Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

19 March 2019*

(State aid — Measures adopted by a consortium of banks governed by private law for the benefit of one of its members — Measures authorised by the Central Bank of the Member State — Decision declaring the aid incompatible with the internal market — Action for annulment — Definition of State aid — Whether imputable to the State — State resources)

In Joined Cases T-98/16, T-196/16 and T-198/16,

Italian Republic, represented by G. Palmieri, acting as Agent, and by S. Fiorentino and P. Gentili, avvocati dello Stato,

applicant in Case T-98/16,

Banca Popolare di Bari SCpA, formerly Tercas-Cassa di risparmio della provincia di Teramo SpA (Banca Tercas SpA), established in Teramo (Italy), represented by A. Santa Maria, M. Crisostomo, E. Gambaro and F. Mazzocchi, lawyers,

applicant in Case T-196/16,

Fondo interbancario di tutela dei depositi, established in Rome (Italy), represented by M. Siragusa, G. Scassellati Sforzolini and G. Faella, lawyers,

applicant in Case T-198/16,

supported by

Banca d'Italia, represented by M. Perassi, O. Capolino, M. Marcucci and M. Todino, lawyers,

intervener in Case T-198/16,

v

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

defendant,

APPLICATION pursuant to Article 263 TFEU for annulment of Commission Decision (EU) 2016/1208 of 23 December 2015 on State aid granted by Italy to the bank Tercas (Case SA.39451 (2015/C) (ex 2015/NN)) (OJ 2016 L 203, p. 1),

* Language of the case: Italian.

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of S. Frimodt Nielsen, President, V. Kreuschitz, I.S. Forrester, N. Półtorak (Rapporteur) and E. Perillo, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 22 March 2018,

gives the following

Judgment

Background to the dispute

1 The present actions were brought by the Italian Republic (Case T-98/16), Banca Popolare di Bari SCpA ('BPB') (Case T-196/16) and the consortium governed by Italian private law, Fondo interbancario di tutela dei depositi ('the FITD') (Case T-198/16) against Commission Decision (EU) 2016/1208 of 23 December 2015 on State aid granted by Italy to the bank Tercas (Case SA.39451 (2015/C) (ex 2015/NN)) (OJ 2016 L 203, p. 1, 'the contested decision').

2 In the contested decision, the European Commission considered that the measures adopted by the FITD for the benefit of Banca Tercas (Cassa di risparmio della Provincia di Teramo SpA) ('Tercas'), authorised by the central bank of the Italian Republic, Banca d'Italia ('the Bank of Italy'), on 7 July 2014 ('the measures' or 'the measures adopted by the FITD for the benefit of Tercas'), constituted unlawful and incompatible State aid which had to be recovered from its beneficiary by the Italian Republic.

Entities involved

Commercial entities concerned by the measures

3 Tercas is a private equity bank which is active principally in the Abruzzo region of Italy. At the end of 2010, Tercas acquired Banca Caripe SpA, a regional bank which also had a presence in that region.

4 BPB is the holding company of a private equity banking group which is active principally in the south of Italy.

FITD

5 The FITD is a consortium of banks governed by private law which was established on a voluntary basis in 1987. It is a mutual consortium which was established for the purpose of pursuing the common interests of its members.

6 The aim of the FITD is to guarantee its members' deposits (see Article 1 of the statutes of the FITD in the version applicable to the facts of the case, 'the statutes of the FITD'). In 1996, as a result of the transposition into Italian national law of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5), the FITD was recognised by the Bank of Italy as one of the deposit guarantee schemes that was authorised to operate in Italy pursuant to the rules laid down by that directive. Under Article 27 of its statutes, in the event of the compulsory liquidation of one of its members, the FITD is to intervene by repaying

the deposits lodged by depositors with the FITD up to a maximum of EUR 100 000 per depositor. Under Article 27(1) of the statutes, claims relating to funds acquired by the members of the consortium with an obligation to repay are eligible for repayment, in euros and foreign currencies, in the form of deposits or any other form, as well as bank cheques and any other equivalent debt instrument.

7 Since its creation, the FITD has had the power to intervene in favour of its members, not only by way of the deposit guarantee for depositors, which has become statutory (mandatory intervention), but also on a voluntary basis, in accordance with its statutes, if that intervention makes it possible to reduce the burden its members may have to bear as a result of the deposit guarantee (voluntary intervention).

8 Thus, under Article 28 of its statutes, where provision is made to lessen the burden, the FITD may, instead of making the repayment provided for under the deposit guarantee for depositors in the event of the compulsory liquidation of a member of the consortium, intervene in transactions involving the transfer of assets and liabilities relating to that member (alternative voluntary intervention). Similarly, under Article 29(1) of its statutes, irrespective of whether a compulsory liquidation procedure has been formally initiated, the FITD may decide to intervene by means of finance, guarantees, the acquisition of shares or in the form of other technical support for one of its members placed under special administration, where there are prospects of recovery and a lesser burden is to be expected compared with the burden that would be incurred by the intervention of the FITD in the event of the compulsory liquidation of that member (voluntary intervention by way of support or preventive intervention, as in the case of Tercas).

9 The FITD's role, the measures that it may adopt, in particular the support measures for the benefit of its members, and, more specifically, the question as to whether the measures which are the subject matter of the contested decision may be classified as 'aid granted by a Member State or through State resources', within the meaning of Article 107(1) TFEU, are at the heart of the present cases.

Bank of Italy

10 The Bank of Italy is a public authority which performs the function of the central bank of the Italian Republic. It has its own legal personality which is separate from that of the Italian State. As a member of the European System of Central Banks (ESCB), the Bank of Italy must, under Article 127(5) TFEU, contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

11 Among other functions, decreto legislativo, n° 385, e successive modifiche e integrazioni, Testo unico delle leggi in materia bancaria e creditizia (Italian Banking Act) of 1 September 1993 (GURI No 230, 30 September 1993, Ordinary Supplement No 92), in the version in force at the material time ('the Italian Banking Act'), assigns to the Bank of Italy the role of the supervisory authority of the banking sector and gives it the objectives of ensuring the sound and prudent management of supervised institutions, overall stability, the efficiency and competitiveness of the financial system and compliance with the provisions on credit.

12 In order to achieve those objectives, in particular that of ensuring the sound and prudent management of supervised institutions, the Bank of Italy has extensive supervisory powers, which include administrative monitoring, regulatory powers, inspection powers and numerous authorisation powers. Those powers allow the Bank of Italy to intervene in every key event in which a bank is involved, in a manner consistent with its commercial autonomy, and for the sole purpose of verifying whether its management is sound and prudent.

13 In the exercise of its rights and powers, the Bank of Italy has, inter alia, approved the statutes of the FITD, assists in FITD meetings as an observer with no voting rights and, in accordance with Article 96b(1)(d) of the Italian Banking Act, has approved the measures adopted by the FITD for the benefit of Tercas.

Context and the measures adopted by the FITD for the benefit of Tercas

14 On 30 April 2012, on a proposal by the Bank of Italy, which had identified irregularities within Tercas, the Italian Ministry of Economy and Finance decided to place Tercas under special administration.

15 The Bank of Italy subsequently appointed a special administrator to manage Tercas during the special administration ('the special administrator').

First attempt to intervene

16 In October 2013, after assessing various options, the special administrator started negotiations with BPB, which had expressed an interest in subscribing to a capital increase in Tercas, on condition that a due diligence inquiry into Tercas was first carried out and that the FITD covered in full that bank's negative equity.

17 On 28 October 2013, following a request by the special administrator of Tercas on the basis of Article 29 of the statutes of the FITD, the Executive Committee of the FITD decided to support Tercas in an amount up to EUR 280 million. That decision was ratified by the FITD's Board on 29 October 2013. On 4 November 2013, in accordance with Article 96b(1)(d) of the Italian Banking Act, the Bank of Italy approved that support measure.

18 Although it had been granted authorisation by the Bank of Italy, the FITD decided to suspend the planned measures in view of uncertainties regarding Tercas' economic situation and its assets and liabilities and the tax treatment of those measures. On 18 March 2014, following the audit of Tercas' assets, requested by BPB (see paragraph 16 above), a disagreement arose between the FITD's and BPB's experts. That disagreement was subsequently resolved following an arbitration procedure. In addition, the FITD and BPB agreed to share any costs resulting from the taxation of the measures in the event that the tax exemption envisaged was not applied.

