EUROPEAN
COMMISSION

Brussels, 23.12.2015
C(2015) 9526 final

COMMISSION DECISION

of 23.12.2015

ON THE STATE AID
SA.39451 (2015/C) (ex 2015/NN)
implemented by Italy
for Banca Tercas

(Text with EEA relevance)

(Only the Italian version is authentic)

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In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […]		PUBLIC VERSION This document is made available for information purposes only.

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above[1],

Whereas:

1. PROCEDURE

(1) The Commission learnt from the press and from the websites of the bank Tercas-Cassa di Risparmio della Provincia di Teramo S.p.A and of the Italian deposit guarantee scheme ("DGS") – i.e. the "Fondo Interbancario di Tutela dei Depositi" ("FITD" or "the Fund") – that the FITD intervened in support of that bank.

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

(3) By letter dated 27 February 2015 ("Opening Decision"), the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("the Treaty") in respect of the aid.

[1] Commission decision SA.39451 - OJ C 136, 24.04.2015, p. 17.

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

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

(6) On 22 May 2015, the Commission received comments from two interested parties, namely Tercas-Cassa di Risparmio della Provincia di Teramo S.p.A. and Banca Popolare di Bari S.C.p.A. ("BPB").

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

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

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

2. BACKGROUND

2.1. Tercas

(10) Tercas-Cassa di Risparmio della Provincia di Teramo S.p.A. is the holding company in a banking group ("Tercas") operating mainly in the Abruzzo region. At the end of 2011, the main shareholder of the holding company was Fondazione Tercas, which at the time had a 65% stake in the holding company.

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

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

(13) On 17 April 2012, after having proceeded to an inspection of Tercas[3], the BOI proposed to the Italian Ministry of Economy and Finance to put Tercas under special administration pursuant to Article 70 of the Italian Banking Act – Testo Unico Bancario ("TUB").

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

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[2] Commission decision SA.39451 - OJ C 136, 24.04.2015, p. 17.

[3] Between 5 December 2011 and 23 March 2012, the BOI performed an inspection on Tercas. During the inspection, the BOI found numerous irregularities and widespread anomalies concerning 1) the management and the governance of the bank 2) the internal audit function; 3) the credit process and 4) the disclosure of information to governing bodies and supervisory body.

[4] On grounds of serious administrative irregularities and serious violations of laws.

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

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

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

(18) The executive committee of the FITD decided, at its meeting of 28 October 2013, to intervene to support Tercas in accordance with Article 96-*ter*, paragraph 1, d) of the TUB, for an amount up to EUR 280 million. The decision to intervene was ratified by the FITD's board on 29 October 2013.

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

(20) On 18 March 2014, a due diligence on the assets of Tercas was concluded with a disagreement arising between the experts of the FITD and those of the banking group ("BPB") controlled by the holding company Banca Popolare di Bari S.C.p.A.. The issue was settled by the parties agreeing to arbitration by an arbitrator chosen on proposal by the BOI. The due diligence disclosed further impairments of assets.

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

(22) The BOI authorised that support intervention on modified terms[5] on 7 July 2014.

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

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

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

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

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5 See recital (38).

6 Figures mentioned in this recital only refer refer to Tercas-Cassa di Risparmio della Provincia di Teramo S.p.A. and not to the whole Tercas Group.

7 Minutes of shareholders' meeting, repertorio n.125.149, raccolta n.28.024 del 29 luglio 2014, notary Dr Vicenzo Galeota.

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

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

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

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

(29) On March 2015, BPB subscribed a new capital increase of Tercas for an amount of EUR 135.4 million (of which EUR 40,4 million for the subsidiary Caripe), to cope with additional losses incurred in the 4th quarter of 2014, to cover restructuring costs in 2015 and 2016 and to improve the capital ratios of Tercas.

2.2. BPB

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

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

2.3. The Italian DGS framework and the FITD

(32) Under Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes ("Directive 94/19/EC")[9], which was applicable at the time when the FITD intervention in relation to Tercas took place, a credit institution cannot take deposits unless it is a member of an officially recognised DGS[10]. According to Article 96 of the TUB: *"Italian banks shall be members of a DGS established and recognised in Italy. Mutual Banks (Banche di credito Cooperativo) shall be members of a different DGS established within their network"*[11].

(33) Currently two DGS are established in Italy:

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8 Figures mentioned in this recital only refer refer to Tercas-Cassa di Risparmio della Provincia di Teramo S.p.A. and not to the whole Tercas Group.

9 OJ L 135, 31.5.1994, p. 5.

10 See Article 3(1) of Directive 94/19/EC.

11 "Le banche italiane aderiscono a uno dei sistemi di garanzia dei depositanti istituiti e riconosciuti in Italia. Le banche di credito cooperative aderiscono al sistema di garanzia dei depositanti costituito nel loro ambito".

(1) The FITD, which was recognised as a DGS on 10 December 1996. It is a mandatory[12] consortium formed under private law. To date, the FITD it is the only established and recognised Italian DGS whose membership is open to banks which are not mutual banks[13]. According to Article 2 of the FITD's Statutes, approved by the BOI: *"Italian banks shall be members of the Fund, with the exemptions of mutual banks".*

(2) Fondo di Garanzia dei Deposanti del Credito Cooperativo ("FGDCC"), a statutory DGS whose membership is only open to, and mandatory for, mutual banks.

(34) Under Article 96-bis of the TUB and Article 29 of the FITD's Statutes, the FITD may undertake support interventions in favour of members that are subject to special administration under certain conditions.

(35) Such interventions are financed ex post, by mandatory contributions of the member banks. The amount of the individual contributions is determined according to the relevant statutory provisions[14] in a way that is proportional to the amount of covered deposits held by each bank. Contributions are not recorded directly into the balance sheet of the FITD, but are recorded in separate accounts for each intervention they refer to.

(36) Decisions to undertake support interventions are taken by the two managing bodies of the FITD:

(1) The Board[15], which decides by absolute majority of members present at the meeting when the decision is taken. The President of the Board is appointed by the members of the Board. The rest of the members of the Board are selected in proportion to the amount of covered deposits held by each bank, thus favouring larger contributors, but ensuring that smaller banks are also represented[16]. The other members of the Board, currently 23, are mostly representatives of the largest member banks[17] with two representatives from currently Unicredit, Intesa Sanpaolo and Monte dei Paschi di Siena. The President of Associazione Bancaria Italiana (ABI) is also a member of the Board.

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

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12 The FITD presents itself as a mandatory consortium on its website.

13 Mutual banks cannot become members of the FITD. They have to become members of the Fondo di Garanzia dei Depositanti del Credito Cooperativoto, the DGS established within the credit union network.

14 Consiglio: See article 25 of the Statutes, and Articles 9 to 14 of the annex to the Statutes.

15 See Articles 3 to 15 of the FITD's Statutes.

16 See Article 12(3) of the FITD's Statutes.

17 See Article 13(10) of the FITD's Statutes. Currently Unicredit, Intesa Sanpaolo and MPS are represented by two members each. Credem, Credito Valtellinese, BNL, Deutsche Bank, Cariparma, Veneto Banca, CheBanca, BPM, Banco Desio e della Brianza, UBI, Banca di Credito Popolare Torre del Greco, Cassa di Risparmio di Rimini, Banca Popolare Pugliese, Unipol Banca, Banco popolare, Banca Popolare dell'Emilia Romagna and banca del Piemonte are represented by one member each.

18 Comitato: see Articles 16 to 18 of the FITD's Statutes.

(37) For support interventions in the form of financing and guarantees, the Executive Committee is empowered to take decisions[19], whilst for acquisition of equity interests and other technical support the Board decides upon proposal of the Executive Committee[20].

3. THE MEASURES

(38) The FITD support intervention authorised by the BOI on 7 July 2014 entails the following measures:

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

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

(3) *Measure 3*: up to EUR 30 million as a guarantee to cover additional costs arising from tax payments on Measure 1. Such tax payments would be necessary if Measure 1 was not tax-exempted under Italian law[21]. That specific tax exemption for intervention measures by the FITD would, according to the relevant legal text, be subject to the approval of the European Commission. In the event, the FITD paid out the full amount of EUR 30 million to Tercas at a point in time when the Commission had not decided on that tax exemption.

4. GROUNDS FOR INITIATING THE PROCEDURE

(39) In its Opening Decision, the Commission's preliminarily concluded that the non-notified measures may contain State aid within the meaning of Article 107 of the Treaty and raised doubts on the compatibility of the measures with the internal market.

(40) The Commission reached the preliminary conclusion that the FITD's support intervention is imputable to the Italian State and that FITD's resources are under public control. In particular, the interventions of the FITD follow a public mandate laid down by the State: the TUB is the basis for the recognition of the FITD as a mandatory DGS; Article 96-bis of the TUB allows the FITD to intervene in ways other than paying out covered depositors in liquidation; and the Statutes of the FITD are approved by the BOI. In addition when the FITD intervenes in cases other than liquidation and by other means, such interventions are always subject to authorisation by Italy in the form of the BOI.

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19 Article 17 (1) (a) of FITD Statutes.

20 Article 14 (1) (e) of FITD Statutes.

21 Article 1, paragraph 627 and 628, of the 2014 Stability Law (Legge 147/2013): 627. Ai fini del riassetto economico e finanziario dei soggetti in amministrazione straordinaria, gli interventi di sostegno disposti dal Fondo interbancario di tutela dei depositi non concorrono alla formazione del reddito dei medesimi soggetti. 628. L'efficacia delle disposizioni del comma 627 e' subordinate all'autorizzazione della Commissione europea.

* Confidential information

(41) In addition as regards the existence of a selective advantage, the Commission noted that the interventions were not carried out by the FITD acting in the capacity of a market economy operator given that it granted support through a non-repayable contribution to cover the negative equity and did not charge any fee for the guarantees issued in favour of Tercas. Such measures permitted Tercas to avoid exiting the market as it was likely to have done in the absence of such support.

(42) The Commission preliminarily concluded that the measures are selective given that they relate to Tercas only and that they distort competition by avoiding bankruptcy and market exit of the beneficiary. At the same time, Tercas is in competition with foreign undertakings, so that trade between Member States has been affected.

