Board or by the Executive Committee, by the majorities indicated in recital 36.
([89]) See paragraph 38 of the judgment in *Doux Élevage*.
([90]) Comité interprofessionnel de la dinde française.

(143) In view of the factors mentioned above, the content, compass and object of the measures show how unlikely it is that the public authorities should have no hand in their adoption. Not only did the measures confer a competitive advantage on an undertaking, they prevented it from failing altogether, thanks to public support provided through measures 1, 2 and 3 described in recital 38, in order to protect depositors and the stability of the Italian banking system.

(144) The Commission accordingly considers that there is sufficient evidence to show that the measure is imputable to the State and financed through public resources.

(145) Even if some of the factors to which the Commission has given weight, taken individually, did not by themselves suffice to justify the conclusion that the measures were imputable to the State, it is plain from recitals 118 to 144 that taken together the evidence considered there demonstrates that the measures assessed by the Commission show the imputability to the State of FITD's action.

(146) Regarding the comments put forward by Italy and the interested parties in relation to the Commission decision on the aid to Banco di Sicilia and Sicilcassa, it should first be recalled that the existence of State aid is an objective concept and cannot be determined on the basis of an alleged practice adopted by the Commission in its decisions, even if such a practice were to be demonstrated. In addition, the Commission points out that at the time when the support measures for Tercas were approved, by contrast with 1999, the Commission had already developed and published in considerable detail the conditions under which support from a deposit guarantee scheme constitutes State aid.

(147) Moreover, at the time of the *Sicilcassa* decision the Commission had not adapted its own assessment of imputability in the light of the findings of the Union law courts in *Stardust Marine* and subsequent rulings.

(148) Contrary to the arguments put forward by Italy and the interested parties, the Commission's practice in its decisions with regard to intervention by deposit guarantee schemes ([91]) provides ample indication that the action taken by the FITD is in the nature of State aid. In light of the above, the *Sicilcassa* decision provides no grounds for invoking legitimate expectations on the part of Italy and the interested parties.

6.1.2. *Selective advantage distorting competition and affecting trade between Member States*

(149) The support measures taken by the FITD conferred a selective advantage on Tercas, and the FITD was not acting in the capacity of an operator in a market economy. Measures 1, 2 and 3, for which there is no expectation or possibility of any return, are not measures that would be taken by a market economy operator. They show that the FITD was acting not as a market economy operator but as a body fulfilling a public mandate ([92]). All three measures are grants of assistance without any fee, remuneration or associated return, whose combined effect was that Tercas did not exit the market as it would likely have done in the absence of such support, and which thereby conferred a selective advantage on Tercas.

(150) Even if it were to be accepted that the measures ought to be assessed in the light of the conduct of a comparably situated market economy operator, it would in any event be for the Member State concerned to furnish the Commission with objective and verifiable evidence to show that the decision was based on a prior economic assessment, comparable to the assessment that might be carried out by a rational private operator in a similar situation in order to determine the future profitability of the measure. In the case at hand, no evidence has been supplied to the Commission to demonstrate that the FITD demanded a business plan or a calculation of the return on the capital invested, which are fundamental requirements for any investment decision on the part of a private operator.

([91]) See decision in case SA.33001 (2011/N) — Denmark — Part B — Amendment to the Danish winding up scheme for credit institutions, recitals 43 to 49; decision in case SA.34255 (2012/N) — Spain — Restructuring of CAM and Banco CAM, recitals 76 to 87; decision in case SA.37425 (2013/N) — Poland — Credit unions orderly liquidation scheme, recitals 44 to 53; decision in case NN 36/2008 — Denmark — Roskilde bank A/S, recitals 28 to 31; decision in case NN 61/2009 — Spain — Rescue and restructuring of Caja Castilla-La Mancha, recitals 97 to 106.

([92]) See *Commission* v *EDF*, Case C-124/10 P, EU:C:2012:318, paragraphs 80 and 81.

(151) Italy and the interested parties claim that those measures were in fact compliant with the principle of the operator in a market economy ([93]), in particular because the action enabled the FITD to limit costs to which it would otherwise have been exposed, namely the costs to the FITD of reimbursing depositors at the stage of compulsory administrative winding up of Tercas.

(152) The interested parties claim further that the actions of the FITD are within the sphere of the private autonomy of the member banks.

(153) The Commission takes the view that the measures are clearly imputable to the FITD, which is controlled by the public authorities (see the assessment in recitals 134 to 136), and not to the member banks. Any comparison with action taken by the FITD before the member banks were legally bound to belong to it are irrelevant, in view of the fact that member banks now have no way of opting out of particular measures, as explained in recitals 134 and 135. This is aggravated by the mechanism by which the FITD decides such measures, as described in recital 36, which is skewed in favour of large banks ([94]) in such a way that decisions to intervene can be taken against the will of the majority of the member banks.