Decision to intervene and authorisation by the Bank of Italy

19 Following the suspension of the measures on 18 March 2014 and in order to satisfy itself that the measures adopted for the benefit of Tercas were economically more advantageous than reimbursement of that bank's depositors, the FITD instructed an auditing and advisory company. In the light of the conclusions presented by that company in a report dated 26 May 2014 and in view of the cost of the measures compared with the cost of compensation under the deposit guarantee scheme in the event of liquidation, on 30 May 2014, the Executive Committee and the Board of the FITD decided to take steps for the benefit of Tercas.

20 On 1 July 2014, the FITD sent the Bank of Italy a new authorisation request.

21 On 7 July 2014, the Bank of Italy authorised the measures to be adopted by the FITD for the benefit of Tercas. This provided for three measures ('the individual measures at issue'), namely, first, a EUR 265 million contribution intended to cover Tercas' negative equity; secondly, a guarantee of EUR 35 million intended to cover the credit risk associated with certain exposures of Tercas and, thirdly, a guarantee of EUR 30 million intended to cover the costs arising from the tax treatment of the first measure (see recital 38 and Article 1 of the contested decision).

Tercas' position after the measures adopted by the FITD

22 The special administrator of Tercas, in agreement with the Bank of Italy, convened a general meeting in order for shareholders to be able to take a decision on covering the losses discovered during the special administration and a capital increase reserved for BPB.

23 The Tercas shareholders' general meeting took place on 27 July 2014 and decided, first, to partially cover the losses, inter alia by reducing the capital to zero and cancelling all of the ordinary shares in circulation and, secondly, to increase the capital to EUR 230 million by issuing new ordinary shares to be offered to BPB. That capital increase took place on 27 July 2014.

24 On 1 October 2014, Tercas left special administration, and BPB appointed the new bodies of that bank.

25 In December 2014, BPB increased capital by EUR 500 million, comprising the issue of new shares and the issue of a tier 2 subordinated loan. The capital increase served to reinforce BPB's capital ratios, which had been affected by the acquisition of Tercas.

26 In March 2015, BPB subscribed a new increase in Tercas' capital in the amount of EUR 135.4 million in order to cope with additional losses recorded in the fourth quarter of 2014, to cover restructuring costs in 2015 and 2016, and to improve Tercas' capital ratios. Those events are not connected to the support measures adopted by the FITD for the benefit of Tercas.

The administrative procedure and the contested decision

27 On 8 August and 10 October 2014, the Commission requested from the Italian authorities information regarding the measures adopted by the FITD for the benefit of Tercas. Those authorities replied to those requests for information on 16 September and 14 November 2014.

28 By letter of 27 February 2015, the Commission informed the Italian Republic of its decision to initiate the procedure laid down in Article 108(2) TFEU in respect of that measure.

29 On 24 April 2015, the Commission published that decision in the *Official Journal of the European Union* and invited interested parties to submit their comments on the measures adopted by the FITD for the benefit of Tercas. Comments in that regard were submitted to the Commission by the Italian Republic, the Bank of Italy, the FITD, BPB and Tercas (see recitals 44 to 109 of the contested decision).

30 On 13 August and 17 September 2015, two meetings were held with the Italian authorities and the interested parties.

31 On 23 December 2015, the Commission adopted the contested decision.

32 By that decision, the Commission found that the individual measures at issue that were authorised on 7 July 2014 (see paragraph 21 above) in breach of Article 108(3) TFEU constituted unlawful and incompatible aid granted by the Italian Republic to Tercas and ordered the recovery of that aid. In that regard, the Commission took the view that the first individual measure, intended to cover Tercas' negative equity, was a non-repayable contribution of EUR 265 million, that the second measure, a guarantee of EUR 35 million intended to cover the credit risk associated with certain exposures, had to be valued at EUR 140 000 to take account, inter alia, of the fact that those exposures had been fully repaid by the debtors at maturity and therefore the guarantee had not been triggered, and that the third measure, a guarantee of EUR 30 million intended to cover the costs arising from the tax treatment of the first measure, was a non-repayable contribution of an amount equivalent to that of the guarantee.

Procedure and forms of order sought

33 By application lodged at the Registry of the General Court on 4 March 2016, the Italian Republic brought the action in Case T-98/16.

34 By application lodged at the Registry of the General Court on 29 April 2016, BPB brought the action in Case T-196/16.

35 By application lodged at the Registry of the General Court on 1 May 2016, the FITD brought the action in Case T-198/16.

36 By documents lodged at the Registry of the General Court on 1 August 2016, the Fondo di Garanzia dei Depositanti del credito cooperativo (Cooperative Credit Depositors' Guarantee Fund) and the Bank of Italy applied for leave to intervene in the proceedings in Case T-198/16 in support of the form of order sought by the FITD.

37 Following a change in the composition of the Chambers of the General Court, pursuant to Article 27(5) of that Court's Rules of Procedure, the Judge-Rapporteur was assigned to the Third Chamber, to which the present cases were consequently allocated.

38 By order of 15 February 2017, the President of the Third Chamber of the General Court dismissed the Fondo di Garanzia dei Depositanti del credito cooperativo's application to intervene and granted the Bank of Italy leave to intervene. The latter lodged its statement in intervention and the main parties lodged their observations on that statement within the periods prescribed.

39 On the proposal of the Third Chamber, the General Court decided, in accordance with Article 28 of the Rules of Procedure, to refer the cases in question to a chamber sitting in extended composition.

40 By decision of the President of the Third Chamber (Extended Composition) of the General Court of 14 December 2017, Cases T-98/16, T-196/16 and T-198/16 were joined for the purposes of the oral part of the procedure and the final decision, in accordance with Article 68 of the Rules of Procedure.

41 Acting on a proposal from the Judge-Rapporteur, the General Court (Third Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure, invited the parties to answer a series of questions.

42 The parties answered those questions on 15 and 16 February 2018.

43 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 22 March 2018.

44 In Case T-98/16, the Italian Republic claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

45 In Case T-196/16, BPB claims that the Court should:

– annul the contested decision;

– in the alternative, annul Articles 2 to 4 of the contested decision;

– order the Commission to pay the costs.

46 In Case T-198/16, the FITD, supported by the Bank of Italy, claims that the Court should:

– annul the contested decision;

– in the alternative, annul the contested decision in so far as it establishes and quantifies the aid element in measure 3;

– order the Commission to pay the costs.

47 The Commission contends that the Court should:

– dismiss the actions;

– order the applicants to pay the costs.

Law

The admissibility of the action brought by the FITD

48 Without formally raising an objection of inadmissibility under Article 130(1) of the Rules of Procedure, the Commission has doubts as to the admissibility of the action brought by the FITD on account of its lack of *locus standi*. In essence, according to the Commission, since the FITD may be regarded as an intermediary through which the Italian State decided to grant aid and the Italian State has also brought an action, the action brought by that intermediary should therefore be declared inadmissible.

49 The FITD disputes the Commission's argument.

50 It should be noted at the outset that, under the fourth paragraph of Article 263 TFEU, 'any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'. Moreover, it should be noted that, since it has legal personality, the FITD is a legal person governed by private law and may bring an action for annulment under Article 263 TFEU.

51 Therefore, it is necessary to determine whether the FITD is directly and individually concerned by the contested decision.

52 As regards whether the FITD is directly affected by the contested decision, it should be noted that, according to well-established case-law, two criteria must be satisfied. First, the measure in question must directly affect the legal situation of the applicant and, secondly, that measure must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules (see judgment of 26 January 2018, *Centro Clinico e Diagnostico G. B. Morgagni* v *Commission*, T-172/16, not published, EU:T:2018:34, paragraph 57 and the case-law cited).

53 In the present case, the adoption of the contested decision, declaring the individual measures at issue incompatible with the internal market, did not confer on the FITD the right to intervene in support of Tercas. Furthermore, in accordance with Articles 2 and 3 of the contested decision, the Italian Republic is required to recover immediately and effectively the aid granted to the FITD and financed by its members from Tercas and the national authorities have no discretion in that regard. It follows

that the contested decision directly affects the legal situation of the FITD within the meaning of the case-law cited in paragraph 52 above. The FITD is therefore directly concerned by the contested decision.

54 As regards whether the FITD is individually concerned by the contested decision, it is clear from the case-law that the legal position of a body other than a Member State, which has legal personality and has adopted a measure classified as State aid in a final decision by the Commission, may be individually concerned by that decision if the decision prevents it from exercising as it sees fit its own powers, which consist, in particular, in granting the aid at issue (see judgment of 17 July 2014, *Westfälisch-Lippischer Sparkassen- und Giroverband* v *Commission*, T-457/09, EU:T:2014:683, paragraph 83 and the case-law cited).