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

5. COMMENTS FROM ITALY AND INTERESTED PARTIES

5.1. State resources and imputability

5.1.1 Observations from Italy[22]

(44) Italy submits that the support intervention measures at issue are not of a mandatory nature, since they are left to the full discretion of the FITD with regards to the time, extent and choice of intervention. Furthermore, those measures are not directly comparable to the mandatory aims laid down by the TUB to protect depositors. Instead they are directly aimed at achieving a different or, in any case, an additional purpose, namely that of aiding the recovery of banks in difficulty. Any alignment of aims with respect to the protection of depositors was purely coincidental. In that context, the Commission's reference to Case T-251/11 *Austria* v *Commission (Austrian Green Electricity Act)*[23] was misplaced. That case concerned a rule establishing a tax exemption which, by definition, is of public nature and justifies the presumption of imputability of the measure to the State.

(45) Furthermore, Italy claims that the interpretation proposed by the Commission which is based on a sort of presumption as to the existence of State aid in the event of any form of intervention by a DGS has no basis in the Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes ("Directive 2014/49")[24] (which had not been transposed by Italy and for which the transposition deadline had not yet expired at the time of adoption of the measures). That interpretation by the Commission also has no basis in the 2013 Banking Communication[25]. More specifically, under point 63 of the 2013 Banking Communication a specific case-by-case assessment is required of whether any given decision for the use of deposit guarantee funds is imputable to the State, while Article 11 of Directive 2014/49 does not establish a generalised obligation of prior notification for any measure undertaken by a guarantee fund. It would be only in the

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22 The Italian public authority that submitted comments to the Commission is the Italian Ministry of Economy and Finance.

23 Case T-251/11 *Austria* v *Commission (Austrian Green Electricity Act)* EU:T:2014:1060.

24 OJ L 173, 12.6.2014, p. 149.

25 Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ("Banking Communication"), OJ C 216, 30.7.2013, p. 1.

event that, following an in concreto examination, a support measure was to be found to constitute aid that a prior notification to the Commission would be necessary.

(46) As regards the imputability of the FITD intervention to Italy, Italy bases its analysis on the test of imputability as developed in *Stardust Marine*[26] which is not satisfied in the case at hand for the following reasons. First, the FITD is a private-law entity and takes all its decisions through its general meeting and governing bodies, whose members are entirely composed of representatives of its member banks and are fully autonomous. The decision-making process for support measures was fully independent and there was no provision for the active involvement of the BOI or any other public body. The fact that a representative of the BOI participates in the meetings of the FITD's governing bodies could not be construed as an indicator of the BOI's active participation in the decision-making process, since the role of the representative was entirely limited to that of a passive observer.

(47) Italy further submits that the BOI's power to approve the FITD's Statutes and amendments thereto as well as to authorise individual interventions does not affect the autonomous decision-making process of the FITD, since it is limited to a mere ex-post authorisation in its capacity as the authority supervising and directing management of the crisis pursuant to the TUB. The BOI's decision constitutes a ratification decision which is confined to a formal retrospective check on the legality of a fully finalised private decision. That analysis is confirmed by the facts and particularly by the statement of reasons given in the order by which the BOI authorised the FITD measure, where the BOI acknowledged that it did not carry out any investigation into the merits of the choices made by the FITD. To strengthen that argument, Italy claims that the case at hand bears clear analogies with the *Sicilcassa* case[27], where the Commission concluded that the intervention did not constitute State aid in view of the decisive participation of private entities.

(48) With regards to the evidence referred to by the Commission in the Opening Decision, Italy claims that it does not demonstrate the interference of the BOI in the FITD's decision-making process. According to Italy, the special administrator, although appointed by the BOI, has no power to directly influence the FITD's decision to grant funding to a bank in difficulty. Instead, he acts as the manager and legal representative of the bank in special administration and not on behalf of the BOI, that is to say he takes over all the private-law powers of the dissolved governing bodies. Secondly, Italy disputes that there was an indication of interference of the BOI. Italy suggests that the passage from a memo of the Director-General of the FITD dated 28 May 2014 – mentioning that the representative of the BOI invited the Fund to look for a balanced agreement with BPB to cover the negative equity – had to be interpreted as a hope and in no case as an obligation. Finally, Italy notes that none of the minutes of the decisions taken by the governing bodies of the FITD as regards the intervention to help Tercas record any positions put forward by the BOI that might imply the exercise of influence over the FITD.

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[26] Case C-482/99 *France v Commission* EU:C:2002:294.

[27] Commission Decision 2000/600/EC of 10 November 1999 – Italy - Banco di Sicilia and Sicilcassa, OJ L 256, 10.10.2000, p. 21.

5.1.2 Observations from the BOI[28]

(49) In its comments on the Opening Decision, the BOI denies that the support intervention of the FITD is imputable to the State as:

(1) the FITD does not fulfil a public policy mandate when supporting credit institutions;

(2) the BOI does not co-decide, either generally or in the case at issue, with the FITD to intervene in support of a given undertaking and does not control that the FITD acts consistently with any public policy mandate attributed to it;

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

(50) As regards the first point, according to the BOI, the sole public policy mandate of DGSs was to reimburse depositors: Article 96-*bis*, paragraph 1, last sentence, of the TUB, which allows the FITD to intervene in other ways than directly paying out covered depositors in liquidation, cannot be construed as an indicator of imputability to the State of the FITD's interventions other than reimbursements of depositors or as assigning a public policy mandate to the FITD. That provision merely allows for recourse to other forms of interventions.

(51) The reference in Directive 2014/49 to preventing the failure of credit institutions merely describes that the role of the interventions is generally to contain the costs of DGS interventions by avoiding having to reimburse depositors and hence bank failures. The fact that Directive 2014/49 does not mention a requirement that DGS support measures are notified to the Commission implies that the exercise of the option to allow such measures cannot be construed as meaning that the DGS has thereby had a public policy mandate conferred on it.

(52) The BOI also submits that Article 29 of the FITD's Statutes, under which the FITD may only intervene in support of a bank placed under special administration "*if there are reasonable prospects for recovery and if the costs may be presumed to be less than would be incurred in the event of liquidation*", indicates the very opposite to what the Commission asserted in the Opening Decision, namely that Italy chose to allow its DGS to intervene "to prevent the failure of a credit institution".

(53) Finally, the fact that the BOI must approve the support interventions of the FITD cannot be an indication that the FITD is pursuing a public policy objective. To consider otherwise would mean that all banking activities subject to the supervision of the ECB or the BOI are activities driven by public policy. In addition, the BOI is

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

required to act independently from the State by Article 19 of Council Regulation (EU) No 1024/2013[29].

(54) As regards the second point, the BOI only exercises supervising powers having regard to the objectives of protecting depositors, stability of the banking system and sound and prudent management of the banks (Article 5 of the TUB). The provision of Article 96-*ter*, paragraph 1, point b), of the TUB that the BOI "*coordinates the activity of the guarantee schemes with banking crisis provisions and supervisory activities*" only attributes to the BOI the general power intended to guarantee that the activities of the DGS are consistent with its supervisory power; such power is only exercised by means of authorisation of the intervention.

(55) As the BOI is required to act independently from the State, the exercise of its powers over the FITD in the context of a bank-support intervention cannot be considered as State control over the use of resources or tied to any public policy mandate. The case at issue is therefore clearly analogous to *Doux Élevage*[30].

(56) Moreover, the BOI submits that it did not contribute to the design or implementation of the FITD's support intervention and that any contact between itself and the FITD prior to formal submission of the FITD's application for BOI approval cannot be classified as BOI contribution to those measures. The BOI merely provided initial guidance, and so solely in the light of the legislative parameters that governed the subsequent authorisation procedure.

(57) The fact that the BOI appointed and supervised the special administrator had no bearing on the case at issue as the tasks and aims of a special administrator's activities' do not differ greatly from those of a "normal" director of a private undertaking in a state of crisis and it did not act on behalf of the BOI.

(58) The BOI representative attending the meetings of the FITD board and executive committee only sat as an observer and had no voting rights. The fact that a dispute between the FITD and BPB as regards the amount of the negative equity of Tercas was settled by an arbitrator appointed by the BOI is irrelevant because it was the parties, on a fully independent basis and by mutual agreement, that asked the BOI to indicate an individual, whom they then proceeded to appoint as arbitrator. BPB would not have agreed to ask the BOI to appoint an arbitrator if the BOI played "a management and strategic role" in the FITD.

(59) As regards the third point, the case at issue differs from those cited in recital 44 of the Opening Decision, where the Commission found that DGSs' interventions in banks' restructuring and liquidation constituted State aid.

(60) In the Danish winding-up scheme case[31], (1) the national legislation governed the conditions for support interventions in detail, (2) the committee responsible for assessing the costs of the various options was appointed by the Minister of economy and finance, (3) the same committee was required to assess whether the purchaser was able to manage the bank in difficulty and whether the solution was commercially

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

30 Case C-677/11 *Doux Élevage SNC and other* EU:C:2013:348, in particular paragraph 41.

31 Commission decision C(2011)5554 of 01.08.2011 in case SA.33001 (2011/N) – Denmark – Part B – Amendment to the Danish winding up scheme for credit institutions, OJ C 271, 14.09.2011.

sustainable; (4) the decision made by the DGS was based on the assessment and recommendation made by that committee, (5) the board of directors of the DGS was appointed by the Minister of economy and finance and (6) the Minister was required to approve the agreement between the purchaser bank and the DGS.

(61) In the Polish credit unions liquidation scheme case[32], the incentives provided by the DGS constituted an integral part of a liquidation scheme for credit unions, which was designed by the Polish authorities and notified to the Commission as State aid. In addition, the DGS "is controlled by the government through voting rights in the Fund Council as well as a number of cases where the Ministry of Finance has a right to intervene and take direct decision influencing the functioning of the Fund". In addition, the Chairman of the Fund Council, appointed by the Minister of Finance, has a decisive vote in case of a tie vote.

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

5.1.3 Observations from other interested parties

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

(64) The other interested parties submit that the Commission erred in stating that DGSs are extremely likely to grant State aid given that DGS act under a public mandate and remain under the control of the public authority. They point out in that respect that there is no mention in the 2013 Banking Communication of a State aid nature of DGSs, that Directive 94/19/EC says nothing on the compatibility with the State aid rules of interventions taken as an alternative to reimbursement of depositors and that Directive 2014/49 takes a neutral position with regard to the compatibility of such measures with the State aid rules.