(154) The costs in question thus arise from obligations imposed on the FITD as a deposit guarantee scheme acting under a public mandate to protect depositors. No market economy operator would have to fulfil the obligations deriving from a public mandate, such as the obligation to reimburse depositors in the event of a liquidation of Tercas. According to established case-law, obligations incurred under a public mandate cannot be taken into account in the application of the market economy operator principle ([95]).

(155) Leaving aside the obligations incurred under the FITD's public mandate, therefore, the Commission concludes that none of the three measures would have been adopted by a market economy operator. The absence of a business plan and any prospect of any return on investment whatsoever is fundamental to that assessment, and cannot but confirm the conclusion.

(156) Finally, BPB and Tercas contend that the action taken by the FITD can be considered to be concurrent with the contribution of BPB as a private operator. The Commission points out that concurrent investment of this kind must be on fully equal conditions for the private and the public co-investors. That condition is clearly not fulfilled here. BPB obtained full ownership of Tercas, whereas the FITD received no return on its investment.

(157) For the reasons set out in recitals 149 to 156, the measures taken by the FITD in favour of Tercas provided Tercas with an advantage, namely a non-repayable contribution to cover its negative equity, an unremunerated guarantee on some credit exposures towards […], and a conditional non-repayable contribution if needed in order to shield Tercas from part of its tax liabilities under the then applicable income tax rules. Taken together those measures prevented Tercas's exit from the market. Tercas would not have benefited from those measures under normal market conditions.

(158) The Commission is of the opinion that the measures at issue are selective, because they relate to Tercas only. Such support measures are available only to banks in special administration, and only on a case-by-case basis. The Commission consequently takes the view that the measures assessed in this Decision were aimed at Tercas specifically and exclusively, in order to prevent its exit from the market, and were therefore selective.

(159) Finally, the advantages conferred on Tercas by the FITD action distort competition by preventing the failure and market exit of Tercas. Tercas is in competition with foreign undertakings, so that trade between Member States is affected.

(160) Regarding measure 1, the grant of EUR 265 million took the legal form of a non-repayable contribution to cover Tercas's negative equity without any element of remuneration. The Commission considers the aid component to be the full amount of EUR 265 million.

([93]) See recitals 80 to 97.

([94]) Together, the four large banks — which have guaranteed representation on the Board and two votes each — require only five more representatives to have a majority (13 votes).

([95]) See *Land Burgenland and Others* v *Commission*, Joined Cases C-214/12 P. C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 52.

(161) Regarding measure 2, the EUR 35 million guarantee was provided for a duration of up to three years to cover the credit risk associated with certain exposures of Tercas towards […]. According to the Commission Notice on Guarantees ([96]), the aid component should be calculated as the gross grant equivalent of the difference between the premium that the beneficiary would have had to pay to a market operator in order to obtain such a guarantee and the premium it actually paid for the same guarantee for the time it was in place.

(162) The Commission has no information concerning the fee that a market operator would have charged for insuring the credit exposure to […] or the credit quality of […]. However, given that the exposure was performing at the time, and that the loan was ultimately repaid on schedule, and taking into account the much more significant volumes of aid provided through measures 1 and 3, the Commission takes the view that it is sufficient to establish a lower bound for an estimate of the amount of aid involved here.

(163) That lower bound can be established by taking as a benchmark the average of three-year credit default swap ('CDS') ([97]) values at the time the aid was granted for the largest Italian non-financial corporates with actively traded CDSs. That average amounts to 53 basis points ([98]). Considering that the guarantee covered EUR 35 million of exposures and was in place for only nine months, the cash value of the guarantee premium is EUR 0,14 million. The agreements did not provide for any premium to the FITD that can be subtracted from that figure, and the Commission accordingly considers that the amount of the aid is EUR 0,14 million.

(164) Regarding measure 3, the Commission observes that Italian law made the tax exemption subject to notification and approval by the European Commission. At the time the aid was granted or thereafter the Commission had not taken a decision on measure 3, so that the guarantee has to be considered to have fallen due. The tax exemption had not been formally notified to the Commission, which means that it could not be applied. Hence, the Commission cannot consider the measure to be a guarantee but rather another non-repayable contribution without remuneration. The Commission considers that the aid component is the full amount of EUR 30 million.

6.1.3. *Conclusions on the existence of aid*

(165) For the reasons set out in recitals 149 to 164 above, the Commission concludes that measure 1 (a non-repayable contribution of EUR 265 million), measure 2 (a guarantee for EUR 35 million of credit exposures to […] with an aid component of EUR 0,14 million) and measure 3 (a further non-repayable contribution of EUR 30 million), totalling EUR 295,14 million in State aid given by the FITD, conferred a selective advantage on Tercas that distorted competition and affected trade between Member States. That selective advantage was granted through State resources via the action taken by the FITD, which is imputable to the State for the reasons set out in recitals 112 to 148. The aid was granted on 7 July 2014.