55 In the present case, first, it is common ground that the FITD, as a body governed by private law (see paragraph 5 above) which has legal personality, granted and delivered the measures classified as aid in the contested decision. Secondly, as the FITD has argued, the contested decision not only made it impossible for the FITD to adopt a measure for the benefit of Tercas in the present case, but it also precluded the possibility of adopting other support measures in the future, by reducing the FITD's autonomy and that of its member banks. Thus, the contested decision affects the FITD individually within the meaning of the case-law cited in paragraph 54 above since it prevents the FITD from exercising as its sees fit its own powers, which consist, in the present case, in the adoption of measures other than the repayment of deposits.

56 The plea of inadmissibility raised by the Commission must therefore be rejected in so far as it seeks to establish that the FITD does not have *locus standi* under Article 263 TFEU.

Substance

57 In Case T-98/16, the Italian Republic puts forward four pleas in law, which relate to the following issues:

– the financing of the aid through 'State resources';

– the imputability of the aid to the State;

– the selective advantage conferred by the aid;

– the incompatibility of the aid with the internal market.

58 In Case T-196/16, BPB puts forward seven pleas in law, which relate to:

– the reasoning with regard to demonstrating the existence of aid 'granted by the State or through State resources';

– the financing of the aid through 'State resources';

– the imputability of the aid to the State;

– the selective advantage conferred by the aid;

– the incompatibility of the aid with the internal market;

– the incorrect classification of the EUR 30 million tax guarantee;

– the recovery of the aid.

59 Lastly, in Case T-198/16, the FITD puts forward five pleas in law, which relate to:

– the financing of the aid through 'State resources';

– the imputability of the aid to the State;

– the selective advantage conferred by the aid;

– the incompatibility of the aid with the internal market;

– the incorrect classification of the EUR 30 million tax guarantee.

60 Those pleas concern, in essence, the main stages of the reasoning followed in the contested decision in order for the Commission to be able to find that aid existed, that it was incompatible with the internal market and that it was necessary to order its recovery.

61 In the present case, the Court considers that it is appropriate first to examine the parties' arguments concerning the criterion of aid 'granted by a Member State or through State resources' within the meaning of Article 107(1) TFEU. For that purpose, it is appropriate to group and examine together the second plea in law raised by the Italian Republic in Case T-98/16, the third plea raised by BPB in Case T-196/16 and the second plea raised by the FITD in Case T-198/16, in so far as they concern the concept of the imputability of aid to the State. Likewise, the first plea raised by the Italian Republic in Case T-98/16, the second plea raised by BPB in Case T-196/16 and the first plea raised by the FITD in Case T-198/16, in so far as they concern the concept of State resources, should be grouped and examined together.

Preliminary observations on the concept of 'aid granted by a Member State'

62 According to settled case-law, categorisation as 'State aid' within the meaning of Article 107(1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or through State resources, that the intervention be liable to affect trade between Member States, that it confer a selective advantage on the beneficiary and that it distorts or threaten to distort competition (see judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 17 and the case-law cited).

63 As regards the first condition relating to the existence of an intervention by the State or through State resources, it should be noted that, for it to be possible to classify advantages as 'State aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State (see judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 20 and the case-law cited).

64 In that regard, in general, it is not appropriate to distinguish a priori cases in which aid is granted directly by the State from those in which it is granted through a public or private body designated or established by that State (see, to that effect, judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 23 and the case-law cited, and Opinion of Advocate General Saugmandsgaard Øe in *ENEA*, C-329/15, EU:C:2017:233, point 67).

65 The inclusion within the scope of Article 107(1) TFEU of advantages granted by bodies distinct from the State seeks to preserve the effectiveness of the rules on 'aid granted by a Member State' set out in Articles 107 to 109 TFEU. The Court has thus held that EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid

(judgment of 16 May 2002, *France* v *Commission*, C-482/99, 'the judgment in *Stardust*', EU:C:2002:294, paragraph 23). In other words, that case-law is intended to counteract a risk of under-inclusion. However, the decision to include the advantages granted by bodies distinct from the State also gives rise to a specific risk of over-inclusion as regards advantages that are not attributable to the State or do not involve the use of State resources (see, to that effect, Opinion of Advocate General Saugmandsgaard Øe in *ENEA*, C-329/15, EU:C:2017:233, points 68 and 69 and the case-law cited).

66 It is in the light of the need to avoid both the risk of under-inclusion and that of over-inclusion of advantages granted by bodies distinct from the State that the evidence on which the Commission relies to establish that the measures at issue originate from the State should be examined.

67 In that regard, the fact remains that the concept of State aid is a legal concept which must be interpreted on the basis of objective factors (see, to that effect, judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 111, and of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 87) including whether the entity which granted the aid is public or private. Where that entity is governed by private law or is autonomous, including, as regards the management of its funds, by comparison with intervention by public authorities and with public funds, in the strict sense, the Commission is, subject to full review by the EU Courts, under an even more important obligation to specify and substantiate the reasons which justify its conclusion that the resources used are under public control and the measures are imputable to the State and, consequently, that there is aid within the meaning of Article 107(1) TFEU.

68 Therefore, in a situation where the Commission inferred that financial assistance granted by the subsidiaries of a public undertaking was attributable to the States simply from the fact that those companies were indirectly controlled by the State, it has been held that, even if the State was in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed (judgment of 16 May 2002, *Stardust*, C-482/99, EU:C:2002:294, paragraphs 50 to 52). In such a case, the Commission must have a set of indicators arising from the circumstances of the case and the context in which that financial assistance was given in order to establish the degree of involvement by the public authorities in granting that assistance through the intermediary of a public undertaking (see, to that effect, judgment of 16 May 2002, *Stardust*, C-482/99, EU:C:2002:294, paragraphs 52 and 55).

69 That obligation on the Commission is all the more necessary in a situation where, as in the present case, the measure at issue is provided by a private entity. In such a situation, it cannot be assumed that the State is in a position to control that undertaking and to exercise a dominant influence over its operations on account of the link of a capital nature and the rights attached to it. The Commission must therefore prove, to the requisite legal standard, a sufficient degree of State involvement in granting the measure at issue by demonstrating not only that the State is able to exercise a dominant influence over the entity granting the aid, but also that it was in a position to exercise that control in the circumstances of the particular case.

70 Moreover, notwithstanding the requirement to distinguish the imputability of aid to a State from the question whether aid was granted through State resources, which are separate and cumulative conditions (see judgment of 5 April 2006, *Deutsche Bahn* v *Commission*, T-351/02, EU:T:2006:104, paragraph 103 and the case-law cited), in the present case, the Commission did not seek to make a clear distinction between those conditions (see recital 144 of the contested decision). The Court therefore considers it appropriate, in the first place, to examine the various items of the evidence on which the Commission relies to establish that the measures adopted are imputable to the State and, in the second place, to assess the evidence regarding the control exercised by the public authorities over the resources used for the measures adopted by the FITD for the benefit of Tercas.

Evidence relied on in the contested decision to establish that the measures originate from the State

71 After noting in recital 112 of the contested decision that the decisive factor in order to determine the existence of 'aid granted by a Member State or through State resources', within the meaning of Article 107(1) TFEU, was not the immediate origin of those resources but the degree of intervention of the public authority in defining those measures and their methods of financing, the Commission set out, in recitals 117 to 145, the various factors, which it regards as 'sufficient evidence', that it took into account.

72 In the first place, the Commission considered that the Italian State had entrusted the FITD with a 'public mandate' of protecting depositors which it exercises in various forms. In this respect, in recital 120 of the contested decision, the Commission noted that the protection of savings and depositors had a specific position in Italian national law, which protects savings and confers on the Bank of Italy the task of safeguarding the stability of the Italian banking system in order to protect depositors.

73 In that context, in recital 121 of the contested decision, the Commission stated that Article 96a of the Italian Banking Act had to be read as a 'specific definition of the public mandate of protecting depositors that applies to deposit guarantee schemes recognised in Italy'. The Commission specified that, 'by including the last sentence in Article 96[a](1) [of the Italian Banking Act, according to which deposit guarantee schemes "may engage in other types and forms of intervention" in addition to repayment of depositors, the Italian authorities [had] chosen to allow their recognised deposit guarantee schemes to use the resources collected from member banks for different types of action'. The Commission also stated that Article 96a of the Italian Banking Act was therefore the basis for recognition of the FITD as a mandatory deposit guarantee scheme in Italy and, at the same time, the provision granting the FITD the power to take 'support measures', including, therefore, a support measure adopted by the FITD in accordance with Article 29 of its statutes.