(65) The other interested parties consider that the Commission came to the preliminary conclusion that the FITD's interventions are imputable to the State on the mere ground that such interventions are imposed by law, while in *PreussenElektra*[35] and *Doux Élevage*[36] the Court expressly ruled that the fact that a measure is imposed by national law is not capable of conferring upon it the character of State aid. In *Austrian Green Electricity Act*[37], the General Court took into account many

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32 Commission decision C(2014)1060 of 18.02.2014 in case SA.37425 (2013/N) – Poland – Credit Unions Orderly Liquidation Scheme, OJ C 210, 04.07.2014.

33 Commission decision C(2012)3540 of 30.05.2011 in case SA.34255 (2012/N) – Spain – Restructuring of CAM and Banco CAM, OJ C 173, 19.06.2013.

34 Fondo de Restructuracion Ordenada Bancaria

35 Case C-379/98 *PreussenElektra* EU:C:2001:160, in particular paragraphs 61 et seq.

36 Case C-677/11 *Doux Élevage SNC and other* EU:C:2013:348, in particular paragraph 41.

37 Case T-251/11 *Austria* v *Commission (Austrian Green Electricity Act)* EU:T:2014:1060.

additional elements which indicated the "*pervasive*" influence and control of the State on ÖMAG (the public limited company in charge of controlling the measure at issue).

(66) The other interested parties consider that a correct reading of the reference national legislation and of the FITD's decision-making mechanisms relative to the latter's support interventions aimed at averting irreversible bank crises shows the insubstantial nature of the elements mentioned by the Commission to come to the preliminary conclusion that the FITD's interventions respond to a public mandate. They base their argument on the fact that Article 96-bis of the TUB only provides that guarantee schemes "*may engage in other types and forms of intervention*"[38]. That non mandatory character of the intervention severs the link between the FITD's action and its statutory mission.

(67) The other interested parties point out that intervention tools other than the reimbursement of depositors have existed since the establishment of the FITD in 1987, prior to the entry into force of Article 96-*bis* of the TUB.

(68) The FITD puts forward that it is a private-law entity, controlled and managed by its member banks and that it acts as a vehicle for implementing interventions which are directly attributable to them by using resources which continue to be their own resources. Moreover, the decision to support Tercas was made by the FITD's governing bodies, which are entirely made up of the member banks. The documentary evidence shows that the FITD's governing bodies assessed carefully the possible alternatives and fulfilment of the lower cost requirement to better protect the interest of member banks, by reducing the costs and risks of the intervention.

(69) The FITD's governing body decided at its full discretion whether, when and how to make support interventions, the only requirement being that the intervention would be less costly than reimbursing depositors. The FITD does not act under any public mandate when it takes support measures. The FITD's Statutes would be fully in line with sectorial legislation even if they provided for no form of alternative intervention or expressly prohibited any such interventions. No public body can oblige the FITD to intervene and the BOI's subsequent authorisation was only given to verify the adequacy of the intervention for the beneficiary bank from the viewpoint of prudential supervision, ensuring it is compatible with the need to protect depositors and with the stability of the banking system.

(70) In addition, the other interested parties point out that according to its Statutes membership of the FITD is non-mandatory, and that banks can choose to establish an alternative DGS of which they could become members. They point in that regard to the existence of a specific DGS for mutual banks[39] (Fondo di Garanzia dei Depositanti del Credito Cooperativo - FDGCC), which are not members of the FITD.

(71) The other interested parties submit that there is no interference of the State either with the appointment of the members of the FITD's governance bodies or with its decision-making (the fact that BOI participates as an observer, without voting rights, does not affect the independent decision-making of the FITD). They point out that, in its decision on the rescue of Danish bank Roskilde[40], the Commission has stressed

[38] Emphasis added.

[39] Banche di credito cooperativo.

[40] Commission decision C(2008)4138 of 31 July 2008 in case NN 36/2008 – Denmark – Roskilde bank A/S, OJ C 238, 17.09.2008.

the independent decision-making of the entity granting a measure to rule out that the granting of a guarantee to a bank in crisis by an association solely made up of and funded by national banks for the purpose of supporting financial institutions implied the use of State resources. Referring to *EARL Salvat père et fils*[41], they consider that for there to be State aid the State should be present in the deciding body of the organisation and able to impose its decisions.

(72) The other interested parties submit that the FITD is a body representing the interests of its member banks and that the powers assigned to the BOI in respect to the FITD's actions only allow it to pursue its general supervisory aims, specifically, supervision of sound and prudent management of the supervised entities and protection of depositors' interests. The BOI's task of coordinating the activities of DGSs by means of the rules on banking crises and on supervisory activity cannot serve as a basis for concluding that the resources of the FITD are under the constant control of the State because of the general character of that task.

(73) The fact that the BOI appoints a special administrator of banks in crisis does not indicate a link with the State because the legal basis (Article 70 *et seq.* of the TUB) of that power is essentially technical in content and its rationale and basis lie in the specific features of the sector. Moreover, mere indications that measures pursue public interest aims do not suffice to conclude that those measures grant State aid[42].

(74) The BOI's power to authorise individual interventions under Article 96-*ter*, paragraph 1, d), of the TUB and Article 3(2) of the FITD's Statutes does not "strip the FITD of its independent judgment" as to whether to implement alternative interventions and, if so, as to their timing, amount and form. The BOI's authorisation of the FITD's interventions is merely an *ex-post* check of the lawfulness of FITD's (independent) decisions, to ensure the safeguard of the general interests.

(75) The other interested parties also refer to the Commission Decision on the aid to Banco di Sicilia and Sicilcassa[43], where the Commission concluded that the intervention of the FITD in favour of those banks did not constitute State aid, without considering the role of the BOI on the activity of the FITD.

(76) The other interested parties submit that, as in *Doux Élevage*, the public control over the FITD did not go beyond exercising a mere formal control of the validity and the lawfulness of the latter's behaviour; it did not extend to a control of the political appropriateness or a control of compliance with the public authorities' policy, while as in *Doux Élevage*, the FITD decided itself how to use the resources. Similarly, in *Pearle*[44], the Dutch government had confirmed that the bye-laws adopted by bodies such as HBA, which introduced levies at issue in that case, required the approval of the public authorities.

(77) The FITD points out that the special administrator, although appointed by the BOI, is not a representative of the supervisory authority. He operates with broad discretion and on his own initiative. He can submit a mere request for intervention to the FITD, which remains free to decide to make alternative interventions in the best interest of its member banks. In the case at issue, the special administrator did not supersede the general meeting of the bank, which is the only body empowered to approve

41 Case T-136/05 *EARL Salvat père & fils* v *Commission*, EU:T:2007:295 paragraph 154.

42 Opinion of AG Wathelet in Case *Doux Élevage*.

43 See footnote 27.

44 Case C-345/02 *Pearle and others* EU:C:2004:448.

operations of an exceptional nature. Furthermore, the authorisation of the BOI is issued only after the FTID has taken an independent decision to intervene. That authorisation is part of the normal supervisory role of the BOI. The BOI representative attending the meetings of the FITD board and executive committee only sits as an observer without voting rights.

(78) The arbitrator on the dispute between the FITD and BPB on the amount of the negative equity of Tercas was not appointed by the BOI, but by the parties themselves (the FITD and BPB), on the BOI's recommendation. Moreover, the arbitral award served to resolve the dispute at issue, while any decision concerning the cost-effectiveness of the intervention for member banks remained entirely within the FITD's powers.

(79) In addition, the cases cited by the Commission concerning DGSs are not comparable to the case at issue. The other interested parties put forward the same reasons as Italy in that respect, to which they add that both the Danish winding-up scheme case and the Polish credit unions liquidation scheme concerned interventions by guarantee schemes in the liquidation of banks and not for preventive purposes, targeting the bank's long-term recovery.

5.2. Advantage criterion

5.2.1 Observations from Italy

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

(81) Furthermore, Italy submits that the Commission did not rely on the correct figures concerning the rescue of Tercas compared to the alternative scenario of liquidation. The comparison between the recovery intervention and the liquidation scenario should have been made after deducting the […] position, whose risk was not included in the estimate of the cost of liquidation. That deduction leads to a commitment not exceeding EUR 295 million for the rescue operation whereas the estimated cost of the liquidation case was EUR 333 million. Therefore, Italy concludes that the actual difference between the two scenarios was almost EUR 40 million and not EUR 3 million as in the Commission's preliminary view stated in the Opening Decision.

(82) In any case, Italy claims that the FITD's intervention is in line with the MEOP. First, the FITD could not have required Tercas to impose burden-sharing on subordinated creditors beyond the contractual terms of individual loans, which provide for write-off only in the event of liquidation. Second, imposing burden-sharing on subordinated creditors would not have in any way reduced the costs to the FITD's member banks. The Commission was wrong to consider that the costs to the member banks and subsequently to the FITD would be minimized in the event of compulsory

winding up of Tercas if subordinated creditors had been made to bear some of the losses. Based on the evidence produced in the minutes of the meetings of the FITD's board and executive committee, Italy contends that the FITD intervention which was ultimately implemented avoids the risk of possible legal actions brought by subordinated creditors because of losses imposed on them. Italys also points out that the FITD's intervention also avoids the negative impact on the banking system's reputation which would result due to a failure to pay back subordinated loans in the event of compulsory liquidation of Tercas.

(83) Therefore, the FITD's decision not to involve subordinated bondholders was reasonable, was in line with the MEOP and was apt to prevent the FITD and its member banks from being exposed to further costs.

5.2.2 Observations from the BOI

(84) The Commission received no comments from BOI on the selective advantage of the implemented measures.

5.2.3 Observations from other interested parties

(85) As regards the economic soundness of the intervention under the MEOP, the other interested parties submit that the intervention was a rational and sound choice for private undertakings such as the FITD and its member banks. According to them, the present case has obvious similarities to the *Sicilcassa* case, where the Commission concluded that the intervention did not constitute State aid in view of the decisive participation of private entities. As in the *Sicilcassa* case, the FITD acted as guarantor for the reimbursement of depositors in accordance with legislation on DGSs, while the FITD's interventions were decided by the same governing bodies and on the basis of the same criteria and the BOI performed the same functions. Furthermore, they note that since there are no longer banks under public control in Italy, all of the FITD's members are private banks and, hence, the FITD can operate only as a private entity.

(86) The other interested parties reviewed earlier cases of alternative interventions by the FITD[45] and their economic *rationale*, including during the period when participation in a DGS was purely voluntary. Even when they were not legally bound to do so, private undertakings have chosen to join the DGS. The other interested parties reject the thesis that a market economy operator would not be exposed to the costs of reimbursing depositors and would not issue non-repayable contributions or guarantees without charging a fee, as the Commission stated in the Opening Decision.