6.2. **Beneficiary of the aid**

(166) The Commission recalls its assessment that all three measures in question confer an advantage on Tercas. The Commission therefore considers that the measures have favoured Tercas's economic activities, by preventing its exit from the market and allowing the continuation of those economic activities within the purchasing undertaking, BPB.

(167) To determine whether the sale of the bank's activities entails State aid to the buyer, in line with points 79, 80 and 81 of the 2013 Banking Communication and point 20 of the Restructuring Communication ([99]), the Commission needs to assess whether certain requirements are met. It needs to examine in particular whether (i) the sale process was open, unconditional and non-discriminatory; (ii) the sale took place on market terms; and (iii) the credit institution or the government maximised the sale price for the assets and liabilities involved.

([96]) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

([97]) A credit default swap (CDS) is a particular type of swap designed to transfer the credit exposure of financial products between two or more parties. The buyer of the CDS makes a series of payments to the seller and, in exchange, receives a payoff if the underlying debtor defaults.

([98]) Average values for three-year CDSs from ENI, ENEL, Telecom Italia and Atlantia are taken at 1 July 2014

([99]) Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ('the Restructuring Communication').

(168) As it said in the opening decision, the Commission has no evidence that would allow it to conclude (i) that the sales process was not open, unconditional and non-discriminatory, (ii) that the sale did not take place on market terms, or (iii) that the Italian authorities did not maximise the sale price for Tercas.

(169) The Commission concludes that the sole beneficiary of the aid measure is Tercas, and that there was no aid to the buyer, BPB.

7. LAWFULNESS OF THE AID

(170) In view of the above, the Commission concludes that the measures identified entail State aid within the meaning of Article 107(1) of the Treaty, and have been granted in breach of the notification and stand-still obligations imposed by Article 108(3) of the Treaty. The Commission therefore considers that the measures granted to Tercas constitute unlawful State aid.

8. COMPATIBILITY OF THE AID

8.1. Legal basis for the assessment of compatibility

(171) Italy has not claimed that the measures are compatible with the internal market. None of the provisions of Article 107(2) of the Treaty are applicable. In the same way, subparagraphs (a) and (d) of Article 107(3) clearly do not apply, while the requirements of Article 107(3)(c) are more restrictive than those which the Commission currently applies to financial institutions in difficulty pursuant to Article 107(3)(b). The Commission will therefore examine the compatibility of the FITD's intervention solely on the basis of the last mentioned provision.

(172) Article 107(3)(b) of the Treaty empowers the Commission to find that aid is compatible with the internal market if it is intended 'to remedy a serious disturbance in the economy of a Member State'. The Commission has acknowledged that the global financial crisis can create a serious disturbance in the economy of a Member State, and that measures to assist banks can be appropriate in order to remedy that disturbance. That view has been successively detailed and developed in the seven Crisis Communications ([100]) and was confirmed again in the 2013 Banking Communication, where the Commission lays out the reasons why it considers that the requirements for the application of Article 107(3)(b) continue to be fulfilled.

(173) In order for an aid measure to be compatible under Article 107(3)(b) of the Treaty, it must comply with the general principles for compatibility in Article 107(3), viewed in the light of the general objectives of the Treaty. In previous decisions ([101]), therefore, the Commission has held that any aid measure or scheme must satisfy three tests: (i) appropriateness, (ii) necessity, and (iii) proportionality.

(174) The 2013 Banking Communication applies to State aid granted from 1 August 2013 onwards. The FITD support intervention was authorised by the Banca d'Italia on 7 July 2014.

(175) In order to establish whether the measures are compatible with the relevant Crisis Communications, the Commission will assess the aid granted in the three measures as follows:

(1) *Measure 1*: The non-repayable contribution of EUR 265 million will be treated as a recapitalisation operation for the purposes of examination under the 2013 Banking Communication and the Restructuring Communication, despite the fact that it differs from a standard recapitalisation measure in that no rights were acquired by the granting authority and no remuneration was paid.

([100]) Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ('the Recapitalisation Communication') (OJ C 10, 15.1.2009, p. 2); the Restructuring Communication; Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis ('the 2011 Prolongation Communication') (OJ C 356, 6.12.2011, p. 7); and the 2013 Banking Communication.

([101]) See Commission Decision of 6 September 2013 in State aid case SA.37314 — Rescue aid in favour of Probanka (OJ C 314, 29.10.2013, p. 1), and Commission Decision of 6 September 2013 in State aid case SA.37315 — Rescue aid in favour of Factor Banka (OJ C 314, 29.10.2013, p. 2).

(2) *Measure 2*: The EUR 35 million guarantee intended to cover the credit risk associated with certain exposures of Tercas towards […], containing an aid component of EUR 0,14 million, can be assessed under the Impaired Assets Communication ([102]) and also under the 2013 Banking Communication and the Restructuring Communication as aid for the restructuring of Tercas.

(3) *Measure 3*: Because no decision had been taken by the Commission, the EUR 30 million guarantee will be assessed as additional support through a non-repayable contribution. As a result, it must be treated as a recapitalisation, to be examined in the same way as Measure 1.