74 Therefore, in recital 122 of the contested decision, the Commission stated that 'the fact that the FITD is organised as a consortium under private law [was] 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'. It also noted that '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[d] with the public interest'. However, the Commission pointed out, first, that 'that d[id] not necessarily mean that the undertaking [namely, the FITD,] could have taken its decision without taking into account the requirements of the public authorities' and, secondly, that 'moreover, it [was] not necessary that the State's influence should result from a legally binding act of a public authority[, since the] autonomy that the undertaking in principle enjoys does not prevent the practical involvement of the State'.

75 In any event, the Commission stated, in recital 123 of the contested decision, that 'Union and Italian legislation [gave] the [Bank of Italy] the authority and the means to ensure that all actions taken by the FITD as a deposit guarantee scheme recognised under the [Italian] Banking Act comply with [the] public policy mandate and contribute to the protection of depositors'.

76 In the second place, the Commission considered that the Italian public authorities had the opportunity to influence all of the steps in the implementation of a support measure such as that at issue in the present case.

77 First, the Commission noted that the Italian Banking Act conferred on the Bank of Italy the power to authorise the adoption of measures by deposit guarantee schemes, including support measures, and to monitor their compliance with the objectives of ensuring the stability of the banking system and protecting deposits (recitals 127, 141 and 142 of the contested decision). In that regard, in recital 129 of the contested decision, the Commission took the view that authorisation by the Bank of Italy had

to occur at a stage where the FITD could still reconsider and amend the proposed measure if the Bank of Italy objected to it. It therefore concluded that the Italian authorities exercised influence over the support measures before it had actually been decided to adopt them (recital 130 of the contested decision).

78 Secondly, the Commission considered that the Italian public authorities had the power to initiate the procedure leading to a support measure. In that regard, in recital 128 of the contested decision, the Commission noted that only banks under special administration qualified for support measures. First, banks are placed under special administration by the Ministry of the Economy on a proposal by the Bank of Italy. Second, the request for intervention is sent to the FITD by the special administrator, who is appointed and supervised by the Bank of Italy.

79 Thirdly, the Commission considered that the influence of the Italian public authorities was further accentuated by the presence of representatives at all decision-making meetings, where those authorities were able to voice their concerns at an early stage (recitals 129 and 130 of the contested decision).

80 Accordingly, in recital 138 of the contested decision, the Commission concluded that, 'in the case at issue, both in principle and in practice, the Italian authorities exercise[d] constant control of compliance in the use of the FITD's resources with public objectives, and influence[d] the use of those resources'.

81 In the third place, in recitals 133 to 136 of the contested decision, the Commission stated that membership of the FITD was obligatory for Italian banks as were contributions to the intervention measures that were decided on by its governing bodies. Regardless of their individual interests, members of the consortium were thus unable to exercise a right of veto over such a decision, or to disassociate themselves from the intervention. Therefore, according to the Commission, the measures adopted are imputable to the FITD and not the consortium's member banks. Consequently, since membership of the FITD and the contributions to the measures which it decides to adopt are obligatory, the Commission stated that the members of the FITD '[were obliged] under Italian law to contribute to the costs of FITD's support measures' and that 'the resources used to finance such support measures [were] clearly required, managed and apportioned according to the law and other public rules, and consequently [had] a public character' (see recital 137 of the contested decision).

82 In the light of the foregoing, in recital 144 of the contested decision, the Commission took the view that, in the present case, there was sufficient evidence to demonstrate that the individual measures at issue were imputable to the State and were financed through public resources. In particular, with regard to the imputability of the measures at issue to the State, in recital 145 of the contested decision, the Commission stated that, even if some of the factors to which it had given weight, taken individually, were not in themselves sufficient for it to be concluded that the measures at issue were imputable to the State, the series of factors it had assessed demonstrated, as a whole, that the measures adopted by the FITD were imputable to the State.

Whether the measures at issue are imputable to the Italian State

83 First, in order to assess whether a measure may be imputed to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure (see judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 21 and the case-law cited).

84 In that respect, in a situation concerning the imputability to the State of an aid measure taken by a public undertaking, it has been held that this may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken, including the fact that the body in question could not have taken the contested decision without taking account of the

requirements of the public authorities or the fact that, apart from factors of an institutional nature linking the public undertakings to the State, those undertakings, through which aid had been granted, had to take account of directives issued by an inter-ministerial committee for economic planning (see, to that effect, judgment of 16 May 2002, *Stardust*, C-482/99, EU:C:2002:294, paragraph 55 and the case-law cited).

85 According to the same line of case-law, other indicators may, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as the fact that it is an integral part of the structures of the public administration, the nature of its activities and the fact that it exercises them on the market in normal conditions of competition with private operators, the legal status of the undertaking (subject to public law or ordinary company law), the degree of supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it entails (see, to that effect, judgments of 16 May 2002, *Stardust*, C-482/99, EU:C:2002:294, paragraph 56, and of 23 November 2017, *SACE and Sace BT* v *Commission*, C-472/15 P, not published, EU:C:2017:885, paragraph 36).

86 Furthermore, in view of the risk of under-inclusion (see paragraphs 64 and 65 above), it has been held that the mere fact that a public undertaking had been constituted in the form of a capital company governed by ordinary law cannot, having regard to the autonomy which that legal form is likely to confer upon it, be regarded as sufficient to exclude the possibility of an aid measure taken by such a company being imputable to the State. The existence of a situation entailing control and the real possibilities of exercising a dominant influence which that situation involves in practice means that it is not possible to exclude automatically any imputability to the State of a measure taken by such a company, and hence the risk of an infringement of the rules on State aid, notwithstanding the relevance, as such, of the legal form of the public undertaking as one indicator, amongst others, enabling it to be determined in a given case whether or not the State is involved (see, to that effect, judgment of 16 May 2002, *Stardust*, C-482/99, EU:C:2002:294, paragraph 57).

87 However, as regards the imputability of an aid measure taken by a private entity, while the legal form of an entity of that kind does not in itself preclude that measure from being imputable to the State, the fact nonetheless remains that it is for the Commission to prove to the requisite legal standard that the State is involved in granting that measure by taking into account the particular features of that private entity's situation (see paragraphs 67 to 69 above).

88 Unlike a public undertaking within the meaning of Article 2(b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, p. 17), which states that public undertaking means 'any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it', a private entity has a fundamental decision-making autonomy. Moreover, that autonomy is necessarily more significant with regard to the State than if it was its principal or only shareholder, and therefore the evidence adduced by the Commission, which may be in the form of indicators, regarding the existence of control or a dominant influence over the operations of a private entity of that kind is even less capable of forming the basis of presumptions and there is an even more stringent requirement for it to be sufficiently probative (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraphs 40 and 41; see, also, paragraphs 68 and 69 above).

89 Thus, unlike a situation in which a measure taken by a public undertaking is imputed to the State, in respect of a measure taken by a private undertaking, the Commission cannot merely establish, in the light of the circumstances of the case, that the absence of actual influence and control by the public authorities over that private entity is unlikely (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 48).

90 In the present case, since the measure at issue was provided by a private entity, there was an even more stringent requirement for the Commission to set out and substantiate the factors which enabled it to conclude that there was sufficient evidence to demonstrate that that measure had been adopted under the actual influence or control of the public authorities (see paragraph 69 above) and that, accordingly, that measure was in fact imputable to the State (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 48).

91 In general, as with the criterion regarding the existence of public resources, the decisive factor in assessing whether the measure in question is imputable to the State is that of the degree of intervention by the public authority in the definition of the measures in question and the methods of financing the measures (see, to that effect, judgment of 27 September 2012, *France* v *Commission*, T-139/09, EU:T:2012:496, paragraph 63). Only a sufficiently high degree of intervention enables the conclusion to be drawn that the measures at issue are imputable to the Italian State. Therefore, in recital 112 of the contested decision, the Commission rightly relied on that factor in defining the scope of its analysis for the purposes of demonstrating that those measures originated from the State.

92 In that regard, with regard to the imputability of those measures to the State, the applicants, supported by the Bank of Italy, submit, first of all, that the measures adopted for the benefit of Tercas were decided on by the FITD's governing bodies with the unanimous agreement of all of its members' representatives, following a simple request by the special administrator. No public authority would have been able to oblige the FITD to adopt the intervention measures if it had not been deemed to be in the interests of members of the consortium. Moreover, the special administrator acted as the manager and legal representative of BPB and merely sent the FITD a simple request for intervention which was not binding on the consortium. Representatives from the Bank of Italy participated in the FITD's meetings as observers, with no voting rights, and did not even act in an advisory capacity. Furthermore, the previous contact with the Bank of Italy and its non-binding invitation to the FITD to find a balanced agreement with BPB are characteristic of normal dialogue between the interested parties. Finally, the Bank of Italy authorised the intervention measures adopted by the FITD as part of its monitoring and supervision tasks in order to ensure the sound and prudent management of banks which is entrusted to it by law. That authorisation was given 38 days after the FITD's decision to intervene and the FITD remained free not to proceed with the intervention measures.

