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| <p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p> |  | <p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p> |
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**Subject: State Aid SA.41924 (2015/N) (ex 2015/PN) – Italy  
Resolution (via liquidation) of Banca Romagna Cooperativa – Credito Cooperativo Romagna Centro e Macerone - Società Cooperativa**

Sir,

#### **1. PROCEDURE**

- 1) On 5 May 2015 Italy initiated pre-notification exchanges with the Commission on the liquidation process of Banca Romagna Cooperativa – Credito Cooperativo Romagna Centro e Macerone – Società Cooperativa in Amministrazione Straordinaria ('BRC' or 'the bank').
- 2) On 29 June 2015, Italy notified to the Commission the forthcoming liquidation of BRC under the existing Italian insolvency law for banks.
- 3) By letter dated 26 June 2015, Italy agreed to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of Regulation 1/1958<sup>1</sup> and to have the present decision adopted and notified in English.

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<sup>1</sup> EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

Onorevole Paolo GENTILONI  
Ministro degli Affari esteri e della Cooperazione Internazionale  
P.le della Farnesina 1  
I - 00194 Roma  
Italy

## **2. BACKGROUND**

### **2.1. The beneficiary**

- 4) BRC is a small Italian bank founded in 2008, having its headquarters in Cesena, in the Emilia-Romagna region. It is a mutual bank (Banca di credito Cooperativo – 'BCC'<sup>2</sup>); that means that it grants credit primarily to its members, its shares are non-tradable and held only by members and that it allocates three-quarters of its profits to building reserves. Its business is focussed on supporting local economy (mainly households and micro- and small business) in the Emilia-Romagna region in Italy.
- 5) On 31 December 2012 the bank had a balance sheet size of EUR 1.1 billion, made a profit of EUR 0.3 million and had 24 branches.
- 6) On 13 November 2013, following a proposal from the Bank of Italy ('BOI'), the Ministry of Economy and Finance put the bank under special administration due to serious administrative irregularities, violation of laws governing the bank's activities, as well as serious expected losses.
- 7) On 3 November 2014, the Ministry of Economy and Finance extended the procedure for another six months in order to allow the special administrators to find a solution to the bank's problems.
- 8) On 12 May 2015, the BOI extended the special administration for another two months to arrange the liquidation process and the sale of assets and liabilities to an already identified buyer.
- 9) As of 31 May 2015, the unpublished accounts of BRC show a balance sheet size of EUR 891 million and a loss of EUR 111.3 million resulting in a negative equity.

### **2.2. The sale process**

- 10) To find a solution for BRC, the special administrators and the BOI decided to either sell BRC as a going concern or sell some of BRC's assets and liabilities out of liquidation.
- 11) For that purpose, a competitive tender process was organised in the last quarter of 2014. While the process was not officially advertised, the Italian authorities submit that the process was open to any potential bidder as the ongoing search for a banking partner was well known in the banking market. To stimulate expression of interest, the special administrator decided to contact potential bidders within the BCC network. Because BCC are subject to a statutory cap of 5% on risky assets they can hold outside their territorial remit, the special administrator selected potential bidders on the basis of geographical and operative criteria. The four invited bidders were the only ones operating in the same region and whose estimated capital ratios after the acquisition were above the regulatory requirements. The invitation letter indicated that the participants to the tender process were allowed to conduct a due diligence on BRC before making a bid and that bids would be accepted for either BRC as a going concern or parts of its assets and liabilities only.

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<sup>2</sup> Under Article 150 of the Italian Banking Act – Testo Unico Bancario (TUB) see footnote 24.

- 12) Of the four invited bidders, one turned down the invitation, a second declared before the conclusion of the due-diligence process that it was no longer interested and a third abandoned the process after the due-diligence. Beyond the four invited parties, the special administrator received no other expression of interest.
- 13) Only [...] \* made an offer for only some parts of BRC's business and including financial support for the acquisition. Consequently, Italy decided to abandon the solution of resolving BRC as a going concern and instead resolve BRC as a gone concern under national insolvency law by selling only parts of assets and liabilities out of liquidation and including the participation of the Fondo di Garanzia dei Deposanti del Credito Cooperativo ('FGDCC'), the statutory DGS for mutual banks.