(176) The Commission will first assess the compatibility of Measure 2 with the internal market in the light of the Impaired Assets Communication, and then make a combined assessment of all three measures under the 2013 Banking Communication and the Restructuring Communication.

8.2. **Compatibility of Measure 2 with the Impaired Assets Communication**

(177) Measure 2 has to be assessed under the compatibility criteria listed in the Impaired Assets Communication, as its purpose is to 'free the beneficiary bank from (or compensate for) the need to register either a loss or a reserve for a possible loss on its impaired assets'. Those criteria are: (i) the eligibility of the assets; (ii) transparency and disclosure of impairments; (iii) the management of the assets; (iv) a correct and consistent approach to valuation; and (v) the appropriateness of remuneration and burden-sharing.

8.2.1. *Eligibility of assets*

(178) As regards the eligibility of the assets, Section 5.4 of the Impaired Assets Communication indicates that asset relief requires clear identification of impaired assets and that certain limits apply in relation to eligibility.

(179) Whilst the Impaired Assets Communication cites as eligible assets those that triggered the financial crisis, it also allows Member States 'to extend eligibility to well-defined categories of assets corresponding to a systemic threat upon due justification, without quantitative restrictions'. Point 35 of the Impaired Assets Communication states that 'assets that cannot presently be considered impaired should not be covered by a relief programme'.

(180) In the present case, an FITD report from July 2014 mentions that the exposures referred to in Measure 2 relate to performing but problematic loans. According to the criteria set out in Section 5.4 of the Impaired Assets Communication, performing loans are not eligible. On that basis, the Commission concludes that Measure 2 does not comply with the criteria for eligibility of assets set down in the Impaired Assets Communication.

8.2.2. *Transparency and disclosure, management and valuation*

(181) According to Section 5.1 of the Impaired Assets Communication, the Commission requires full *ex ante* transparency and disclosure of impairments on assets which are to be covered by relief measures. However, the Commission has not received any information on the exposures in question or on the underlying company.

(182) Moreover, neither the Member State concerned nor any interested party provided any valuation of the impaired assets, as required by Section 5.5 of the Impaired Assets Communication, nor is there any information allowing the Commission to conclude that, as required by Section 5.6 of the Communication, the assets were properly separated functionally or organisationally.

([102]) Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ C 72, 26.3.2009, p. 1).

(183) The Commission concludes that the criteria regarding transparency and disclosure are not fulfilled, and that there is no evidence based on which the Commission could conclude that the criteria regarding management and valuation are fulfilled.

8.2.3. *Burden-sharing and remuneration*

(184) As regards remuneration, Section 5.2 of the Impaired Assets Communication repeats the general principle that banks ought to bear the losses associated with impaired assets to the maximum extent and provide for correct remuneration so as to ensure equivalent shareholder responsibility and burden-sharing.

(185) As described in recitals 195 to 212, adequate burden-sharing measures have not been taken. In addition, the Commission observes that for the guarantee related to the exposure to […] no remuneration was provided for.

(186) Based on the above, the Commission concludes that measure 2 fulfils none of the cumulative requirements outlined in the Impaired Assets Communication. In consequence, measure 2 cannot be considered compatible with the internal market.

8.3. **Compatibility of Measures 1, 2 and 3 with the 2013 Banking Communication and the Restructuring Communication**

(187) Regarding measures 1 and 3, the form of the measures is legally that of a non-repayable grant, i.e. a cash contribution with no consideration in exchange (in the form of rights of ownership or remuneration). The compatibility criteria set out in the 2013 Banking Communication do not contemplate grants as such.

(188) The only form of aid similar to a grant in the 2013 Banking Communication is aid for recapitalisation. However, recapitalisation requires a number of compatibility criteria to be fulfilled: there must be: (i) a capital raising plan, outlining all possibilities available for the bank in question to raise capital from private sources, (ii) a restructuring plan that will lead to the restoration of the viability of the financial institution, (iii) a sufficient contribution on the part of the beneficiary itself, with holders of capital and subordinated debt instruments contributing as much as possible (burden-sharing), and (iv) measures sufficient to limit the distortion of competition. While a capital raising plan may have been implemented by Tercas's special administrator (see recital 15), the Commission has not been provided with evidence that the compatibility requirements described here have been met.

(189) In essence, the non-repayable contributions under measures 1 and 3 were provided in order to bring the negative equity of Tercas up to zero before the business was taken over by BPB. The Commission has in the past found similar transactions to be compatible with the internal market, but only as aid to facilitate resolution or to support the orderly wind-down of a bank ([103]). As Italy has that the measures to assist Tercas did not apply resolution or liquidation schemes, the Commission cannot follow the same reasoning in the case of Tercas. It therefore has to assess the measure as recapitalisation aid.