93 The Commission submits that it has identified a body of evidence which, taken together, allow the imputability of the measures at issue to the State to be established. In the first place, it contends that although the FITD is a private consortium, in essence it pursues a public objective, namely protecting savers, an objective which is monitored by the Bank of Italy. In the second place, the special administrator is a public official, appointed by the Bank of Italy and subject to its supervision. In the third place, the participation of a Bank of Italy official at meetings of the Board and the Executive Committee, as an observer, enables the Bank of Italy to make known, at an early stage, all of its concerns regarding the planned intervention. The presence, even as an observer, of a Bank of Italy representative enables the bank to exercise control over the FITD's actions. In the fourth place, the Commission states that all of the intervention measures that the FITD intended to implement, from reimbursing savers to other measures, require the prior authorisation of the Bank of Italy.

– *The scope of the public mandate given to the FITD*

94 The applicants submit, in essence, that the FITD has no public mandate to adopt measures for the benefit of banks in difficulty, because, as Article 96a of the Italian Banking Act provides only for the possibility of other measures, without further clarification, the FITD has autonomy with respect to measures other than the repayment of deposits. Thus, with respect to the latter, the Italian legislature has left it to deposit guarantee schemes, such as the FITD, to define completely autonomously the aim, the scope and the specific arrangements for such measures. Therefore, the measures referred to in Article 29 of the statutes of the FITD primarily serve the private interests of the consortium's member banks. Moreover, the decision for the statutes of the FITD to provide for the possibility of implementing measures other than the repayment of deposits was taken by the consortium's member banks and no rule or administrative act forced them to do so. The fact that the Bank of Italy approves the statutes of the FITD does not influence its decision-making mechanisms since the Bank of Italy must continue itself to establishing that the provisions in the statutes regarding the public tasks assigned to the FITD comply with the statutory objective of protecting depositors.

95 The Commission contends that, although it is a consortium governed by private law, with its own bodies which are officially independent, the FITD is entrusted by law with a public interest task, namely protecting savers, which is reflected in various forms of intervention. That claim is also confirmed by the fact that, on its website, the FITD states that its institutional purpose is to guarantee the deposits of the consortium's member banks and that that task may take various forms. Moreover, according to the Commission, the protection of savings in Italy is a public objective with constitutional status. The fact that, in authorising all of the measures decided on by the FITD, the Bank of Italy is acting, in accordance with Article 96b of the Italian Banking Act, by 'having regard to the protection of depositors and the stability of the banking system', confirms that all of the FITD's intervention measures are directed towards protecting savers, that the FITD is acting under a public mandate and that it is subject to the public intervention of the Bank of Italy.

96 In the first place, it should be noted, as observed by the applicants, that the FITD's support measures are principally aimed at furthering the private interests of the FITD's member banks.

97 Thus, for the FITD's members, the overarching aim of support measures is to avoid the more onerous economic repercussions of repaying deposits in the event of compulsory liquidation. It is clear from the wording of Article 29(1) of the statutes of the FITD that support measures are subject to two cumulative conditions. First, there must be the prospect of the bank in difficulty which is benefiting from the intervention recovering, in order to prevent the FITD from being called on again to intervene in the future, whether by means of a new support measure or under the statutory obligation to repay deposits. Secondly, the support measures must constitute a less onerous financial burden on the FITD's member banks than implementing the statutory obligation to repay deposits. By imposing the latter condition, it should be noted that the statutes of the FITD give precedence to the private interests of the FITD's member banks over any other consideration relating to the protection of savings. The statutes of the FITD preclude any support measure which may lead to an excessive financial burden on the FITD's members, even if that support measure would afford better protection of savings by also protecting deposits above the statutory threshold of EUR 100 000 in the event of compulsory liquidation.

98 For the FITD's members, the aim of support measures is also to avoid the negative consequences for themselves and for the whole of the banking sector, in particular in terms of reputation and the risk of panic amongst depositors, which would result from the compulsory liquidation of a bank in difficulty. The fact that a sector establishes a private mutual assistance scheme does not constitute in itself an indicator that the State is involved. Indeed, in the present case, as the Commission acknowledges in recital 122 of the contested decision, the FITD's member banks have a common interest in strengthening the safety of deposits and protecting the banking system's reputation. It is also clear in the present case that the creation of a deposit guarantee fund and the possibility of

providing support measures originally stemmed from a purely private initiative by the FITD's member banks at a time when the law did not require banks to be members of any form of deposit guarantee scheme (see paragraph 5 above).

99 It is true that the private interests of the consortium's member banks may coincide with the public interest. However, it is clear from case-law that the fact that, in some cases, general interest objectives are consistent with the interest of private entities — such as a consortium governed by private law as in the present case — does not, in itself, offer any indication as to the possible involvement or lack of involvement of the public authorities in some way or other in the adoption of the measure in question (see, to that effect, judgment of 23 November 2017, *SACE and Sace BT* v *Commission*, C-472/15 P, not published, EU:C:2017:885, paragraph 26).

100 In the second place, contrary to the Commission's submissions, it must be noted that the support measures do not give effect to any form of public mandate conferred by Italian law.

101 First, it follows from Article 96a(1) of the Italian Banking Act, which provides that 'guarantee schemes shall make repayments in the event of the compulsory liquidation of licensed banks in Italy', that the public mandate conferred on the FITD by Italian law consists solely in reimbursing depositors, as a deposit guarantee scheme, where a member bank of that consortium is the subject of compulsory liquidation. Moreover, the public mandate conferred by Italian law on deposit guarantee schemes is not only limited to the repayment of deposits in the event of compulsory liquidation, but is also capped, since Article 96a(5) of the Italian Banking Act provides that 'the repayment limit for each depositor shall be EUR 100 000'. Outside that framework, the FITD is therefore not acting in accordance with a public objective imposed by Italian legislation (see paragraph 97 above).

102 Secondly, it should be noted that Italian legislation in no way requires the FITD, or any other deposit guarantee scheme, to provide for the possibility of providing support measures. Likewise, it does not regulate the arrangements for such interventions. The statutory provision invoked by the Commission does not require the FITD, in the absence of the compulsory liquidation of one of its members, to intervene under a public mandate to protect depositors. Apart from the repayment of deposits, that provision does not require any form of mandatory intervention.

103 Admittedly, although Article 96a(1) of the Italian Banking Act provides that 'guarantee schemes may provide for other types and forms of intervention', that provision expressly states that this is a mere possibility which is left to the discretion of the deposit guarantee schemes. Italian legislation does not require those schemes to provide for types and forms of intervention other than the statutory obligation to repay deposits in the event of compulsory liquidation. Moreover, while an Italian deposit guarantee scheme provides for the possibility of such interventions, the Italian legislature gives it free rein to define its purpose and the rules.

104 In the present case, the possibility for the FITD to provide support measures therefore does not result from any statutory obligation, but solely from an autonomous decision by the consortium's member banks to provide for such an option into the statutes of the FITD. The consortium's member banks also defined autonomously the conditions in which such support measures may be implemented. Thus, Article 29 of the statutes of the FITD provides that the FITD 'may intervene for the benefit of a consortium member placed under special administration if there is a prospect of recovery and if it is foreseeable that the cost will be lower than that of intervening in the event of liquidation'.

105 In the absence of any statutory obligation to provide for such intervention measures, the fact that, in accordance with Article 96b(1)(a) of the Italian Banking Act, the statutes of the FITD are approved by the Bank of Italy is not a factor that is capable of calling into question the FITD's decision-making autonomy in respect of support measures. This is a fortiori the case since, in accordance with the provisions of the Italian Banking Act, the Bank of Italy approves the statutes of all Italian banking institutions as part of its tasks relating to prudential supervision.

106 It follows from the foregoing that, contrary to what the Commission claims in recital 121 of the contested decision, support measures, such as those at issue in the present case, have a different purpose from that of the repayment of deposits in the event of compulsory liquidation and do not constitute the fulfilment of a public mandate.

– *The FITD's autonomy when adopting the intervention measures*

107 First, the applicants submit that the decision by the FITD to intervene for the benefit of Tercas was taken autonomously. That decision was adopted voluntarily by the FITD's governing bodies and received the unanimous agreement of all of the representatives of the consortium's member banks. No public authority issued instructions or binding guidelines and no public authority could have required the FITD to proceed with the intervention if its bodies had not deemed it to be in the interest of its members.