### 3. DESCRIPTION OF THE MEASURE

- 14) In order to ensure that the best offer was presented and chosen, Banca Sviluppo was invited by Italy to express its interest for parts of BRC's assets and liabilities out of liquidation. Banca Sviluppo is a fully consolidated subsidiary of the ICCREA banking group (ICCREA). ICCREA is the central organisation of Italian mutual banks, holds assets of EUR 50 billion as of June 2014 (about 1.25% of the Italian banking market) and is under the supervision of the ECB as a systemic Italian bank. Through Banca Sviluppo, ICCREA is active in acquiring and resolving cooperative banks through mergers, divisions and acquisitions.
- 15) Both [...] and ICCREA submitted offers for a set of assets and liabilities. The negative difference between assets and liabilities to be acquired was to be covered in cash by the FGDCC.
- 16) The two offers differed *inter alia* as to the scope of assets and liabilities to be acquired. According to the special administrator, [...] 's bid was not final and contained elements of uncertainty requiring complex additional valuations and negotiations in order to precisely determine its cost. The special administrator applied the same assumptions in the valuation of both bids to identify the least costly one for the FGDCC which led to the offer of Banca Sviluppo being selected. That offer was complete and final as well as the one minimising the cost of the intervention of the FGDCC after taking into account the estimated proceeds from the liquidation.
- 17) Italy plans to implement the liquidation plan before 10 July 2015. Once the Commission has decided on the notified measure, BOI will terminate the special administration. Then, following a decree from the Ministry of Finance, the bank will be put under mandatory administrative liquidation procedure<sup>3</sup> and liquidators will be appointed by the BOI to take over the bank and implement the sale of assets and liabilities.
- 18) Immediately after the opening of the liquidation, ICCREA will acquire all of BRC's assets and liabilities with the exception of loans classified as non-performing, deferred tax assets (DTA) and subordinated debt. The FGDCC will contribute in cash the negative difference between the acquired assets and liabilities and in turn become the only senior creditor of the entity in liquidation.

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\* Confidential information.

<sup>3</sup> Under section III of TUB.

- 19) The economic activities made up by the assets and liabilities acquired by ICCREA will immediately cease to operate as a stand-alone entity and will become part of the structure and network of Banca Sviluppo, where they will be subject to a far-reaching restructuring.
- 20) The intervention will cost the FGDCC a maximum amount of EUR 260.8 million, corresponding to EUR 248.9 million for the negative difference between assets and liabilities acquired by ICCREA and no more than EUR 11.9 million of transaction related costs covering agreements on staff reduction and real-estate related costs. The exact amount of the contribution will depend of the size of BRC's balance sheet at the liquidation date.
- 21) In return, the FGDCC will become the only senior creditor of the liquidation and, on the assumption that the proceeds of liquidation will not be sufficient to satisfy all of the liabilities, the exclusive beneficiary of the recovery of the residual assets left in the liquidation. The special administrators have brought legal action against the previous management of BRC, and any revenues resulting from that litigation will also be transferred to the FGDCC.

Table 1 – Provisional balance sheet of BRC in liquidation after asset-liability transfer to ICCREA (in EUR million)

| Assets       |               | Liabilities       |               |
|--------------|---------------|-------------------|---------------|
| Bad Loans    | 156.90        | FDGCC claims      | 260.80        |
| DTA          | 66.00         | Subordinated debt | 23.96         |
| <i>Total</i> | <i>222.90</i> | <i>Total</i>      | <i>284.76</i> |

#### 4. THE ITALIAN DEPOSIT GUARANTEE SCHEME (DGS) FRAMEWORK

- 22) The deadline for transposition of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes ("Directive 2014/49")<sup>4</sup> is 3 July 2015. Hence the applicable Union law at the time of the present decision is Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (Directive 94/19/EC)<sup>5</sup>.
- 23) Since Italy has not yet transposed Directive 2014/49/EU, it follows that the intervention of the FGDCC, which is the statutory DGS for mutual banks, still falls under the existing national law<sup>6</sup> implementing Directive 94/19/EC.
- 24) The Italian implementation of Directive 94/19/EC goes further than the minimum required under that Directive and provides for rules and procedures that regulate DGS interventions during banking crises<sup>7</sup>.