(190) Measure 2 was intended to shield Tercas from possible losses as a result of its exposure to […]. It is thus akin to recapitalisation aid for the restructuring of Tercas. Independently of its compliance with the Impaired Assets Communication, if measure 2 is to be declared compatible it would also need to be in line with the 2013 Banking Communication and the Restructuring Communication. Moreover, it would not be possible to assess measures 1 and 3 under those Communications without having regard to measure 2.

([103]) Decision in case SA.39250 (2014/N) — Portugal —Resolution of Banco Espírito Santo, S.A.; Commission Decision of 16 April 2015 in case SA.41503 (2015/N) — Greece — Resolution of Panellinia Bank through a transfer order to Piraeus bank (OJ C 325, 2.10.2015, p. 1); Commission Decision of 2 July 2015 in case SA.41924 (2015/N) — Italy — Resolution (via liquidation) of Banca Romagna Cooperativa (OJ C 369, 6.11.2015, p. 1).

8.3.1. *Restoration of long-term viability*

(191) The 2013 Banking Communication requires both a capital raising plan, to ensure that all possible sources of private capital have been tapped before requiring State aid, and a restructuring plan, to demonstrate the return to long-term viability. Long-term viability is achieved when a bank is able to compete in the marketplace for capital on its own merits in compliance with the relevant regulatory requirements. For a bank to do so, it must be able to cover all its costs and provide an appropriate return on equity, taking into account the risk profile of the bank. According to point 17 of the Restructuring Communication, viability can also be achieved through the sale of the bank.

(192) The interested parties argue that the special administrator took steps 'to remedy deficiencies in Tercas's organisation and internal control system. BPB also claims that the structural elements of the recovery plan were developed within the BPB's business plan 2015-2019.

(193) The Commission observes that it has not received a restructuring or recovery plan showing a return to long-term viability, despite making a formal request for such a plan to Italy.

(194) The Commission recognises that it may examine a restructuring plan submitted after the implementation of a recapitalisation measure. The 2013 Banking Communication provides for such a possibility in particular when the aid has been notified and implemented as rescue aid under strict conditions. Nonetheless, as no rescue measure has been notified, and given the information available, in particular the absence of a restructuring plan, the Commission cannot take the view that the requirement of long-term viability demonstrated by a detailed restructuring plan is fulfilled.

8.3.2. *Aid limited to the minimum and burden-sharing*

(195) The Restructuring Communication, supplemented by the 2013 Banking Communication, indicates that an appropriate contribution by the beneficiary is necessary in order to limit the aid to a minimum and to address distortions of competition and moral hazard. To that end, it provides (i) that both the restructuring costs and the amount of aid should be limited and (ii) that there should be maximum burden-sharing by existing shareholders and subordinated creditors.

(196) According to point 29 of the Communication, the Commission can authorise aid measures only once the Member State concerned demonstrates that all measures to limit such aid to the minimum necessary have been exploited to the maximum extent. To that end, Member States are invited to submit a capital raising plan, before or as part of the restructuring plan.

(197) According to point 44 of the Communication, 'subordinated debt must be converted or written down, in principle before State aid is granted. State aid must not be granted before equity, hybrid capital and subordinated debt have fully contributed to offset any losses'.

(198) According to point 47 of the Communication, outflows of funds must be prevented at the earliest stage possible in order to limit the amount of aid to the minimum necessary.

(199) According to point 52 of the Communication, the Commission will authorise rescue aid in the form of recapitalisation measures (and allow a restructuring plan to be submitted after the implementation of the measure) only if the rescue aid does not prevent compliance with the burden-sharing requirements set out in the Communication.

(200) The Commission observes that a complete write-down of shareholders' equity was performed in Tercas.

(201) In line with the requirements set out in the 2013 Banking Commission, however, EUR 189 million (at 31 March 2014) of Tercas's subordinated debt on a consolidated basis (including its subsidiary Caripe) should have been

converted or written down in line with the requirements set out in the 2013 Banking Commission in order to reduce the capital shortfall and minimise the amount of aid. No such conversion or write-down took place, and according to information provided by Tercas subordinated debt issued by the holding company, amounting to EUR 36 million, expired and was repaid in December 2014. The Commission has no information on whether any subordinated debt issued by Caripe expired and was repaid.

(202) The Commission considers that the outflow of funds related to the expiry of that subordinated debt, and the pay-out made subsequently, in principle violate the conditions under which recapitalisation aid can be found compatible under the 2013 Banking Communication.

(203) The interested parties claim that the option of bailing in the subordinated debt was not legally feasible under the Italian legislation in force, and that debt can be written down only in the event of compulsory administrative winding up. The 2013 Banking Communication outlines the factors which the Commission will consider in order to establish whether a State aid measure is compatible with the internal market, amongst which is the bail-in requirement. Such burden-sharing is possible in a liquidation, as is clear from the context of the decision adopted in the case of Banca Romagna ([104]), in which aid granted by Italy was approved and the burden-sharing requirements with regard to subordinated debt were met.