(87) Furthermore, the other interested parties stress that the behaviour of the FITD and its member banks should not be assessed in abstract terms (referring to a hypothetical non-regulated scenario). That behaviour should rather be assessed on the basis of the regulatory framework in which they operate. In that context if, as in the present case, the coverage of negative equity is the less costly measure for member banks, given the obligation under the regulatory framework for repayment of deposits up to a certain threshold, that intervention is the most rational choice from the perspective of a market economy operator.

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

(88) The other interested parties dispute the Commission's argument that the costs of reimbursing depositors at the stage of compulsory administrative liquidation of Tercas are not to be taken into account in the application of the MEOP since they arise from obligations imposed on the FITD as a DGS required to act in the public interest by protecting depositors. They argue that in the case of the resolution of Banco Espirito Santo in Portugal[46] the Commission considered that the costs of reimbursing depositors in the event of liquidation should be included for the purpose of applying the MEOP. Moreover, the Commission could not compare the case at issue with the Court's ruling in *Land Burgenland*[47] as the Court distinguished between measures imputable to the State acting in its capacity as a shareholder and those where the State acted as a public authority.

(89) Moreover, the other interested parties highlight that the intervention was designed on the basis of the least-cost criterion with the support of a reputable auditing and advisory firm in identifying the least costly and risky solution for the member banks. On that basis, the FITD designed an intervention which allowed it to significantly reduce costs for member banks, avoid the risks of a liquidation scenario and prevent possible negative externalities deriving from the possible compulsory administrative liquidation of Tercas.

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

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46 Commission decision C(2014)5682 of 03.08.2014 in case SA.39250 (2014/N) - Portugal - Resolution of Banco Espirito Santo S.A., OJ C 393, 07.11.2014, recitals 75-77.

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

48 See minutes of the FITD's executive committee Meeting of 30 May 2014, p. 4; Report of the FIDT's General Director of 28 May 2014, File No 7/2014, p. 5.

49 See Report of the FIDT's General Director of 28 May 2014, File No 7/2014, p. 5.

50 See communication from Tercas to the FITD of 1 April 2015

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

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

(93) While the […] report on the basis of which the FITD calculated the lower cost was based on the accounting situation at 31 December 2013, BPB presented an updated assessment of the impact on the FITD of the scenario of liquidation as at 31 July 2014, i.e. the date on which the extraordinary shareholders' meeting for the recapitalisation of Tercas was held and where the support intervention was defined formally. The estimated cost under that updated assessment is EUR [350-750] million. The difference between it and the estimation of the report based on the situation at 31 December 2013 is due to the reclassification of accounting positions recorded as performing as at 31 December 2013 and non performing as at 31 July 2014 and to the increase of the deposits which the FITD would have been required to repay.

(94) The other interested parties reject the Commission's argument that the purported cost to the FITD in the support intervention could have been further reduced by writing down the subordinated debt. At the date the FITD decided to intervene, the option of bailing-in the subordinated debt was not legally feasible. Under the then applicable Italian legislation, debt could be written down only in case of compulsory administrative liquidation. The FITD's members would have incurred a huge effective current cost immediately with uncertain possibilities of recovery had such a bail-in been attempted. Litigation by subordinated debt holders would have increased the cost of the liquidation procedure and the costs for the FITD's members due to the decrease of the value of the assets being liquidated. The subsequent spill-over effect would have a negative impact on customers' confidence, and on the reputation and the overall stability of the banking system. Moreover, they point out that the majority of Tercas' subordinated creditors were individual savers and deposit holders and that the special administrator had already adopted the only possible burden-sharing measure vis-à-vis subordinated creditors, which consisted in postponing coupon payments on the bonds held by Banco Popolare S.c.

(95) Finally, the other interested parties highlight that the […] report, when performing the least-cost analysis, chose a valuation scenario which was not the worst-case scenario. The estimated cost of liquidation was based on i) the possibility of finding a party willing to purchase part of the branches even in a liquidation scenario and ii) the dismissal of non-transferred personnel based on a severance bonus of 12 months' salary to each employee. The […] report, used by the FITD as the basis for its intervention decision, was based on an intermediate scenario while other worse-case scenarios had also been considered.

(96) Moreover, it should be assumed that the FITD's intervention did not grant an advantage to Tercas as it occurred alongside the capital injection of BPB into Tercas which was concurrent, significant and comparable to the FITD's intervention.

(97) In light of those considerations, the intervention should be deemed as the less costly and risky solution for the member banks of the FITD.

5.3. Compatibility

5.3.1 Observations from Italy

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

5.3.2 Observations from the BOI

(99) The Commission received no comments from BOI on the compatibility of the implemented measures.

5.3.3 Observations from other interested parties

(100) The other interested parties submit that even if the measures constituted State aid, they are compatible with the internal market. Tercas' restructuring plan will allow it to restore its long-term viability, the intervention of the FITD is limited to the minimum necessary and that intervention limits any potential impact on the market's competitive set-up.

(101) As regards restoration of long-term viability, the other interested parties submit that the special administrator acted to remedy deficiencies in Tercas' organisation and internal control system. He focused his attention on management anomalies (credit, equity investments, disputes) and on the correct valuation of the associated risks (doubtful outcomes, write-downs, provisions). He implemented gradual deleveraging to offset the substantial decrease in funding due to the reduction in the customer base. He rationalised operational structures (review of the business model with closure of certain branches, staff downsizing plan, simplification of organisational structures, reduction of administrative expenses) to achieve significant cost containment on a structural basis. Tercas' recapitalisation by the FITD and BPB was the best way to remedy rapidly the liquidity shortage. BPB took upon itself the business risk associated with the recovery of Tercas, injecting significant financial and other resources to ensure the success of its business plan.

(102) BPB puts forward that it developed an intervention strategy based on lending and deposits margin improvements[51], cost rationalisation[52], development of group synergies, careful monitoring and improvement of credit quality, optimisation of the management of impaired receivables by selling non-performing loans ("NPLs"), strengthening of liquidity profiles[53] and deployment of management resources. It indicates that the "structural elements" of the recovery plan were developed within the "Business Plan 2015-2019" of BPB. It submits that those elements show "a coherent sequence of actions directed at restoring the profitability of Tercas". It also contends that the absence of a detailed restructuring plan should not prevent the

[51] […].
[52] […].
[53] […]

Commission from assessing positively "general programmes" that have a "coherent direction"[54].

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

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

(105) The other interested parties also submit that not converting or writing-down subordinated debt was in line with point 42 of the 2013 Banking Communication which makes clear that any contributions required of depositors are not a mandatory component of burden-sharing. It is also in line with point 45 of the 2013 Banking Communication which allows an exception to the principle of conversion or writing-down of subordinated creditors, where "implementing such measures would endanger financial stability or lead to disproportionate results".

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54 BPB refers to the Commission's position in Case T-11/95 *BP Chemicals* v *Commission* EU:T:1998:199, according to which the 'formulation of a restructuring plan is not a static exercise' (paragraph 105 of the judgment). Likewise, BPB submits that some recent Commission decisions confirm that the failure to submit promptly a restructuring plan does not prevent a decision of compatibility of a given measure with the internal market. See Commission Decision C(2014)962 of 13 February 2014 in case SA.36663(2014/NN) - Spain - Support measure for SGR, OJ C120, 23.04.2014, and Commission Decision C(2014)5201 of 23 July 2014 on State aid SA.34824(2012/C), SA.36007(2013/N), SA.36658(2014/NN), SA.37156 (2014/NN), SA.34534(2012/NN), concerning the National Bank of Greece Group, OJ L 183, 10.07.2015.

55 See intervention application from the special administrator to the FITD of 25 October 2013, p. 3; the 'lack of alternative solutions' to the transaction proposed by BPB was also acknowledged in the minutes of the FITD's executive committee meeting of 28 October 2013, p. 4.

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

(107) Furthermore, the intervention does not distort the internal market due to:

(1) the small size and limited geographical reach of Tercas' operations;

(2) the fact that BPB was the only operator to express a real interest in injecting capital into Tercas and that the Commission has pointed out that the sale of a failing bank (whose activity benefits from the alleged aid) to a private market operator in the framework of an 'open' sales process is a form of mitigation of potential distortions of competition[56];

(3) the sufficiently far-reaching character of Tercas' restructuring plan and the fact that it provides for the integration of Tercas into BPB.

(108) The transfer of Tercas to BPB was the only feasible option to overcome the issues addressed by the Italian supervisory authority and prevent possible distortions of competition. Furthermore, the restructuring transaction involved full recapitalisation of Tercas and a significant capital increase by the BPB to implement the transaction.

(109) Finally, relying on the Commission's earlier decisions[57], the other interested parties claim that the recapitalisation of Tercas and its incorporation into BPB following the unremunerated coverage of the negative equity by the FITD can be deemed to be justified as necessary to ensure the transfer of company assets and to implement deep and extensive restructuring of a bank. In the case at hand, no return was possible on any option that could have overcome Tercas' deep crisis. Had the FITD claimed remuneration, the negative equity of Tercas would have worsened, increasing, thereby, the cost for the purchasing bank.

6. ASSESSMENT OF THE MEASURES

6.1. Existence of State aid

(110) Pursuant to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. The Commission will assess in the following whether those cumulative conditions are met for the FITD interventions.

(111) As regards the tax exemption scheme mentioned in recital 4 of the Opening Decision, the Commission notes that it was not notified by Italy. In addition, on the basis of the information currently available to the Commission, it was not applied to the case at issue. Hence the tax exemption scheme is not covered in the present decision.

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56 Commission Decision C(2011)5554 of 1 August 2011 in case SA.33001 (2011/N) - Denmark – Part B Amendment of the Danish Winding up Scheme for credit institutions, OJ C 271, 14.09.2011.

57 Commission decision C(2012)2043 of 27 March 2012 in case SA.26909(2011/C) – Portugal - *Banco Português de Negócios (BPN)*, paragraphs 247 and 248; decision of 18.02. 2014, *Poland - Credit Unions Orderly Liquidation Scheme*, cit., paragraph 65; decision of 30.05.2012, *Spain Restructuring of CAM and Banco CAM*, cit., paragraph 113; see also paragraphs 119 and 120.