108 Secondly, in accordance with Article 72(1) of the Italian Banking Act, the special administrator exercises 'the bank's administrative duties and powers' and therefore assumes the private powers of the dissolved administrative bodies. In the present case, as the manager and legal representative of Tercas, a bank placed under special administration, the special administrator merely sent the FITD a simple request for intervention, which was in no way binding on it. Moreover, the applicants submit that the special administrator does not need to obtain the Bank of Italy's consent or advice in order to submit a request to the FITD for a support measure.

109 Thirdly, the Bank of Italy's representative participated in meetings of the FITD's Board and the Executive Committee merely as an observer, thus passively with no voting rights, and did not even act in an advisory capacity.

110 Fourthly, the 'contact' with the Bank of Italy and its 'invitation' to find a 'balanced agreement with the purchaser BPB to cover the negative equity' are characteristic of normal healthy dialogue with the competent supervisory authorities in a complex context such as crisis management in respect of a credit institution. Moreover, the Bank of Italy's 'invitation' expressed a mere general desire ('to look for a balanced agreement') and, as such, is fully acceptable as it left it to the parties' discretion as to any possible agreement. In any event, an 'invitation' could not have been in any way binding on the FITD.

111 Fifthly, like all authorisations given by the Bank of Italy, the authorisation relating to support measures provided for by Article 96b(1)(d) of the Italian Banking Act is given as part of the task of surveillance and supervision entrusted to the Bank of Italy in order to ensure the sound and prudent management of banks, without affecting the autonomous choices made by the bodies which are under the supervision of the Bank of Italy. Such authorisation is also given after the bodies of the FITD have taken their own independent decision, namely, in the present case, 38 days after the decision to intervene. In any event, even after it was granted, the authorisation by the Bank of Italy could not have been in any way binding on the FITD, which remained free not to proceed with the intervention measures.

112 The Commission contends that the Bank of Italy exercises effective, constant and ex ante control over the FITD's activities by the approval of its statutes, the participation of one of its representatives in meetings of the FITD's Board and the Executive Committee and the prior authorisation of each intervention measure that the FITD intends to implement. The Bank of Italy also appointed the special administrator, a public official who is subject to its supervision, who managed Tercas and has wider ranging powers.

113 In that regard, it should first be noted that the FITD is a consortium governed by private law which, pursuant to Article 4(2) of its statutes, acts 'on behalf of and in the interests of the members of the consortium'. Moreover, its management bodies, namely the Executive Committee and the Board, are appointed by general meetings of the FITD and are, like the general meeting, made up solely of representatives of the consortium's member banks. It must therefore be concluded that no factors relating to how it is organised link the FITD to the Italian public authorities.

114 This is the context in which the evidence on which the Commission relied in the contested decision in concluding that the Italian public authorities nevertheless had the authority and the means to influence all of the steps in the implementation of a support measure and that they exercised those powers in respect of the adoption of the measures at issue must be examined. In particular, it must be determined whether the evidence on which the Commission relies proves, to the requisite legal standard, that the measures adopted by the FITD for the benefit of Tercas may be imputed to the Italian State in the light of the case-law and the principles recalled in paragraphs 63 to 69 and 83 to 91 above.

115 In the first place, with regard to the authorisation by the Bank of Italy of the intervention by the FITD for the benefit of Tercas, it should be noted that this is not an indicator which enables the measure at issue to be imputed to the State.

116 First, it is clear from relevant Italian legislation that the Bank of Italy's authorisation of support measures is given only following a check that the measure complies with the regulatory framework, which is carried out as part of the latter's prudential supervision duties. In that regard, Article 96b(1)(d) of the Italian Banking Act provides that the Bank of Italy 'shall authorise intervention measures by guarantee schemes … having regard to the protection of depositors and the stability of the banking system'. That provision must be interpreted in the light of the prudential supervisory duties conferred on the Bank of Italy by Italian law, which it performs 'having regard to the sound and prudent management of the institutions subject to its supervision, overall stability, the effectiveness and competitiveness of the financial system and compliance with the applicable provisions' (Article 5(1) of the Italian Banking Act). In addition to intervention measures by guarantee schemes, Italian legislation makes a number of major decisions by banks, such as those involving acquisitions and other participants in the financial sector, subject to authorisation by the Bank of Italy (see, inter alia, Article 19 of the Italian Banking Act). By making intervention measures by guarantee schemes and other decisions taken by private participants in the financial sector subject to authorisation by the Bank of Italy, the Italian legislation concerned is in no way intended to substitute the assessment of the Bank of Italy for that of the operators concerned on whether it is appropriate to take the decisions in question or as to the detailed rules governing their implementation. On the contrary, it must be concluded that the Bank of Italy checks only whether the measure complies with the regulatory framework, for the purposes of prudential supervision.

117 Secondly, it must be noted that the Bank of Italy has no means of requiring the FITD to intervene in support of a bank in difficulty.

118 The Bank of Italy's powers are limited to checking whether support measures, as decided on by the FITD's governing bodies, comply with the regulatory framework, in order to authorise them. Contrary to what the Commission appears to indicate in recital 129 of the contested decision, the fact that the FITD remains free, if it so wishes, to submit to the Bank of Italy a new authorisation request for a support measure on different terms in the event of the authorisation being refused does not give the Bank of Italy the power to intervene when the FITD adopts support measures. As is clear from recitals 18 and 19 of the contested decision, the Bank of Italy merely has the power to authorise the implementation of support measures which have been adopted autonomously by the FITD's governing bodies. Those bodies alone have the power to decide whether to intervene in support of a bank in difficulty and to determine the practical details of that intervention.

119 Moreover, as the Commission acknowledges in recital 132 of the contested decision, the FITD is not required to adopt a support measure which has been authorised by the Bank of Italy. In that regard, it is sufficient to note that, on 4 November 2013, the Bank of Italy authorised an initial support measure for the benefit of Tercas, which had been decided on by the FITD's governing bodies on 28 and 29 October 2013 and which the FITD never implemented.

120 In any event, in the present case, it should be noted, first, that the measures adopted by the FITD for the benefit of Tercas were adopted unanimously by the Executive Committee and the Board of the FITD on 30 May 2014 and, secondly, that those measures were authorised as they stood by the Bank of Italy on 7 July 2014. In those circumstances, the authorisation of the measure at issue by the Bank of Italy cannot constitute evidence providing that the Italian public authorities were involved in the adoption of those measures in such a way that the measures adopted by the FITD for the benefit of Tercas may be imputed to them.

121 In the second place, with regard to the presence of Bank of Italy representatives at the meetings of the FITD's governing bodies, this is not an indicator which allows the measure at issue to be imputed to the State either.

122 First, Articles 13(6) and 16(3) of the statutes of the FITD expressly state that Bank of Italy representatives attending meetings of the Board and the Executive Committee of the FITD are merely observers, have no voting rights and may not offer advice.

123 Second, it is apparent from the documents before the Court that the Commission has not adduced any evidence to substantiate its assertions, in recitals 129 and 130 of the contested decision, that 'it [could] be supposed' that the presence of representatives, as observers, at the meetings of the FITD's governing bodies 'enable[d] the [Bank of Italy] to voice any concerns about planned intervention at an early stage' and to 'embed …' its influence over them. In that regard, it should be noted that it is clear from the contested decision that those assertions are mere assumptions and are in no way substantiated by the documents in the file. On the contrary, the minutes of meetings of the FITD's governing bodies attest to the purely passive role played by the Bank of Italy's representatives. At the Executive Committee's meeting on 30 May 2014, a Bank of Italy's representative merely expressed at the end of the meeting his satisfaction with the way in which the Tercas crisis had been handled whereas, at the meeting of the Board on 30 May 2014, the Bank of Italy's representatives did not even speak.

124 In the light of those findings of fact, the Commission has not proved that the presence, even only as an observer, of Bank of Italy's representatives at meetings of the FITD's governing bodies enabled the Bank of Italy to influence the FITD's decisions.

125 In the third place, with regard to the context in which the measures taken by the FITD for the benefit of Tercas were adopted, it should be noted that the Commission has not adduced any evidence proving that the Bank of Italy had a decisive influence in the negotiations between the FITD on the one side and BPB and the special administrator on the other.