(204) The interested parties refer to point 42 of the 2013 Banking Communication, but the Commission observes that point 42 speaks of senior debt holders and not subordinated debt holders.

(205) The interested parties also make reference to point 45 of the Communication, which allows an exception to the principle of conversion or writing-down of subordinated creditors where implementing such measures would endanger financial stability or lead to disproportionate results.

(206) The Commission observes that in line with the 2013 Banking Communication burden-sharing by subordinated debtholders was applied to a large proportion of the entire banking system in Slovenia ([105]) and to Portugal's third-largest bank ([106]). It was also applied to a large proportion of the banking system in Spain prior to the adoption of the 2013 Banking Communication, without putting financial stability in danger or leading to disproportionate results. In view of the small scale of Tercas, the Commission cannot accept that there is such a risk in this case. The only cases where the Commission has accepted a deviation from normal burden-sharing on the grounds of disproportionate results are not relevant here ([107]).

(207) The Commission concludes that the holders of subordinated debt instruments did not contribute to the maximum extent possible, and that the FITD's action is not in line with a fundamental aspect of the 2013 Banking Communication.

(208) In the comments it submitted the FITD claims that the restructuring operation involved a full recapitalisation of Tercas, executed through the intervention of BPB, which contributed to the capital increase by raising capital on the market. On the other hand, point 34 of the 2013 Banking Communication provides that after the submission of the capital raising plan the Member State must determine the residual capital shortfall that has to be covered by State aid,. However, as is acknowledged in the submission by BPB and Tercas, the recapitalisation by BPB was conditional on the negative equity first being covered by the FITD.

([104]) See footnote 103.

([105]) Commission decision of 18 December 2013 in case SA.35709 (2013/N) — Slovenia — Restructuring of Nova Kreditna Banka Maribor dd (NKBM) (OJ C 120, 23.4.2014, p. 1); Commission Decision 2014/535/EU of 18 December 2013 on State aid SA.33229 (2012/C) — (ex 2011/N) — Restructuring of NLB — Slovenia which Slovenia is planning to implement for Nova Ljubljanska banka (OJ L 246, 21.8.2014, p. 28); Commission decision of 18 December 2013 in case SA.37690 (13/N) — Slovenia — Rescue aid in favour of Abanka dd (OJ C 37, 7.2.2014, p. 1); Commission decision of 18 December 2013 in case SA.37642 (13/N) — Slovenia — Orderly winding down of Probanka d.d. (OJ C 69, 7.3.2014, p. 1); and Commission decision of 18 December 2013 in case SA.37643 (2013/N) — Slovenia — Orderly winding down of Factor Banka (OJ C 69, 7.3.2014, p. 1).

([106]) Decision in case SA.39250 (2014/N) — Portugal —Resolution of Banco Espírito Santo, S.A.

([107]) The situation in the case of Tercas is not comparable with the *Eurobank* decision, where the Commission accepted that some results would be disproportionate in a case in which the State fully underwrote a recapitalisation measure without ultimately having to provide any capital, as all of the new capital was subscribed by private sources. Commission Decision 2014/885/EU of 29 April 2014 on the State aid SA.34825 (2012/C), SA.34825 (2014/NN), SA.36006 (2013/NN), SA.34488 (2012/C) (ex 2012/NN), SA.31155 (2013/C) (2013/NN) (ex 2010/N) implemented by Greece for the Eurobank Group related to: Recapitalisation and Restructuring of Eurobank Ergasias S.A.; Restructuring aid to Proton bank through creation and capitalisation of Nea Proton and additional recapitalisation of New Proton Bank by the Hellenic Financial Stability Fund; Resolution of Hellenic Postbank through the creation of a bridge bank (OJ L 357, 12.12.2014, p. 112).

(209) BPB and Tercas claim further that the measures were limited to the minimum necessary in order to achieve the objective, i.e. the long-term profitability of Tercas. They give the following reasons: (1) the FITD's contribution meets the 'least cost' criterion in the FITD's constitution; (2) it was the only feasible option, in view of the deterioration of Tercas and the need to find a purchaser; and (3) the FITD contributed only partly to resolving the negative equity and restoring minimum capital ratios: specifically, it contributed EUR 265 million, against the EUR 495 million required.

(210) In that respect, the Commission points out that the least-cost criterion in the FITD's constitution is irrelevant to an assessment of the compatibility of the measures. For compatibility, the only inquiry that is relevant here asks whether the State aid provided is sufficient to restore the long-term viability of the financial institution in question and whether it is limited to the minimum necessary, with distortion of competition being sufficiently limited. The claim that the aid granted was less than the amount needed to meet capital requirements does not prove that aid was limited to the minimum necessary.

(211) As remarked in recital 194, it is not clear to the Commission from the information provided that the aid was indeed sufficient to restore viability. Moreover, the aid was clearly not limited to the minimum, as there was no bail-in of subordinated debt.