6.1.1 State resources and imputability to the State

(112) The Court of Justice has repeatedly confirmed that all financial means by which the public authorities actually support undertakings fall under State aid control, irrespective of whether those means are permanent assets of the public sector. Compulsory contributions that are mandatory by and managed and apportioned in accordance with the law or other public rules imply the presence of State resources, even if not administered by the public authorities[58]. The mere fact that resources are financed by private contributions is not sufficient to rule out the public character of those resources. The relevant factor is not the direct origin of the resources but the degree of intervention of the public authority within the definition of the measure and its method of financing[59].

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

(114) In *Doux Élevage*, the Court of Justice considered that it could not be concluded that the activities of a trade organisation, whose resources were raised by levies made mandatory by the State, were imputable to the State. In support of that finding, the Court of Justice noted that the objectives pursued by the use of the resources had been *entirely* determined by the organisation and that the mandatory nature of the levies was in that case not *"dependent upon the pursuit of political objectives which are specific, fixed and defined by the public authorities"*. The State only controlled the validity and lawfulness of the trade organisation's levying of contributions, i.e. the procedural setup, and *could not influence* the administration of the funds.

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

(116) The Court of Justice has also clarified in Stardust Marine that imputability to the State of an aid measure taken by a prima facie independent body which does not itself form part of the State can be inferred from a set of indicators arising from the circumstances of the case. One such indicator is that the body in question cannot take the contested decision without taking into account the requirements or directives of the public authorities before taking the decision allegedly involving State aid. Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by an undertaking is imputable to the State.

(117) In relation to the measures on which the Commission has opened the formal investigation procedure in the present case, it should be recalled that in Directive

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

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

60 Case C-83/98 P *France* v *Ladbroke Racing and Commission* EU:C:2000:248, paragraph 50: "even if the sums […] 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".

94/19/EC the Union legislator introduced DGSs with the policy objective of preserving and increasing "stability of the financial system"[61] and entrusted them with the mandate of protecting depositors[62]. It is mandatory for Member States under Directive 94/19/EC to introduce one or more DGSs which should reimburse depositors in case of a credit institution's failure. Directive 94/19/EC is silent on possible other interventions, so that Member States retain discretion on whether to allow DGSs to go beyond a pure reimbursement function and to use the available financial means in other ways.

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

(119) Under Directive 2014/49/EU Member States may allow DGSs to intervene in order to preserve the access of depositors to covered deposits both at an early stage in a going concern phase as well as in the context of national insolvency proceedings[64]. The Commission notes that, contrary to the position of the other interested parties mentioned in recital (79), the aid nature of alternative measures taken by a DGS does not depend on whether they are aimed at preventing the failure of a credit institution or whether they are interventions in liquidation.

(120) Moreover, the protection of savings and depositors has a specific position in Italian national law. Under Article 47 of the Italian Constitution, "The Republic […] protects savings in all their forms"[65]. The BOI – a public institution whose behaviour as such is that of the Member State and does not fall outside of the scope of Article 107 of the Treaty on the basis that it is a constitutionally independent body[66] – is appointed as the guardian of the stability of the Italian banking system[67] and should protect depositors[68].

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

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

63 See inter alia, recitals 3, 4 and 16 to Directive 2014/49.

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

65 "La Repubblica […] tutela il risparmio in tutte le sue forme".

66 See Case T-358/94 *Air France* v *Commission* EU:T:1996:194, paragraphs 59 to 62, where, in respect of the French "Caisse des Dépôts et Consignations", the General Court held that the conduct of a public sector body is necessarily attributable to the State on the basis that it is a public sector body. It added that that conclusion could not be undermined by the arguments to the effect that such a body may enjoy independence from the other authorities of the State.

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

68 According to the Internet site of the BOI (Section on the BOI's "Banking and financial supervision") "The BOI is entrusted the relevant tasks with respect to the protection of clients of banking and financial intermediaries, which represent constituent element of banking and financial supervision; alongside and complementing the other objectives of the supervision activity" ("Alla Banca d'Italia sono affidati rilevanti compiti in materia di tutela dei clienti degli intermediari bancari e finanziari che rappresenta un elemento costitutivo della supervisione bancaria e finanziaria, affiancandosi ed integrandosi con gli altri obiettivi dell'azione di vigilanza.").

(121) In view of the foregoing, Article 96-bis of the TUB has to be read as the specific definition of the public mandate of protecting depositors as it applies to DGSs recognised in Italy. By including the last sentence in Article 96-bis, paragraph 1, where DGSs "may engage in other types and forms of intervention" than repayment of depositors, Italy have chosen to allow their recognised DGSs to use the resources collected from member banks for different types of interventions. Therefore, Article 96-bis of the TUB is the basis for recognition of the FITD as a mandatory DGS in Italy *and* grants the FITD competence to take support intervention measures.

(122) The fact that the FITD is organised as a consortium under private law[69] is irrelevant from that perspective, as the mere constitution in the form of a company under ordinary law cannot and cannot be regarded as sufficient to exclude the possibility of an aid measure taken by such a company being imputable to the State, as the Court of Justice has held in *Stardust Marine*. The FITD's objectives – pursuit of the common interests of its members by strengthening the safety of deposits and the protection of the reputation of the banking system – clearly coincide with the public interest. However, such coincidence does not necessarily mean that the undertaking could have taken its decision without taking into account the requirements of the public authorities. Moreover, it is not necessary that the State's influence results from a legally binding act of a public authority. Concrete implication of the State is not excluded by the autonomy which is in principle enjoyed by the undertaking.

(123) In any event, Union and Italian legislation gives the BOI the authority and means to ensure all interventions by the FITD as a recognised DGS under the TUB comply with the latter's public policy mandate and contribute to the protection of depositors. This is made clear in the introductory sentence of Article 96-*ter*, paragraph 1, of the TUB where the list of all the powers exercised by the BOI with respect to the Italian DGSs is followed by a statement that those powers should be exercised "having regard to the protection of depositors and the stability of the Italian banking system".

(124) In view of that evidence and unlike *Doux Élevage*, where the object of the *ex-post* approval by the public administration was purely procedural in nature, the BOI has to approve *any intervention by the FITD in substance* as to whether it complies with its public mandate under the TUB.

(125) The assertion by Italy that prudential supervision would thus have to be considered as the exercise of public control over banks and the banks' resources consequently public resources (recital (53)) is clearly immaterial. The Commission merely notes that banking supervision carried out by the BOI does not serve to verify compliance with a public policy mandate *entrusted upon the supervised banks*.

(126) The precedence of the public mandate and the related public controls are recognised in the Statutes of the FITD[70] where all support interventions must comply with the concurrent conditions that "there are reasonable prospects for the bank's recovery and the cost to the Fund may be presumed to be less than would be incurred by intervention in case of liquidation" (the *least-cost principle*). Those concurrent conditions imply that the decision to implement a support intervention can only be taken if it allows the FITD to fulfil its public mandate of protecting depositors. That precedence is enforced by requiring approval of the intervention by the BOI in accordance with the TUB.

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69 Article 1 of the FITD Statutes.

70 Article 29, paragraph 1.

(127) In addition, the TUB provides the BOI with wide-ranging powers over DGSs:

(1) Point (d) of Article 96-ter, paragraph 1, of the TUB, provides that the BOI must "authorise the interventions of the guarantee systems [DGSs]";

(2) Point (b) of Article 96-ter, paragraph 1, of the TUB provides that the BOI shall "coordinate the activity of the guarantee schemes with banking crisis discipline and the supervisory activity"[71];

(3) Point (a) of Article 96-ter, paragraph 1, of the TUB provides that the BOI "recognises the guarantee systems, approving their Statutes, provided that the systems do not have characteristics which could lead to an unbalanced distribution of insolvency risks on the banking system"[72];

(4) Point (h) of Article 96-ter, paragraph 1, of the TUB provides that the BOI "can issue provisions to implement the rules set out in […] section [IV of the TUB on DGSs]"[73].

(128) In addition to those powers over the FITD given to the BOI under the TUB, only banks under special administration can benefit from the FITD's support interventions[74]. On a proposal from the BOI, it is the Ministry of Economy and Finance that issues the decree putting a bank under special administration. Then, according to the FITD Statutes, "the Fund shall intervene […] in cases of special administration of member banks authorized to do business in Italy"[75]. Only the special administrator can send the request for an intervention to the FITD, a request that needs to be subsequently approved by the shareholders' meeting of the bank. As a public official, the special administrator represents the public interest and is appointed and supervised by the BOI. The BOI also has the power to revoke or substitute the special administrator[76], and to give instructions to impose specific safeguards and limitations on the management of the bank[77]. Therefore, a public official under the control of the BOI has the power of initiating the FITD intervention measure.

(129) Regarding the power to authorise DGS interventions, the Commission notes that the notion of authorisation is that of an administrative act which precedes the entry into force of the measure which is subject to it. The exercise of the BOI's powers regarding the FITD's interventions to ensure the stability of the financial system and the protection of depositors would otherwise be ineffective. In practice, authorisation

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71 "La Banca d'Italia, avendo riguardo alla tutela dei risparmiatori e alla stabilità del Sistema bancario […] coordina l'attività dei sistemi di garanzia con la disciplina delle crisi bancarie e con l'attività di vigilanza".

72 "La Banca d'Italia, avendo riguardo alla tutela dei risparmiatori e alla stabilità del Sistema bancario riconosce i sistemi di garanzia, approvandone gli statuti, a condizione che i sistemi stessi non presentino caratteristiche tali da comportare una ripartizione squilibrata dei rischi di insolvenza sul sistema bancario").

73 "La Banca d'Italia, avendo riguardo alla tutela dei risparmiatori e alla stabilità del Sistema bancario […] emana disposizioni attuative delle norme contenute nella presente sezione".

74 Article 29, paragraph 1, of the FITD's Statutes.

75 See Article 4 of FITD's Statutes

76 See TUB, Article 71(3).

77 TUB, Article 72(4): "The BOI, through instructions given to the special administrators and to the members of the surveillance committee, can impose specific safeguards and limitations to the management of the bank. The special administrators and the members of the surveillance committee are personally responsible for non-compliance with the instructions received by the BOI".

has to occur at a stage where the FITD can still reconsider and amend the proposed measure if the BOI objects to it. Authorisation cannot be considered as occurring *after the FITD's decision to intervene* (as put forward by Italy, the FITD, Tercas and BPB[78]). In that respect, the fact that the BOI participates as an observer in all meetings of the Board and the Executive Committee of the FITD[79] seems relevant (contrary to claims of Italy, the FITD, Tercas and BPB[80]) as it should allow the BOI to voice any concerns about planned interventions at an early stage.