126 Therefore, as regards the fact that the negotiations between the interested private parties were said to have been conducted 'in coordination with the Bank of Italy' (recital 131 of the contested decision), it should be pointed out, as noted by the applicants, that, in an operation as complex as crisis management in respect of a credit institution, it is hardly surprising that the Bank of Italy is informed of the progress of the negotiations between the interested parties. Consequently, the fact that informal meetings may have taken place between, on the one hand, the interested parties (namely, the FITD, BPB and, on behalf of Tercas, the special administrator) and, on the other, the Bank of Italy, for the purposes of informing the Bank of Italy of progress that was being made in the negotiations, is simply characteristic of legitimate and ordinary dialogue with the competent supervisory authorities. It is clear that the Commission has not adduced any evidence demonstrating that the Bank of Italy used those contacts in order decisively to influence the content of the disputed measures at issue. On the

contrary, there is nothing in the file which is capable of calling into question the applicants' argument that such contacts simply allowed the Bank of Italy to be informed of developments in order to be able more rapidly to take its decision as to whether to authorise the measure at issue once it had been adopted by the FITD's governing bodies and the Bank of Italy had received notification of it.

127 The same applies with regard to the fact that the Bank of Italy 'invited' the FITD to reach a 'balanced agreement' with BPB with regard to covering Tercas' negative equity, taking account of the possible negative impact of the liquidation of Tercas and its subsidiary Banca Caripe. It should be pointed out, as observed by the applicants, that this is the expression of a mere general desire, which is in no way binding on the FITD. Such a desire on the part of the public authorities is not surprising in circumstances such as those in the present case. However, such a desire was never intended to give orders to the parties concerned and nor was is interpreted in that way by those parties. In any event, the documents in the case file do not show that that invitation had the slightest impact on the FITD's decision to adopt measures for the benefit of Tercas, that decision being primarily due to economic considerations specific to the FITD and to its members, as attested by the report by the auditing and advisory company appointed for that purpose (see paragraph 19 above).

128 Finally, in the fourth place, with regard to the role played by the special administrator, the fact that he had the power to initiate the procedure which could lead to a support measure by the FITD by sending it a non-binding request in that regard is also incapable of calling into question the FITD's autonomy in deciding whether to intervene in that way.

129 Under Article 29(1) of its statutes, the FITD may provide support measures only for the benefit of the consortium's member banks which are placed under special administration. In that regard, it follows from Articles 70 to 72 of the Italian Banking Act that the decision to place a bank under special administration is taken by the Minister for the Economy on a proposal by the Bank of Italy and the special administrator is appointed by the Bank of Italy, which also has the power to remove him. Once appointed, the special administrator acts in accordance with Article 72(1) of the Italian Banking Act as the bank's administrator and takes over the private law powers of the administrative bodies of the bank placed under special administration in the interests of depositors.

130 However, it should be noted that the submission, by the special administrator, of a request for the FITD to intervene imposes no obligation on the FITD to grant that request and nor does it influence the FITD's autonomy with regard to the content of the support measure if it decides to act. Moreover, contrary to what the Commission states in recital 128 of the contested decision, there is nothing in the statutes of the FITD or in Italian legislation which states that the special administrator alone can make such a request or which contradicts the FITD's assertion that it can take the initiative to start the procedure to implement a support measure even where no request has been made in that regard by the special administrator.

131 Furthermore, in the present case, the Commission has not adduced any evidence to show that the request submitted by the special administrator was the result of instructions being given by the Bank of Italy. On the contrary, it is clear from the facts set out in paragraph 16 above that the initiative to call upon the FITD stems from the requirements imposed by BPB, which had made its subscription to a capital increase in Tercas conditional upon that bank's negative equity being covered by the FITD.

132 In conclusion, it is clear from all the foregoing that the Commission made an error in taking the view, in recital 133 of the contested decision, that it had demonstrated that the Italian authorities had exercised substantial public control in establishing the measures adopted by the FITD for the benefit of Tercas. On the contrary, it is clear that the Commission has not proved to the requisite legal standard that the Italian public authorities were involved in the adoption of the measure at issue or, consequently, that that measure is imputable to the State within the meaning of Article 107(1) TFEU.

The financing of the intervention measures through State resources

133 The concept of intervention 'through State resources', within the meaning of Article 107(1) TFEU, is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid. EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid (see judgment of 9 November 2017, *Commission* v *TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraphs 44 and 45 and the case-law cited).

134 Furthermore, in accordance with settled case-law, Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the State. Therefore, even if the sums corresponding to the measure in question 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 resources' (see judgment of 9 November 2017, *Commission* v *TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraph 46 and the case-law cited).

135 In that regard, in a situation concerning public undertakings, it has been held that, since their resources were subject to the control of the State and were therefore at its disposal, those resources were covered by the concept of 'State resources', within the meaning of Article 107(1) TFEU. The State is perfectly capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order, as occasion arises, to finance specific advantages in favour of other undertakings. The fact that the resources concerned may be administered by entities that are distinct from the public authorities or that the source of those resources may be private is of no significance in that regard (see judgment of 9 November 2017, *Commission* v *TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraphs 47 and 48 and the case-law cited).

136 Thus, in the case giving rise to the judgment of 9 November 2017, *Commission* v *TV2/Danmark*, C-656/15 P, EU:C:2017:836, paragraphs 49 to 53), the Court noted that the three undertakings concerned were public undertakings owned by the State and they had been delegated the task of administering the transfer, to one of those undertakings, of the revenue deriving from the sale of the advertising space of that undertaking. The Court also observed that the entire distribution channel of that revenue was governed by legislation under which public undertakings specially appointed by the State had the task of administering that revenue. The revenue in question was, accordingly, under public control and at the disposal of the State, which could decide how it was to be used. Consequently, the Court concluded that that revenue did constitute 'State resources' within the meaning of Article 107(1) TFEU.

137 In the present cases, the applicants, supported by the Bank of Italy, submit that the Commission wrongly considered, in the contested decision, that the resources used by the FITD were 'State resources'. Thus, the Commission cannot claim that the FITD is acting under a public mandate when it adopts measures for the benefit of one of its members in difficulty and not under the statutory deposit guarantee for depositors. Moreover, account should be taken of the fact that the FITD is a consortium governed by private law and its bodies represent its members and not the public authorities. Although a Bank of Italy representative attends some meetings of the FITD's bodies, this is solely as an observer with no voting rights or advisory role. No public authority could have imposed an obligation on the FITD to decide to intervene or have dictated the rules governing such intervention. Furthermore, although the special administrator, who took over from Tercas' management, requested that the FITD intervene, this was in the interests of that undertaking and its creditors and he could not have compelled the FITD. In addition, the Bank of Italy's authorisation of the intervention measures was given in the context of its ordinary tasks of protecting stability and savings. This was a ratification measure confined to a formal a posteriori scrutiny of a private law measure. Furthermore, the contributions made by the members to the intervention measures are not imposed, controlled or at the disposal of the State. Although the members of the consortium are

obliged to contribute to the repayment of deposits, no rule or administrative act compels them to contribute to the intervention measures. The mandatory nature of those contributions follows only from the statutes of the FITD and its decisions.

138 The Commission submits, in essence, that, although it is a consortium governed by private law, with its own bodies which are officially independent, the FITD is entrusted by law with a public interest task, the protection of savers, which can take various forms. Similarly, the Bank of Italy exercises effective, constant and ex ante control over the FITD's activities because it approves its statutes, one of its representatives participates in meetings of the FITD's Board and Executive Committee and gives prior authorisation for each intervention measure. In addition, the Bank of Italy appointed the special administrator, a public official subject to its supervision, who managed Tercas during the period of special administration. Furthermore, since the FITD is the only deposit guarantee scheme recognised by the Bank of Italy, banks which are not cooperative credit associations are therefore obliged to become members and to pay the required contributions to it in order to comply with the public objective of protecting savings.

139 In the present case, in order to conclude in recital 144 of the contested decision that the measures adopted by the FITD for the benefit of Tercas was financed through public resources, the Commission took the following into account: the fact that the FITD held a public mandate; the control by the public authorities over the resources used by the FITD to finance the intervention measures and the fact that the contributions used by the FITD to finance the measures were mandatory.

140 First, the Commission considered that the FITD held a public mandate and that the FITD intervened for the benefit of Tercas in order to protect depositors' deposits. The Italian authorities chose to allow their deposit guarantee schemes to use the resources collected from their members in order to adopt intervention measures other than the repayment of depositors' deposits (see recital 121 of the contested decision).