(212) It should be added that if the FITD had acted in line with the approach set out in the 2013 Banking Communication, the cost to the FITD could have been further reduced by writing down entirely the subordinated debt of EUR 169 million (EUR 88 million for Tercas — Cassa di Risparmio della Provincia di Teramo SpA and EUR 81 million for Caripe), thereby significantly reducing the burden on the Member State. Such a write-down would have been legally possible in case of liquidation ([108]).

8.3.3. *Measures to limit distortion of competition*

(213) Finally, Section 4 of the Restructuring Communication requires that the restructuring of a financial institution should include measures to limit distortion of competition. Such measures should be tailor-made to address the distortions on the markets where the beneficiary bank operates post restructuring.

(214) Point 34 of the Restructuring Communication provides that one of the most appropriate limitations of distortion of competition is adequate remuneration of public capital, as it limits the amount of aid.

(215) In all three measures there is a complete absence of any element of remuneration of the FITD's contribution, or any premium for the guarantee, or any acquisition of rights (i.e. ordinary shares) or participation in any future revenue. Nor is there any claw-back mechanism allowing recovery of part of the aid from Tercas after it returns to viability.

(216) The FITD contends that when steps are taken to cover negative equity in order to allow a failing undertaking to be purchased by other parties, it is quite normal that there should be no return. The Commission observes that the measures constituted grants of assistance whose immediate effect was that Tercas did not exit the market as it would have done in the absence of such support. They must therefore be considered a major distortion of competition. Accordingly, as stated in recital 189, the Commission considers such measures compatible with the internal market only if the aid is granted to facilitate resolution or to support an orderly wind-down.

(217) The FITD asserts that the Commission has previously accepted a low level of remuneration, or even the absence of remuneration, for example in the cases of Banco de Valencia (BVA) ([109]), Banco Português de Negócios (BNP) ([110]) or Banco CAM ([111]).

([108]) See footnote 103.
([109]) Commission decision of 28 November 2012 in case SA.34053 (12/N) — Spain — Recapitalisation and restructuring of Banco de Valencia S.A. (OJ C 75, 14.3.2013, p. 1).
([110]) Commission Decision 2012/660/EU of 27 March 2012 on the measures SA. 26909 (2011/C) implemented by Portugal for the restructuring of Banco Português de Negócios (BPN) (OJ L 301, 30.10.2012, p. 1).
([111]) Commission decision of 29 June 2010 in case NN 61/09 — Spain — Rescue and restructuring of Caja Castilla-La Mancha (OJ C 289, 26.10.2010, p. 1).

(218) The Commission points out that all those decisions — in so far as the aid authorised was not aid to facilitate resolution or to support an orderly wind-down (recital 189) — were taken before the 2013 Banking Communication became applicable.

(219) On the substance, the Commission observes that in all three cases invoked by the interested parties particularly deep restructuring measures were implemented in line with the requirements of the Restructuring Communication. In all three cases this led to the disappearance from the market of the bank and its brand. In addition, the reduction in the scale of business was particularly significant in each of those cases (in CAM, a reduction of about 50 % in number of branches and about 35 % in staff; in BVA, a reduction of about 90 % in number of branches and about 50 % in staff; and in BPN, a reduction of 65 % in the balance sheet and closure of all lines of business but retail).

(220) The Commission points out that in Tercas's case, by contrast, branches and staff are to be reduced by roughly […] % each, while all business lines will continue to operate. The brand name of Tercas continues to exist, and the business continues to operate in its former business area.

(221) On that basis, the Commission concludes that, contrary to the claims of the FITD, BPB and Tercas, the reorganisation to be implemented by Tercas does not go as far as in the examples they have cited, and does not warrant a complete absence of remuneration for the measures.

(222) The FITD further asserts that the impact of the operation on the market is of itself limited on account of the limited size and geographical scope of the activities of Tercas, which operates mainly in the Abruzzo region.

(223) However, according to statistics available from the Banca d'Italia at the end of 2014, there are 12 banks active in the Abruzzo region, including at least one large European financial institution. Given that Tercas operates in the financial sector, with 163 branches in the Abruzzo region in 2011, and competes with a number of other European financial institutions with branches in the same region, any advantage conferred on it would have the potential to distort competition.

(224) Given the lack of remuneration for the FITD measures, and the relatively moderate reduction in the business of Tercas, coupled with the continuation of the Tercas brand, the Commission considers that there are insufficient safeguards to limit potential distortion of competition.

8.4. **Conclusion on compatibility**

(225) In summary, the Commission cannot identify any grounds for finding that the three measures are compatible with the internal market.

(226) In particular, the documents submitted demonstrate that the measures do not provide for the burden-sharing sought in accordance with the 2013 Banking Communication and do not meet the combined requirements of the Restructuring Communication for the compatibility of restructuring aid, i.e. the restoration of long-term viability, the limitation of the aid to the minimum necessary, and measures to limit distortion of competition.