(130) In summary, public authorities have the power of initiating an intervention through their request and, by their power to authorise the intervention in substance, have an influence on the intervention *before* that intervention is actually decided. That influence is further procedurally embedded by the presence of public authorities in all decisional meetings where they are able to voice concerns. Nonetheless, and even though the BOI's authorisation of the measure would have to be considered *ex-ante* rather than *ex-post*[81], the Commission recalls that even *ex-post* control can be relevant as one of a set of indicators of imputability in line with *Stardust Marine*.

(131) It should also be pointed out that the powers available to the public authorities were also exercised as regards the adoption of the support measures at issue:

(1) The documents communicated by Italy to the Commission show that the BOI authorised the specific interventions in favour of Tercas having regard to the interests of depositors and clients within the meaning of Article 96-ter, paragraph 1, (d) of the TUB[82]. Thus, the BOI has authorised the specific FITD interventions at issue in relation to specific national public policy provisions;

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

(3) The BOI "*invited the FITD*" to reach a "*balanced agreement*" with BPB as regards the cover of the negative equity of Tercas by taking into consideration

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

79 Article 13, paragraph 6, and Article 16, paragraph 1, d) of the FITD's Statutes.

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

81 See for instance the comment of Irene Mecatti on Art. 96 to 96 *quater* of the TUB, in Testo unico bancario, Commentario, by Porzio M., Santoro V., Belli F., Losappio G., Rispoli Farina M., Giuffrè Editore, 2010: "… ogni intervento dei spd deve essere *preventivamente* autorizzato della BI (art. 96-ter, co. 1, lett. d)" ("… each DGS intervention should be *prior* authorised by the BOI"), the emphasis is not ours, but that of the author.

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

83 Report attached to the minutes of the FITD's Consiglio's meeting of 30 May 2014, p.1 (Annex 3.9 to Italy reply of 14 November 2014 to the Commission request for information of 10 October 2014): "The evolution of these factors has led to specific negotiations with the BPB and with the special administrator, in coordination with the Bank of Italy, with the aim to establish the terms for implementing the Fund's intervention so as maximize the effectiveness of the support initiatives as part of the broadest plan for the return to long term viability of Tercas, based on its recapitalisation by the BPB" ("L'evolversi di tali fattori ha portato ad un articolato negoziato con la BPB e con il Commissario straordinario, in coordinamento con la Banca d'Italia, per l'individuazione di modilità attuative del'intervgento del Fondo volte a massimizzare l'efficicia dell'azione di sostegno nel quadro del più ampio piano di risanamento della Tercas, imperniato su un'operazione di ricapitalizzazione de parte della BPB").

the possible negative impact of the liquidation of Tercas and its subsidiary Caripe[84].

(132) The Commission concludes that in contrast to the situation in *Doux Elevages* where the Court concluded that the aims and purposes of intervention had been *entirely* determined by the organisation, here, the aims and purposes of the intervention are certainly not *entirely* determined by the FITD. They are in fact closely prescribed by its public mandate under the TUB and in substance controlled by the public authorities. The Commission notes that the effective freedom of the FITD *not to intervene* does not affect its previous conclusion about those FITD interventions that are actually implemented.

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

(134) As described in section 2.3, membership to the FITD is mandatory for Italian banks[85]. In that respect, the reference to FGDCC (see recital (70)) to highlight the alleged voluntary nature of membership to the FITD is erroneous, since under the TUB[86], Italian mutual banks are mandated to establish a distinct DGS within their network: as a consequence mutual banks cannot be members of the FITD and conversely, non-mutual banks cannot be members of the FGDCC and have to be members of the FITD. Hence the statutory provision[87] allowing member banks to withdraw their membership, highlighted by interested parties in their comments (see recital (70)), is a mere theoretical possibility that cannot be put into effect, since they could not become members of any other existing recognised DGS.

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

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

(137) Therefore, since both membership in the FITD and contributions to support interventions decided by the FITD are mandatory, the Commission concludes that in

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

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

86 TUB Article 96.

87 Article 8 of the FITD's Statutes.

88 The decisions to intervene are decided by the Board or by the Executive Committee with the composition indicated in recital (36).

order to operate as a non-mutual bank in Italy it is mandatory under Italian law to contribute to the costs of FITD's support intervention. The resources used to finance such support interventions are clearly mandated by, as well as managed and apportioned according to, the law and other public rules. They hence have a public character.

(138) Accordingly, the Commission concludes that Italy constantly control whether the use of the FITD's resources is consistent with the public policy objectives and influence the FITD on the use of the latter's resources, in principle and in practice in the case at issue.

(139) In particular, taking into account the formal powers by public authorities to both request an intervention as well as approve it in substance with respect to its compliance with the public mandate (recital (126)), the Commission concludes that the role of the BOI cannot be considered as limited to a mere procedure of purely informative nature or a mere formal check of validity and lawfulness[89].

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

(141) Given that the measures under examination are controlled by the BOI, they are controlled also with respect to the objectives of the BOI, including preserving the stability of the financial system. Here, the following facts need to be recalled:

(1) the importance of the BOI's role of ensuring stability of the Italian banking system and protecting depositors;

(2) the extensive powers of the BOI to ensure the FITD takes into account those requirements.

(142) The elements mentioned in recitals (127) to (131) above (regulation by law subjecting the organisation to tight control and effective coordination by the BOI in order to ensure participation to very important public policy objectives) show that the FITD enjoys an exceptional status compared to normal private consortia under Italian law and that its purpose witnessed by its public mandate extends clearly beyond, for instance, that of the CIDEF[90] assessed in the *Doux Élevage* judgment. Such an exceptional status is a valid indicator of imputability under the *Stardust Marine* test.

(143) The content, compass and object of the measures are such that the elements mentioned above demonstrate that an absence of implication of the public authorities in their adoption is unlikely. The measures did not merely provide a competitive advantage to an undertaking. They prevented Tercas from failing altogether, thanks to public support provided through measures 1, 2 and 3 as described in recital (38) granted to protect depositors and the stability of the Italian banking system.

(144) In view of the preceding elements, the Commission considers that there are sufficient indicators to show that the measure is imputable to the State and financed through public resources.

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89 See paragraph 38 of the *Doux Élevage* judgment.

90 Comité interprofessionnel de la dinde française (CIDEF).

(145) The Commission points out that, even if it were the case that taken individually some elements put forward by the Commission might not on their own suffice to conclude that the measures are imputable to the State, it results from recitals (118) to (144) that taken together the set of indicators assessed by the Commission show the imputability of FITD's interventions to the State.

(146) Regarding the comments by Italy and the interested parties in relation to the Commission decision on the aid to Banco di Sicilia and Sicilcassa, it should be first recalled that the existence of State aid is an objective notion and cannot be determined on the basis of an alleged decisional practice, even if it were to be established. In addition, the Commission points out that unlike in 1999, at the date when the support measures in favour of Tercas were approved the Commission had already developed and published in considerable detail the conditions under which support from a DGS would fulfil the conditions to constitute State aid.

(147) In addition at the date of adoption of the *Sicilcassa* decision the Commission had not adapted its assessment of imputability to the Courts' requirements as laid out in *Stardust Marine* and subsequent rulings.

(148) Contrary to the arguments put forward by Italy and the interested parties, the Commission's decisional practice with respect to DGS interventions[91] is highly relevant to provide an indication for the State aid nature of the FITD's intervention. In light of the above, the decision on Sicilcassa does not provide ground to invoke legitimate expectations on the part of Italy and the interested parties.

6.1.2 Selective advantage distorting competition and affecting trade between Member States

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

(150) Even if those measures had to be assessed in the light of the conduct of a comparably situated market economy operator, it is up to the Member State concerned to communicate to the Commission the objective and verifiable evidence that its decision was based on a prior economic assessment comparable to that of a rational private operator in a similar situation in order to determine the future profitability of that measure. In the case at hand, no evidence has been provided to the Commission

91 See Commission decision C(2011)5554 of 01.08.2011 in case SA.33001 (2011/N) – Denmark – Part B – Amendment to the Danish winding up scheme for credit institutions, OJ C 271, 14.09.2011, p. 1, recitals 43 to 49; Commission decision C(2012)3540 of 30.05.2011 in case SA.34255 (2012/N) – Spain – Restructuring of CAM and Banco CAM, OJ C 173, 19.06.2013, recitals 76 to 87; and Commission decision C(2014)1060 of 18.02.2014 in case SA.37425 (2013/N) – Poland – Credit Unions Orderly Liquidation Scheme, OJ C 210, 04.07.2014, recitals 44 to 53, Commission decision C(2008)4138 of 31 July 2008 in case NN 36/2008 – Denmark – Roskilde bank A/S, OJ C 238, 17.09.2008 recitals 28 to 31; Commission decision C(2010)4453 of 29.06.2010 in case NN 61/2009 –Spain Rescue and restructuring of Caja Castilla-La Mancha, OJ C289, 26.10.2010 recitals 97 to 106.

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

that the FITD required a business plan or an investment return calculation, which are fundamental requirements for any investment decision of a private operator.

(151) Italy and the interested parties claim that those measures were in fact compliant with the MEOP[93], in particular because the intervention could allow the FITD to limit costs to which it would otherwise be exposed, namely the costs to the FITD of reimbursing depositors at the stage of compulsory administrative liquidation of Tercas.

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

(153) The Commission considers that the intervention is clearly due to the FITD (as controlled by public authorities, see the assessment in recitals (134) to (136)) and not to the member banks. Any comparison with interventions carried out by the FITD before member banks were legally bound to be part of it are irrelevant in view of the fact that member banks now have no way of opting out of particular interventions as assessed in recitals (134) and (135). This is aggravated by the intervention decision mechanism of the FITD as described in recital (36) which is skewed in favour of large banks[94], implying that decisions can be taken to intervene against the will of the majority of the member banks.

(154) The costs in question then arise from obligations imposed on the FITD as a DGS acting under its public mandate to protect depositors. No market economy operator would have to fulfil such obligations incurred under a public mandate such as reimbursing depositors in the event of the liquidation of Tercas. According to established case law, such obligations incurred under a public mandate cannot be taken into account in the application of the MEOP[95].

(155) Without taking into account the obligations incurred under the FITD's public mandate, the Commission therefore concludes that none of the three measures would have been adopted by a market economy operator. The absence of a business plan and any prospect of investment return whatsoever is fundamental to that assessment and cannot but confirm that conclusion.