<sup>4</sup> OJ L 173, 12.6.2014, p. 149.

<sup>5</sup> OJ L 135, 31.5.1994, p. 5.

<sup>6</sup> Decreto Legislativo 4 December 1996, n.659

<sup>7</sup> Articles from 96 to 96-quarter of the Italian Banking Act – Testo Unico Bancario (TUB Decreto legislativo 1° settembre 1993, n. 385.

## **5. POSITION OF THE ITALIAN AUTHORITIES**

- 25) Italy notified this measure for reasons of legal certainty and submits that the measure does not entail State aid as it is not granted through State resources.
- 26) According to Italy even if the FGDCC is, or more generally Italian DGSs are, based on mandatory contributions paid by member banks, the use of those resources cannot be considered under the control of public authorities and imputable to the State for the following reasons:
- (a) alternative measures by DGSs are totally different from the compulsory interventions to reimburse depositors in a bank in liquidation, since they are fully discretionary and do not take place as a consequence of an obligation established by legislative provisions;
  - (b) such interventions are aimed at pursuing, first and foremost, a private interest which is different from the protection of depositors, i.e. minimising the costs for the banks that are members of the Fund by preventing the mere liquidation of credit institutions, which is generally much more expensive;
  - (c) the FGDCC's decisions are autonomously taken by its bodies without any influence from the Bank of Italy or other public authorities, either in the governance or in the decision-making process.
- 27) Italy further submits that even if the measure was to be considered State aid, it would be compatible with the rules of the internal market as set forth in the Commission Communication from 1 August 2013 on the application of State aid rules to support measures in favour of banks in the context of the financial crisis (the 2013 Banking Communication)<sup>8</sup>.
- 28) Italy also submits that the measure was carried out in compliance with the applicable Italian law, which specifies that a DGS can carry out alternative interventions only if they are less costly than reimbursing covered depositors.

## **6. ASSESSMENT OF THE MEASURES**

### **6.1. Beneficiary of the FGDCC measure**

- 29) The Commission notes that the measure contributes to the stabilisation and the continuance of the economic activities made up by the assets and liabilities acquired by ICCREA as the measure will allow the continuation of those activities within the buyer. Therefore the Commission considers that such activities are beneficiary of the notified measure.
- 30) The economic activities not acquired by ICCREA will still be subject to the ordinary insolvency procedure for banks. Since winding up these economic activities is subject to the same procedure as it would be in absence of aid, such activities do not obtain any benefit from the granting of the notified aid measure. Hence the Commission considers

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<sup>8</sup> OJ C 216, 30.07.2013, p. 1.

that the economic activities not acquired by ICCREA do not benefit from the notified measure implemented through the FGDCC.

- 31) Under section 6.3 of the 2013 Banking Communication it is possible to exclude the presence of aid to the buyer if the sale is organised via an open and unconditional competitive tender and the assets are sold to the highest bidder.
- 32) The assets and liabilities have been offered through the sales process described above. The Commission accepts the process as open and competitive on the basis of the information submitted by Italy, in particular that (a) all potential competitors, although not formally invited, could participate in the ongoing tender process, (b) that the tender process was overt and easily detectable because the marketplace was aware of the search for a banking partner and (c) that the sale process itself was aimed at selling assets and liabilities to the highest bidder. The Commission consequently excludes the presence of aid to the buyer.

## **6.2. Existence of aid**

- 33) According 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 measure.
- 34) Where DGSs carry out measures other than paying out depositors in the liquidation of a bank, for example transfers of assets and liabilities in the context of national insolvency proceedings, they should in any event comply with State aid rules.<sup>9</sup>
- 35) The Commission also points out that, because they act under a public mandate of the Member State and remain under the control of the public authority,<sup>10</sup> statutory DGSs are extremely likely to grant State aid when they provide the interventions mentioned in recital 34) as well as when they undertake alternative measures to prevent the failure of a credit institution. That preliminary evaluation is confirmed by an examination of Member States' DGSs, in particular in the light of the Commission's recent assessments of the conformity with State aid rules of DGSs' interventions formally notified to it<sup>11</sup>.