141 In that respect, as is evident from the foregoing with regard to the imputability of the intervention measures to the State, it is the case that the public mandate conferred on various deposit guarantee schemes in Italy requires only that a scheme be implemented which enables depositors' deposits to be repaid in the event of the failure of a credit institution. That public mandate does not require, however, that those schemes should also intervene in advance, before such a failure occurs, by requesting the necessary resources from their members. In the present case, the statutes of the FITD, a private consortium, have, since its creation, provided for the possibility of adopting measures for the benefit of one of its members if that member, which is in difficulty, has a prospect of recovering and if that intervention measures is less costly than implementing the deposit guarantee for depositors which has become statutory.

142 The same analysis applies with regard to the examination of the evidence relied on in order to establish that the intervention measures were financed through State resources.

143 Secondly, in order to establish that the public authorities had control over the resources used by the FITD to finance the intervention measures, the Commission noted certain features of those measures. Thus, it stated that only banks under special administration could benefit from the FITD's intervention under Article 29(1) of its statutes and, therefore, only the special administrator of Tercas, a public official answerable to the Bank of Italy, had '[the power to initiate] intervention on the part of the FITD' (see recital 128 of the contested decision). Moreover, it stated that the Bank of Italy has wide-ranging powers in respect of the FITD, having, inter alia, approved its statutes and authorised the measures adopted for the benefit of Tercas before they entered into force (see recitals 124 and 127 to 129 of the contested decision).

144 In that regard, for the same reasons as those given with regard to the imputability of the intervention measures to the State, it is clear that the facts set out above must be assessed in their proper context, from which it is apparent that they are not sufficient for it to be concluded that, as a result of the control exercised by the public authorities, the resources used by the FITD to finance the intervention measures are 'State resources' within the meaning of Article 107(1) TFEU.

145 The decision by the special administrator of Tercas to request that the FITD intervene on behalf of the undertaking for which he performed management duties on account of it having been placed under special administration, is explained by the fact that, of the various different options available, the option proposed by BPB appeared to him to be the most interesting. Since BPB's option was conditional on the FITD intervening for the benefit of Tercas (see paragraph 16 above), the view cannot therefore be taken that such a request stemmed from an initiative by the public authorities, which had thus sought to direct the use of the FITD's resources. Accordingly, it is rather on account of a private initiative sent to the special administrator, who took the view, as an ordinary administrator in the same situation would have done, that it was in the interest of the undertaking under his administration for a request for intervention to be sent to the FITD in accordance with Article 29(1) of its statutes.

146 Moreover, as the Bank of Italy claimed before the General Court, the purpose of the various intervention possibilities available to it with regard to the FITD is simply to enable it to exercise its supervisory powers as regards the objectives of protecting savers, ensuring the stability of the banking system and the sound and prudent management of banks.

147 In the present cases, the documents in the case file do not show that the authorisation of the measures adopted by the FITD for the benefit of Tercas gave rise to anything other than a formal check by the Bank of Italy that the measures were lawful. In the present case, that authorisation, like the various measures which preceded it, following the FITD's approval as one of the recognised deposit guarantee schemes in Italy, cannot, both individually and taken as a whole, be treated as measures which enable it to be established that the State was in a position to direct the use of the FITD's resources to finance the intervention measures by exercising a dominant influence over that consortium.

148 The measures adopted by the FITD for the benefit of Tercas originate from a proposal that was made initially by BPB and subsequently, in its interests, adopted by Tercas. Moreover, those measures, which meet the consortium's objective, are also in the interests of its members.

149 In that context, the various mechanisms provided for by Italian legislation to prevent such an intervention disrupting the banking sector or threatening the implementation of the public mandate given to the FITD did no more in this case, in general terms, than simply validate the option accorded to the FITD by its statutes to adopt measures for the benefit of one of its members by allocating its own resources and, more specifically, to authorise the measures adopted by the FITD for the benefit of Tercas in the interests of BPB, Tercas and all of the other consortium members. At no point has the Commission been able to establish that the Bank of Italy, through its formal scrutiny of lawfulness, sought to direct the private resources that were made available to the FITD.

150 Thirdly, the Commission considered that the contributions that the FITD uses to finance the intervention measures were mandatory since, first, the member banks in practice had no choice but to become members of the FITD and, secondly, those banks cannot veto the FITD's decisions or disassociate themselves from the intervention measures on which it has decided (see recitals 133 to 135 of the contested decision).

151 In order to examine that line of argument, it should first of all be observed that it is not disputed that the funds used for the measures adopted by the FITD for the benefit of Tercas are private resources which were provided by the consortium's member banks.

152 In general, the statutes of the FITD provide that it is financed using resources 'provided by the members of the consortium' (see Article 1(1) of the statutes of the FITD). The amount of the contributions from the consortium's member banks is determined on the basis of the amount of their respective repayable funds ('contributory base') and is linked to the undertaking's level of risk, measured using 'modes of governance indicators' (see Article 25 of and the annex to the statutes).

153 Furthermore, at the material time, Article 21 of the statutes of the FITD specified that, in response to decisions taken by the competent statutory bodies, the resources used for intervention measures such as those granted to Tercas were requested by the FITD and provided specifically by the members of the consortium. Thus, while the resources needed for the consortium to operate efficiently contributed to the drawing up of its budget, the contributions intended to be used for intervention measures were regarded as 'advances' paid by the members of the FITD, which managed them on their behalf as agent.

154 The obligation for the FITD's members to contribute to the intervention measures decided on by the FITD therefore does not stem from a regulatory provision, as is the case where it is specially mandated by the State to manage the contributions made by members under the statutory deposit guarantee for depositors, but from a — private — statutory provision, which maintains the autonomy of the FITD's members to take decisions.

155 It should also be noted that, before deciding on the intervention measures and accordingly marshalling the private resources of its members, the FITD made sure, in accordance with the requirements in Article 29 of its statutes and as is clear from the report issued by an auditing and advisory company on 26 May 2014, that the cost of those measures was lower than the cost to its members of the liquidation of Tercas and therefore of calling on the statutory deposit guarantee for depositors.

156 The measures adopted by the FITD for the benefit of Tercas were therefore not only in the interests of BPB and Tercas, but also in the interests of all of its members since they risked having to pay out sums greater than those required in order to enable the takeover of Tercas by BPB.

157 In that context, it should be observed that, as the FITD submits, the intervention measures were adopted unanimously by the Executive Committee and the Board of the FITD by the representatives of its members which make up those bodies. None of those representatives were therefore opposed to such a measure.

158 It is also normal that, once adopted by its governing bodies, in accordance with the provisions in the statutes, the decision in question is binding on all members of the consortium. Moreover, there is nothing in the file to substantiate the argument that some members of the consortium disapproved of the statutory mechanism for interventions or of the measures adopted by the FITD for the benefit of Tercas.

159 Therefore, the mandatory nature of the contributions by the FITD's members to the intervention measures stems from a decision which was accepted twice by those members, on account not only of their decision to become members of the FITD, which provides for such a possibility, but also of their decision to agree to such measure being adopted by the FITD's governing bodies. The intervention measures are also in fact consistent with the FITD's objectives and with the interests of its members.

160 Consequently, the Commission's argument that it is, de facto, difficult for banking institutions to disassociate themselves from the FITD, of which they have historically been members and which today is the only deposit guarantee fund which brings together non-mutual banks, in order to set up a different guarantee fund which might then be recognised by the Bank of Italy and the statutes of which would allow the fund to intervene only under the statutory deposit guarantee for depositors or, as the

case may be, to refuse to contribute to an intervention measure for the benefit of a member, even though that measure had been adopted by the governing bodies, remains largely theoretical and has no bearing on the measures at issue in the present case.

161 It is clear from the foregoing that the Commission has failed to establish sufficiently, in the contested decision, that the resources at issue were controlled by the Italian public authorities and that, therefore, they were at their disposal. The Commission was therefore not entitled to conclude that, even though the measures adopted by the FITD for the benefit of Tercas were in accordance with the statutes of that consortium and in the interests of its members, by using private funds exclusively, it is in reality the public authorities which, by exercising a dominant influence over the FITD, decided to direct the use of those resources in order to finance those measures.

Conclusion

162 Since the first of the conditions relating to the classification of a measure as aid within the meaning of Article 107(1) TFEU is not satisfied in the present case, the pleas in law alleging that the Commission wrongly considered that the measures at issue presupposed the use of State resources and that they were imputable to the State must be upheld and, accordingly, there being no need to examine the other arguments put forward by the applicants, the contested decision must be annulled.

Costs

163 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay the costs incurred by the applicants and the intervener, in accordance with the form of order sought by those parties.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. **Annuls 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));**

2. **Orders the European Commission to pay the costs.**

Frimodt Nielsen Kreuschitz Forrester

Półtorak Perillo

Delivered in open court in Luxembourg on 19 March 2019.

[Signatures]

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