(156) Finally, BPB and Tercas put forward that the contribution by the FITD can be considered as concurrent to the intervention of BPB as a private operator. Here, the Commission recalls that such concurrent investment must be on fully equal conditions for the private and the public co-investors. That condition is clearly not fulfilled. BPB obtained full ownership of Tercas whereas the FITD received no such return on its investment.

(157) For the reasons set out in recitals (149) to (156), the interventions of the FITD in favour of Tercas provided the latter with an advantage, namely a non-repayable contribution to cover its negative equity, an unremunerated guarantee on some credit exposures towards […]and a conditional non-repayable contribution if needed to shield Tercas of part of its tax liabilities stemming from the then applicable income

93 See recitals (80) to (97)

94 Together, the four large banks – which have guaranteed board participation and two votes –require only five more representatives to have a majority (13 votes).

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

tax rules. Altogether those measures avoided Tercas' exit from the market. Tercas would not have benefited from those measures under normal market conditions.

(158) The Commission is of the opinion that the interventions at issue are selective given that they relate to Tercas only. Such support interventions are only available to banks in special administration and on a case-by-case basis only. On that basis, the Commission considers that the measures assessed in this Decision were available to Tercas specifically and exclusively to avoid Tercas' exit from the market and were thereby selective.

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

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

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

(162) The Commission does not have any information about the fee that a market operator would have charged for insuring the credit exposure against […]or the credit quality of […]. However, given that the exposure was performing at the time and that the loan was ultimately repaid on schedule and taking into account the much more significant aid amounts provided through *measures 1* and *3*, the Commission takes the view that it is sufficient to establish a lower bound for the aid amount.

(163) That lower bound can be established by taking as a benchmark the average of the 3-year Credit Default Swap ("CDS")[97] values at the time of the aid granting for the largest Italian non-financial corporates with actively traded CDS. That average amounts to 53bps[98]. Considering that the guarantee covered EUR 35 million of exposures and was in place for only nine months, the cash value of the guarantee fee is EUR 0.14 million. Given that there was no fee for the FITD foreseen in the arrangement which could be subtracted, the Commission considers EUR 0.14 million to also be the aid element.

(164) Regarding *measure 3*, the Commission points out that the Italian law made the tax exemption rule subject to notification and approval by the European Commission. As at the moment of the granting, or afterwards, no decision had been taken by the

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

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

98 Average over values for 3y CDS from ENI, ENEL, Telecom Italia and Atlantia are taken as of 1 July 2014

European Commission on measure 3, the guarantee has to be considered due. In fact, the tax exemption had not been formally notified to the Commission ruling out the possibility for it to be applied. Hence, the Commission cannot consider that measure as a guarantee but rather as another non-repayable contribution without remuneration. The Commission considers the aid element to be the full amount of EUR 30 million.

6.1.3 Conclusions on the existence of aid

(165) For the reasons set out in recitals (149) to (164) above, the Commission concludes that measure 1 – a non-repayable contribution of EUR 265 million, measure 2 – a guarantee for EUR 35 million of credit exposures to […]with an aid element of EUR 0.14 million and measure 3 – a further non-repayable contribution of EUR 30 million, in total EUR 295.14 million of State aid, given by the FITD have provided Tercas with a selective advantage distorting competition and affecting trade between Member States. That selective advantage has been granted through State resources through the FITD's intervention which is imputable to the State for the reasons set out in recitals (112) – (148). The aid was granted on 7 July 2014.

6.2. Beneficiary of the aid

(166) The Commission recalls its assessment that all three measures in question provide an advantage to Tercas. The Commission therefore considers that the measures have benefited the economic activities of Tercas, by preventing its exit from the market and allowing the continuation of those economic activities within the buyer, BPB.

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

(168) In line with the Commission's considerations in the Opening Decision, the Commission has no evidence that would allow it to conclude either (i) that the sales process was not open, unconditional and non-discriminatory, (ii) that the sale did not take place on market terms and (iii) that the Italian authorities did not maximise the sale price for Tercas.

(169) Therefore, the Commission concludes that the sole beneficiary of the aid measure is Tercas and aid to the buyer BPB can be excluded.

7. LEGALITY OF THE AID

(170) In view of the above, the Commission concludes the measures identified entail State aid within the meaning of Article 107(1) of the Treaty and have been granted in breach of the notification and stand-still obligations provided in Article 108(3) of the

99 Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules. OJ C 195, 19.8.2009, p. 9–20

Treaty. Thus, the Commission considers that the measures granted to Tercas qualify as unlawful State aid.

8. COMPATIBILITY OF THE AID

8.1. Legal basis for the compatibility assessment

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

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

(173) In order for an aid to be compatible under Article 107(3)(b) of the Treaty, it must comply with the general principles for compatibility under Article 107(3) of the Treaty, viewed in the light of the general objectives of the Treaty. Therefore, according to the Commission's decisional practice[101] any aid or scheme must comply with the following conditions: (i) appropriateness, (ii) necessity and (iii) proportionality.

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

(175) In order to establish the intervention's compatibility with the relevant Crisis Communications, the Commission will assess the aid granted through the three measures as follows:

(1) *Measure 1*: The non-repayable contribution of EUR 265 million will be treated as a recapitalisation for the purposes of examination under the 2013 Banking Communication and the Restructuring Communication, notwithstanding the

[100] The Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ("Recapitalisation Communication"), OJ C 10, 15.1.2009, p. 2; Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ("Restructuring Communication"), OJ C 195, 19.8.2009, p. 9; Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ("2011 Prolongation Communication"), OJ C 356, 6.12.2011, p. 7; and the 2013 Banking Communication.

[101] See Commission decision of 6.9.2013 in State Aid Case SA.37314 "Rescue aid in favour of Probanka", OJ C 314, 29.10.2013, p. 1 and Commission decision of 6.9.2013 in State Aid Case SA.37315 "Rescue aid in favour to Factor Banka", OJ C 314, 29.10.2013, p. 2.

differences from a standard recapitalisation measure in that no rights were acquired by the granting authority and that no remuneration was paid;

(2) *Measure 2*: The EUR 35 million guarantee with the purpose to cover the credit risk associated with certain exposures of Tercas towards […]containing an aid element of EUR 0.14 million qualifies for an assessment under the Impaired Assets Communication[102], as well as for an assessment under the 2013 Banking Communication and the Restructuring Communication as aid for the restructuring of Tercas;

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

(176) Based on the above, the Commission will first assess the compatibility of Measure 2 with the internal market with regard to the Impaired Assets Communication and then proceed to a combined assessment of all three measures under the 2013 Banking Communication and Restructuring Communication.

8.2. Compatibility of Measure 2 with the Impaired Assets Communication

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

8.2.1 Eligibility of assets

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

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

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

[102] Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector, OJ C 72, 26.03.2009, pages 1-22.

8.2.2 Transparency and disclosure, management and valuation

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

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

(183) Therefore, the Commission concludes that the criteria regarding transparency and disclosures have not been fulfilled and that there is also no evidence based on which the Commission could conclude that criteria with regard to management and valuation were fulfilled.

8.2.3 Burden-sharing and remuneration

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

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

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

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

(187) Regarding measures 1 and 3, the form of the measures is legally that of grant aid, i.e. a cash contribution without receiving any value (in form of rights of ownership or remuneration) in exchange. The compatibility criteria set out in the 2013 Banking Communication do not contemplate grant aid as such.

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

(189) In essence, the non-repayable contributions under measures 1 and 3 were provided in order to bring up the negative equity of Tercas to 0 before the business was taken over by BPB. The Commission has in the past approved similar transactions as compatible with the internal market. However, it has done so only as resolution aid

or aid to support the orderly wind-down of a bank[103]. As Italy have stated clearly that neither resolution nor liquidation regimes were applied in the aid measures to Tercas, the Commission cannot apply the same reasoning for Tercas. It therefore has to assess the measure as recapitalisation aid.

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

8.3.1 Restoration of long-term viability

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

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

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

(194) The Commission recognises that it may consider a restructuring plan submitted after the implementation of a recapitalisation measure. The 2013 Banking Communication provides for such a possibility in particular when the aid has been notified and implemented as rescue aid under strict conditions. Nonetheless, in the absence of even a notification for a rescue measure and based on the information available to the Commission, in particular the absence of a restructuring plan, the Commission finds itself unable to consider that the criterion of establishing long-term viability as demonstrated by the presence of a detailed restructuring plan as fulfilled.

8.3.2 Aid limited to the minimum and burden-sharing

(195) The Restructuring Communication supplemented by the 2013 Banking Communication indicates that an appropriate contribution by the beneficiary is necessary to limit the aid to a minimum and to address distortions of competition and moral hazard. To that end, it provides (i) that both the restructuring costs and the

[103] Commission decision C(2014)5682 of 03.08.2014 in case SA.39250 (2014/N) – Portugal –Resolution of Banco Espirito Santo, S.A., OJ C 393, 07.11.2014, Commission decision C(2015)2606 of 16.04.2015 in case SA.41503 (2015/N) - Greece - Resolution of Panellinia Bank through a transfer order to Piraeus bank, OJ C 325, 01.10.2015; Commission decision C(2015)4599 of 02.07.2015 in case SA.41924 (2015/N) – Italy – Resolution (via liquidation) of Banca Romagna Cooperativa, OJ C 369, 06.11.2015.

amount of aid should be limited and (ii) that there should be a maximum burden-sharing by existing shareholders and subordinated creditors.

(196) According to point 29 of the 2013 Banking Communication, the Commission can only authorise aid measures once the Member State concerned demonstrates that all measures limit such aid to the minimum necessary have been exploited to the maximum extent. To that end, Member States are invited to submit a capital raising plan, before or as part of the restructuring plan.

(197) According to point 44 of the 2013 Banking Communication, "subordinated debt must be converted or written down, in principle before Sate aid is granted. State aid must not be granted before equity, hybrid capital and subordinated debt have fully contributed to offset any losses".

(198) According to point 47 of the 2013 Banking Communication, outflows of funds must be prevented at the earliest stage possible to limit the amount of aid to the minimum necessary.

(199) According to point 52 of the 2013 Banking Communication, the Commission authorises rescue aid in the form of recapitalisation aid (and thereby accept a restructuring plan after the implementation of the measure) only if the rescue aid does not prevent compliance with the burden-sharing requirements set out in the 2013 Banking Communication.

