



Reports of Cases

(Joined Cases T-98/16, T-196/16 and T-198/16)

Italian Republic and Others

v

European Commission

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)

1. *Action for annulment — Natural or legal persons — Measures of direct and individual concern to them — Direct concern — Individual concern — Criteria — Commission decision finding aid incompatible with the internal market — Action brought by a consortium of banks governed by private law, having legal personality, provider of the measure classified as State aid — Admissibility*
(Art. 263, fourth para., TFEU)

(see paragraphs 50-56)

2. *State aid — Definition — Grant of advantages imputable to the State — Measures adopted by a consortium of banks governed by private law for the benefit of one of its members — Involvement of the public authorities in the adoption of the measure — Proof of the existence of a public mandate — Measures pursuing the private interests of the members of the bank consortium — Not included — Proof of the existence of substantial public control in establishing the measures — None — Not included*
(Art. 107(1) TFEU)

(see paragraphs 96-106, 113-132)

3. *State aid — Definition — Aid from State resources — Concept of State resources — Measures adopted by a consortium of banks governed by private law for the benefit of one of its members — Proof of the existence of public control over the resources — None — Not included*
(Art. 107(1) TFEU)

(see paragraphs 139-161)

Résumé

In the judgment in *Italy and Others v Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), delivered on 19 March 2019, the Court, in an action for annulment under Article 263 TFEU, annulled Commission Decision 2016/2018¹ on State aid granted by Italy to an Italian bank, Banca Tercas, holding that the Commission was wrong to find that the measures at issue were imputable to the State and that they involved the use of State resources.

In 2013, an Italian bank, Banca Popolare di Bari (BPB), expressed interest in subscribing to a capital increase in another Italian bank, Banca Tercas, which had been placed under special administration since 2012 after the central bank of the Italian Republic, Banca d'Italia (Bank of Italy), discovered irregularities. One of the transaction conditions laid down by BPB was that the Fondo Interbancario di Tutela dei Depositi (FITD) covered Banca Tercas' deficit, in respect of which an audit was also sought. The FITD is a consortium of cooperative banks governed by Italian private law, which has the power to adopt intervention measures for the benefit of its members, not only in respect of the statutory deposit guarantee provided for in case of the compulsory liquidation of one of its members (mandatory intervention), but also on a voluntary basis, in accordance with its statutes, if such measures help to reduce the burden its members may have to bear as a result of the deposit guarantee (voluntary interventions, including the voluntary preventative or support intervention at issue).

In 2014, after ensuring that adopting measures in support of Banca Tercas would be economically more advantageous than reimbursing that bank's depositors, the FITD decided to cover the bank's negative equity and grant it certain guarantees. Those measures were approved by the Bank of Italy. The European Commission opened an in-depth investigation into those measures because it had doubts as to whether they were compatible with EU rules on State aid. By Decision 2016/2018, against which the present proceedings were brought, it came to the conclusion that the measures in question constituted State aid granted by the Italian Republic to Banca Tercas.

After recalling the Court's case-law concerning classification as State aid for the purposes of Article 107 TFEU, the General Court assessed, in the first place, whether those measures were imputable to the Italian State and, in the second place, whether they had been financed by State resources.

The General Court found, first, that the Commission had been wrong to consider that it had demonstrated that the Italian authorities had exercised substantial public control in establishing the measures adopted by FITD for the benefit of Banca Tercas, since the Commission had not proven to the requisite legal standard the involvement of the Italian public authorities in the adoption of the measure at issue, or, consequently, that that measure was imputable to the State within the meaning of Article 107(1) TFEU. Pointing out that, in cases where a measure is issued by a private entity, it is for the Commission to establish the existence of sufficient evidence for it to be concluded that it was adopted under the actual influence or control of the public authorities, the General Court assessed, first, the scope of the public mandate conferred on the FITD and, subsequently, the FITD's autonomy when adopting the measure.