9. **RECOVERY**

(227) According to the Treaty and the settled case-law of the Court of Justice, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ([112]). The Court has also consistently held that the aim of obliging the State concerned to abolish aid found by the Commission to be incompatible with the internal market is to restore the previous situation ([113]).

([112]) See *Commission* v *Germany*, Case 70/72, EU:C:1973:87, paragraph 13.
([113]) See *Spain* v *Commission*, Joined Cases C-278/92, C-279/92 and C-280/92, EU:C:1994:325, paragraph 75.

(228) The Court has established that that objective is achieved once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([114]).

(229) In line with the case-law, Article 16(1) of Council Regulation (EU) 2015/1589 ([115]) provides that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary … The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.'

(230) Neither Italy nor any of the third parties has formally requested that recovery should not be ordered on the grounds that it would be contrary to a general principle of Union law. Nevertheless, in the light of the exchanges it has had with Italy and the third parties, the Commission believes that it would be appropriate to assess whether in the case at issue a recovery order would be contrary to any general principle of Union law.

(231) In the light of the reference to action by deposit guarantee schemes in point 63 of the 2013 Banking Communication, and the Commission's practice in previous decisions ([116]), no bank or Member State could in June 2014 have had an expectation that measures taken by guarantee schemes might not be considered State aid. Moreover, a recipient of unlawful aid cannot have a legitimate expectation that the aid is lawful before the Commission has taken a final decision pursuant to Article 108(3) of the Treaty.

(232) In principle the Commission assesses the compatibility of an aid measure on the basis of the criteria applicable at the date on which it takes its decision. The compatibility criteria set forth in the 2013 Banking Communication applied with effect from 1 August 2013, and hence were applicable more than 11 months before the measures were taken. There could be no problem of legal certainty on grounds of the novelty of the 2013 Banking Communication.

(233) Recovery is the normal consequence of a negative decision in a case of unlawful aid, and as such it cannot be considered a disproportionate result.

(234) The case-law of the Union courts has strictly circumscribed the scope of the cases in which it is absolute impossible for a Member State to comply with a recovery order. In particular, the financial difficulties which would be faced by an aid beneficiary if the aid were to be recovered do not render recovery impossible. The Commission concludes that in the case at issue it is not possible to invoke absolute impossibility to recover the aid.

(235) Thus, given that the measures in question were implemented in violation of Article 108(3) of the Treaty, and are to be considered unlawful and incompatible aid, and given that recovery would not be contrary to a general principle of Union law, they must be recovered in order to re-establish the situation that existed on the market beforehand. The period in respect of which aid is to be recovered is the period from when the beneficiary first enjoyed the advantage, that is to say when the aid was put at the beneficiary's disposal, until the date of effective recovery, and the sums to be recovered should bear interest until the date of effective recovery. In the case at issue the date on which the aid was put at the disposal of the company is the date of the payment of the contribution, for measure 1, and the date of provision of the guarantee, for measures 2 and 3.

10. **CONCLUSION**

(236) The Commission finds that Italy has unlawfully implemented measure 1, which is a non-repayable contribution of EUR 265 million, measure 2, which is a guarantee for EUR 35 million of credit exposures to […] with an aid element of EUR 0,14 million, and measure 3, which is a further non-repayable contribution of EUR 30 million,

([114]) See *Belgium* v *Commission*, Case C-75/97, EU:C:1999:311, paragraphs 64 and 65.
([115]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).
([116]) See decision in case SA.33001 (2011/N) — Denmark — Part B — Amendment to the Danish winding up scheme for credit institutions, recitals 43 to 49; decision in case SA.34255 (2012/N) — Spain — Restructuring of CAM and Banco CAM, recitals 76 to 87; and decision in case SA.37425 (2013/N) — Poland — Credit unions orderly liquidation scheme, recitals 44 to 53.

in total EUR 295,14 million in State aid, granted on 7 July 2014 in breach of Article 108(3) of the Treaty on the Functioning of the European Union. As a consequence, the illegal and incompatible aid should be recovered from the beneficiary, Tercas, together with the recovery interest,

HAS ADOPTED THIS DECISION:

Article 1

The State aid implemented through measure 1, which is a non-repayable contribution of EUR 265 million, measure 2, which is a guarantee for EUR 35 million of credit exposures to […] with an aid element of EUR 0,14 million, and measure 3, which is a further non-repayable contribution of EUR 30 million, in total EUR 295,14 million, unlawfully granted to Tercas by Italy on 7 July 2014 in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

Article 2

1. Italy shall recover the aid referred to in Article 1 from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([117]) and Commission Regulation (EC) No 271/2008 ([118]) amending Regulation (EC) No 794/2004.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. Italy shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, Italy shall submit the following information to the Commission:

(a) the total amount (principal and interest) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

([117]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).
([118]) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 23 December 2015.

For the Commission

Margrethe VESTAGER

Member of the Commission