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

(201) However, EUR 189 million (as of 31 March 2014) of subordinated debt of Tercas on a consolidated basis (including its subsidiary Caripe) should have been converted or written down in line with the requirements envisaged in the 2013 Banking Commission in order to reduce the capital shortfall and minimise the amount of aid. The Commission notes that no such conversion or write-down was performed and that, according to information provided by Tercas, subordinated debt issued by the holding company amounting to EUR 36 million expired and was repaid in December 2014. The Commission has no information on whether subordinated debt issued by Caripe expired and was repaid.

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

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

[104] See footnote 103.

(204) Although the interested parties refer to point 42 of the 2013 Banking Communication, the Commission points out that point 42 refers to senior debt holders and not subordinated debt holders.

(205) The interested parties also make reference to point 45 of the 2013 Banking Communication, which allows an exception to the principle of conversion or writing-down of subordinated creditors where implementing such measures would endanger financial stability or lead to disproportionate results.

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

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

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

(209) BPB and Tercas claim further that the intervention was limited to the minimum necessary to achieve its objective, i.e. long-term profitability of Tercas. They support the argument with the following reasons: 1/ the FITD's contribution meets the 'least

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105 Commission decision C(2013)9634 of 18.12.2013 in case SA.35709 (2013/N) – Slovenia – Restructuring of Nova Kreditna Banka Maribor d.d. (NKBM), OJ C120, 23.04.2014, Commission decision C(2013)9632 of 18.12.2013 in case SA.33229 (2011/N) – Slovenia – Restructuring of NLB, OJ L246 21.08.2014, Commission decision C(2013)9633 of 18.12.2013 in case SA.37690 (2013/N) – Slovenia – Rescue aid in favour of Abanka d.d., OJ C 37, 07.02.2014, Commission decision C(2013)9622 of 18.12.2013 in case SA.37642 (2013/N) – Slovenia – Orderly winding down of Probanka d.d., OJ C69 07.03.2014 and Commission decision C(2013)9640 of 18.12.2013 in case SA.37643 (2013/N) – Slovenia – Orderly winding down of Factor banka, OJ C 69, 07.03.2014.

106 Commission decision C(2014)5682 of 03.08.2014 in case SA.39250 (2014/N) – Portugal –Resolution of Banco Espirito Santo, S.A., OJ C 393, 07.11.2014.

107 The situation in the case of Tercas is not comparable with the Eurobank decision, where the Commission accepted disproportionate results for a measure where the State fully underwrote a recapitalisation measure without actually having to provide any capital in the end, as the entire capital raising was taken up by private sources. Commission decision C(2014)2933 of 29.04.2014 in cases SA.34825 (2012/C), SA.34825 (2014/NN), SA.36006 (2013/NN) SA.34488 (2012/C) SA.31155 (2013/C) For the Eurobank group, OJ L 357, 12.12.2014.

cost' criterion of the FITD Statutes, 2/ it was the only feasible option, in view of the deterioration of Tercas and of the need to find a purchaser and 3/ the FITD contributed only partly to resolving the negative equity and restoring minimum capital ratios: specifically, it contributed EUR 265 million (against the EUR 495 million required).

(210) In that respect, the Commission recalls that the 'least cost criterion' as in the FITD Statutes is irrelevant for the assessment of the compatibility of the measures. For compatibility, the only relevant question in this context is whether the State aid provided is sufficient to restore the long-term viability of the financial institution in question and is limited to the minimum necessary while distortions of competition are sufficiently limited. The claim that the aid granted was less than the required amount to meet capital requirements does not prove that aid was limited to the minimum necessary.

(211) As pointed out in recital (194), it is not clear to the Commission from the information provided that the aid was indeed sufficient to restore viability. Moreover, the aid was clearly not limited to the minimum as bail-in of subordinated debt was not applied.

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

8.3.3 Measures to limit distortions of competition

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

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

(215) Regarding all three measures, the Commission notes the complete absence of any elements containing remuneration associated with the FITD's contribution, or a fee for the guarantee, as well as the absence of any acquisition of rights (i.e. ordinary shares) or future upside participation. There also was no claw-back mechanism allowing recovery of part of the aid from Tercas after its return to viability.

(216) The FITD claims that in the case of interventions aimed at covering negative equity to enable the purchase of a failing undertaking by other parties, it is quite normal that there should be no return. The Commission notes that such interventions constitute grants of assistance whose immediate effect of the beneficiary bank not exiting the market as it would have done in the absence of such support. They must therefore be considered a major distortion of competition. Accordingly, as stated in recital (189), the Commission considers such measures compatible with the internal market only when aid is granted in resolution or to support orderly wind-down.

[108] See footnote 103.

(217) The FITD has pointed out that the Commission has previously accepted a low level or even the absence of remuneration in, for example, the cases of Banco de Valencia (BVA)[109], Banco Portugues de Negocios (BPN)[110] or Banco CAM[111].

(218) Here, the Commission recalls that all those decisions – as far as approval was not granted in the form of aid in resolution or to support orderly wind-down (recital (189)) – were taken before the 2013 Banking Communication became applicable.

(219) Furthermore, on substance, the Commission points out that in line with the requirements of the Restructuring Communication particularly deep restructuring measures were implemented in all three cases invoked by the interested parties. They led in all three cases to the disappearance of the bank including its brand from the market. In addition, business reduction was particularly significant in each of those cases (~50% reduction in number of branches and ~35% in headcount in CAM, ~90% reduction in number of branches and ~50% in headcount in BVA, 65% reduction of balance sheet and closure of all business lines but retail in BPN).

(220) The Commission recalls that by contrast, as regards Tercas, branches and headcount are going to be reduced by roughly […]% each while all business lines continue to operate. In addition the brand name of Tercas continues to exist and the business continues to operate in its former business area.

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

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

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

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

8.4. Conclusion on compatibility

(225) In summary, the Commission does not find any grounds based on which it could find the three measures compatible with the internal market.

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109 Commission decision C(2012)8849 of 28.11.2012 in case SA.34053 (2012/N) – Spain - Recapitalisation and restructuring of Banco de Valencia S.A. OJ C 75, 14.03.2013.

110 Commission decision C(2012)2043 of 27.03.2012 in case SA.26909 (2011/C) – Portugal – Restructuring of Banco Português de Negócios, OJ L301 30.10.2012.

111 Commission decision C(2010)4453 of 29.06.2010 in case NN 61/2009 –Spain Rescue and restructuring of Caja Castilla-La Mancha, OJ C289, 26.10.2010.

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

9. RECOVERY

(227) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market.[112] The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation.[113]

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

(229) In line with the case-law, Article 16(1) of Council Regulation (EU) No 2015/1589[115] provides that "where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law".

(230) Italy and third parties did not formally claim that recovery should not be required on grounds that it would be contrary to a general principle of Union law. Nevertheless, in light of the exchanges it had with Italy and the third parties, the Commission considers it appropriate to assess whether in the case at stake a recovery order would be contrary to general principles of union law.

(231) The reference to DGS interventions made in point 63 of the 2013 Banking Communication and the past Commission decision-making practice[116] would preclude any bank or Member State in June 2014 having any expectation that DGS interventions should not be considered State Aid. Moreover, the beneficiary of unlawful aid cannot have legitimate expectations as to its legality in absence of a final decision of the Commission pursuant to Article 108(3) of the Treaty.

(232) In addition the Commission assesses the compatibility of an aid measure in principle on the basis of the criteria applicable at the date on which it takes its decision. The compatibility criteria set forth in the 2013 Banking Communication apply as of 1

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112 See Case 70/72 *Commission* v *Germany* EU:C:1973:87, paragraph 13.

113 See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* EU:C:1994:325, paragraph 75.

114 See Case C-75/97 *Belgium* v *Commission* EU:C:1999:311 paragraphs 64 and 65.

115 Council Regulation (EU) No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

116 See Commission decision C(2011)5554 of 01.08.2011 in case SA.33001 (2011/N) – Denmark – Part B – Amendment to the Danish winding up scheme for credit institutions, OJ C 271, 14.09.2011, p. 1, recitals 43 to 49; Commission decision C(2012)3540 of 30.05.2011 in case SA.34255 (2012/N) – Spain – Restructuring of CAM and Banco CAM, OJ C 173, 19.06.2013, recitals 76 to 87; and Commission decision C(2014)1060 of 18.02.2014 in case SA.37425 (2013/N) – Poland – Credit Unions Orderly Liquidation Scheme, OJ C 210, 04.07.2014, recitals 44 to 53.

August 2013, and hence were applicable more than 11 months before the measures were granted. Therefore there was no lack of legal certainty on grounds of the novelty of the 2013 Banking Communication.

(233) Moreover the Commission notes that recovery is the normal consequence for negative decisions in cases of unlawful aid, and as such it cannot be considered a disproportionate result.

(234) Moreover the case Law of the Union Courts has strictly circumscribed the scope of absolute impossibility for a Member State to comply with a recovery order. In particular, financial difficulties which would be faced by an aid beneficiary, if the aid were to be recovered, does not render recovery impossible. Therefore the Commission concludes that in the case at stake absolute impossibility to recover could not be invoked.

(235) Thus, given that the measures in question were implemented in violation of Article 108(3) of the Treaty, and are to be considered as unlawful and incompatible aid, and that recovery would not be contrary to a general principle of Union law, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery. In the case at stake, the date at which the aid was put at the disposal of the company is the date of the pay out of the contribution for measure 1 and the date of the establishment of the guarantee for measures 2 and 3.

10. CONCLUSION

(236) The Commission finds that Italy has unlawfully implemented Measure 1 – a non-repayable contribution of EUR 265 million, Measure 2 – a guarantee for EUR 35 million of credit exposures to […]with an aid element of EUR 0.14 million and Measure 3 – a further non-repayable contribution of EUR 30 million, in total EUR 295.14 million as State aid, granted on 7 July 2014 in breach of Article 108(3) of the Treaty on the Functioning of the European Union. As a consequence, the illegal and incompatible aid should be recovered from the beneficiary, Tercas, together with the recovery interest.

HAS ADOPTED THIS DECISION:

Article 1

The State aid implemented through measure 1 – a non-repayable contribution of EUR 265 million, measure 2 – a guarantee for EUR 35 million of credit exposures to […]with an aid element of EUR 0.14 million and measure 3 – a further non-repayable contribution of EUR 30 million, in total EUR 295.14 million, unlawfully granted by Italy on 7 July 2014 in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Tercas is incompatible with the internal market.

Article 2

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

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

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

Article 3

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

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

Article 4

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

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

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

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

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

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 23.12.2015

For the Commission

Margrethe VESTAGER
Member of the Commission