On the first point, the General Court considered, first, that the FITD's support measures sought mainly to pursue the private interests of the consortium's members and, second, that those measures did not implement any public mandate conferred on it by Italian law. It stated, in that

¹ Commission Decision (EU) 2016/2018 of 23 December 2015 on State aid SA.39451(2015/C) (ex 2015/NN) granted by Italy to Banca Tercas (OJ 2016 L 203, p.1).

regard, that the mandate conferred on the FITD by Italian law consisted only in refunding depositors (up to EUR 100 000 per depositor), as a deposit guarantee scheme, when a bank that is a member of the consortium was subject to compulsory liquidation and, outside that framework, the FITD did not act in implementation of a public objective imposed by Italian law. It concluded from this that the support measures therefore had a purpose that was different from that of the reimbursement of deposits in the event of compulsory liquidation and did not constitute the implementation of a public mandate.

On the second point, the General Court considered that the Commission had not proven the involvement of the Italian public authorities in the adoption of the measure in question. In that regard, the General Court noted that the FITD was a consortium governed by private law which acted, in accordance with its statutes, 'on behalf of and in the interests' of its members, and that its management bodies were elected by the FITD's General Assembly and were exclusively made up of representatives of the members of the bank consortium, as was the General Assembly. In those circumstances, the General Court found, *inter alia*, that the Bank of Italy's authorisation of the measures adopted by FITD for the benefit of Banca Tercas did not constitute evidence imputing the measure in question to the Italian State, since, in that regard, the State was merely monitoring their conformity with the regulatory framework for the purposes of prudential supervision. It also found that the presence of representatives of the Bank of Italy at the meetings of the FITD's management bodies also did not constitute evidence that the measure in question was imputable to the State, since those representatives were merely observers with no voting rights and no advisory capacity. Moreover, it considered that the Commission had not provided any evidence proving that the Bank of Italy had influenced decisively the negotiations between, on the one hand, the FITD and, on the other hand, BPB and the special commissioner, since those negotiations were merely a characteristic of legitimate regular dialogue with the competent supervisory authorities allowing the Bank of Italy to be informed of developments in order to be able to make its decision more quickly on the authorisation of the measure in question once adopted by the FITD's management bodies. In addition, the Commission has not established that the invitation addressed by the Bank of Italy to the FITD with the aim of reaching a balanced agreement with BPB as regards covering Banca Tercas' negative equity had the slightest impact on the FITD's decision to adopt measures for the benefit of Banca Tercas. Lastly, the General Court found that the fact that the special administrator has the power to start the procedure that may lead to the adoption of a support measure by the FITD by sending it a non-binding request to that effect also did not affect the autonomy of the latter since, (i) the submission of such a request imposes no obligation on the FITD to agree to it, (ii) the FITD decides the contents of such measures independently, and, (iii) the FITD confirms that it is able to take the initiative to initiate the procedure for implementing a support measure and that is not contradicted by the FITD's statutes or by Italian legislation.

In the second place, examining the three pieces of evidence relied on by the Commission in holding that the FITD's intervention was financed by State resources, the General Court found that the Commission had not established that the funds granted to Banca Tercas were controlled by the Italian public authorities and therefore available to them.

The General Court therefore dismissed, first, the finding that the FITD had a public mandate and that its decision to adopt measures for the benefit of Banca Tercas was made in order to protect the deposits lodged by depositors, referring in that regard to the analysis carried out in the context of the imputability of the FITD's intervention to the State. It considered, second, that the Commission had not been able to establish that the Bank of Italy had sought, by means of formal control of the regularity of the use of resources by the FITD, to steer private resources available to

the latter. It held, third, that the fact that the contributions used by the FITD to finance the intervention measures were obligatory, since its member banks have in practice no choice but to participate and cannot veto its decisions or disassociate themselves from the intervention measures decided upon, remains essentially theoretical in nature and has no impact on the measures. It held in particular in this regard that the funds used for the intervention by the FITD were private resources provided by the consortium's member banks, that the obligation of the FITD's members to contribute to the intervention originated not in a legislative provision but in a private provision preserving the decision-making autonomy of those members, and that, before deciding on the intervention measures and mobilising the private resources of its members, the FITD satisfied itself that the cost of adopting those measures was lower than the cost that would be incurred as a result of the liquidation of Banca Tercas and thus of calling on the statutory deposit guarantee, with the result that the adoption of those measures was in the interest of BPB, Banca Tercas and all its members.