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<sup>9</sup> See also point 63 of the 2013 Banking Communication, "the use of [deposit guarantee funds] or similar funds to assist in the restructuring of credit institutions may constitute State aid. Whilst the funds in question may derive from the private sector, they may constitute aid to the extent that they come within the control of the State and the decision as to the funds' application is imputable to the State".

<sup>10</sup> An informal review by the Commission of Member States' DGSs confirmed that the existing DGSs act under a national public mandate or operate under public authority control, two of the criteria relevant to conclude that the behaviour of a DGS is imputable to the State.

<sup>11</sup> 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.

### 6.2.1. State resources and imputability to the State

- 36) 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 a transfer of State resources, even if not administered by the public authorities. The mere fact that resources are financed in part by private contributions is not sufficient to rule out the public character of those resources since 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<sup>12</sup>.
- 37) Moreover, as the Court of Justice pointed out in *Ladbroke*<sup>13</sup>, *Stardust Marine*<sup>14</sup> and *Doux Élevage*<sup>15</sup>, resources that remain under public control and are therefore available to the public authorities constitute State resources.
- 38) 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”<sup>16</sup>. The State would only control the validity and lawfulness of the trade organisation's levying of contributions and could not influence the administration of the funds<sup>17</sup>.
- 39) The Court of Justice has also clarified in *Stardust Marine*<sup>18</sup> 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 (for instance, a public undertaking) can be inferred from a set of indicators arising from the circumstances of the case, such as the fact that, apart from factors of an organic nature which link it to the State, 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 a public undertaking is imputable to the State<sup>19</sup>. Similarly, the fact that private persons participate in the running of an entity is not sufficient to exclude imputability to the State of the interventions at issue.

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<sup>12</sup> Case T-139/09 *France v Commission* EU:T:2012:496, paras 63 and 64.

<sup>13</sup> Case C-83/98 P *France v Ladbroke Racing and Commission* EU:C:2000:248, para 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”.

<sup>14</sup> Case C-482/99 *France v Commission* (“*Stardust Marine*”) EU:C:2002:294, para 37.

<sup>15</sup> Case C-677/11 *Doux Élevage and Coopérative agricole UKL-ARREE* EU:C:2013:348, para 35

<sup>16</sup> Case C-677/11 *Doux Élevage and Coopérative agricole UKL-ARREE* EU:C:2013:348, paras 36 and 39.

<sup>17</sup> Case C-677/11 *Doux Élevage and Coopérative agricole UKL-ARREE* EU:C:2013:348, para 38.

<sup>18</sup> Case C-482/99 *France v Commission* (“*Stardust Marine*”) EU:C:2002:294, para 55. See also Case C-303/88 *Italy v Commission* EU:C:1991:136, paras 11 to 13.

<sup>19</sup> The General Court has also considered the “supervision by the public authorities” as “one of three indicia show[ing] that the Commission was correct to find that the measures at issue [...] were directly imputable to the [...] State”, in Case T-387/11 *Nitrogénművek Vegyipari Zrt. v Commission* EU:T:2013:98, paras 65 and 66.

- 40) In the Austrian Green Electricity Act judgment of December 2014<sup>20</sup>, the General Court found that the Commission was correct in classifying the green electricity aid mechanism and the partial exemption of energy-intensive users from the financing of green electricity as imputable to the State. The fact that they were established by law was held sufficient to find such imputability. The General Court indicated that it was not necessary to carry out a more thorough assessment of the possible integration of the public limited company in charge of controlling the mandatory surcharge for green electricity imposed on the distributors and the consumers (the "ÖMAG") into the structures of the public administration, of its legal status or of the intensity of the supervision exercised by the public authorities over its management. It also indicated that, in any case, it had already been established in the examination of another part of the same plea that the ÖMAG was integrated in a structure regulated by the Austrian regulator which set out not only the nature of its activities and how they should be performed in practice, but also ex post supervisory control by the competent State bodies. Hence, the ÖMAG could not be considered as a private operator acting freely.
- 41) Unlike the pay-out of covered deposits by DGSs in cases of liquidation of banks, which are mandatory under Directive 94/19/EC, the FGDC's interventions in transfers of assets and liabilities in the context of national insolvency proceedings as in the case at hand are discretionary and fulfil a public policy mandate laid down in Italian law at the discretion of the State<sup>21</sup>.
- 42) While the TUB allows the FGDC to intervene in cases other than paying out covered depositors in liquidation, such interventions are also subject to authorisation by the Italian authorities (the BOI) under the same provision and guided by the same concerns<sup>22</sup> as for interventions paying out covered depositors<sup>23</sup>.
- 43) By adopting Article 96-bis, paragraph 1, last sentence, of the Italian Banking Act – Testo Unico Bancario (TUB)<sup>24</sup>, the Italy has chosen to allow their recognised DGSs, among which is the FGDC, to intervene in operations of transfer of assets and liabilities, as is made explicit by Article 33 of the FGDC's Statutes.
- 44) Thus, the FGDC's support interventions in operations of transfer of assets and liabilities follow the public policy mandate of depositor protection under the control of the Italian authorities. However, that instrument is in addition to and not the same as the function of reimbursing covered depositors laid down in Directive 94/19/EC, which is to pay out covered depositors in case of liquidation.
- 45) The interventions of the FGDC in operations of transfer of assets and liabilities follow a public mandate of the Member State given that:

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<sup>20</sup> Case T-251/11 *Austria v Commission (Austrian Green Electricity Act)* EU:T:2014:1060, para 87.

<sup>21</sup> That assessment will not change after the transposition of Directive 2014/49, which provides for the mandatory intervention to pay out covered deposits and for the possibility for Member States to allow the use of their DGS for interventions other than the reimbursement of covered depositors under the conditions specified in Article 11, paras 3 and 6.

<sup>22</sup> I.e. the protection of depositors and the stability of the financial system (Art 96-ter, paragraph 1, d) of the TUB provides that "La Banca d'Italia, avendo riguardo alla tutela dei risparmiatori e alla stabilità del Sistema bancario [...] autorizza gli interventi dei sistemi di garanzia ...".

<sup>23</sup> Art 96-ter, paragraph 1, d) of the TUB.

<sup>24</sup> Decreto legislativo 1° settembre 1993, n. 385.



- (a) The TUB is the basis for recognition of the FGDC as a mandatory DGS in Italy;
  - (b) Article 96-bis, paragraph 1, last sentence, of the TUB allows the FGDC to intervene in ways other than directly paying out covered depositors in liquidation as is obligatory under Directive 94/19/EC; and
  - (c) The Statutes of the FGDC must be approved by the BOI<sup>25</sup>.
- 46) Moreover, the Italian authorities appear to constantly control whether the use of the FGDC resources is consistent with its specific public policy mandate and to at least co-decide with the FGDC the use of the latter's resources in the case at issue. In that regard, the factors set out in recitals 47) to 48) are relevant.
- 47) Article 96-ter, paragraph 1, b) of the TUB provides that the BOI shall "coordinate the activity of the guarantee schemes with banking crisis discipline and the supervisory activity"<sup>26</sup>.
- 48) Furthermore, the Italian authorities, including the BOI in its capacity as supervisor, have constantly been involved in different forms and at various stages in the design, approval and implementation of the FGDC's support interventions:
- (a) FGDC intervention has been requested by BRC's special administrator. As public officials<sup>27</sup>, special administrators represent the public interest; they are appointed and supervised by the BOI;
  - (b) According to Article 33 of its Statutes, the FGDC intervenes in operations of transfer of assets and liabilities in agreement with the liquidators. As public officials<sup>28</sup>, liquidators represent the public interest; they are appointed and supervised by the BOI;
  - (c) According to Article 96-ter, paragraph 1, (d) of the TUB, the BOI must authorise the interventions of the FGDC, having regard to the protection of depositors and to the stability of the financial system. Hence the authorisation is granted in relation to specific national public policy provisions;
  - (d) the BOI coordinates the activity of the FGDC<sup>29</sup>;
  - (e) The BOI participates as an observer in the meetings of the Board and the Executive Committee of the FGDC<sup>30</sup>.
- 49) The Commission is of the opinion that, contrary to the elements invoked by the Court of Justice in *Doux Élevage*<sup>31</sup>, the elements set out in recitals 42) to 48) show that the

<sup>25</sup> Article 96-ter, paragraph 1, a) of the TUB ("La Banca d'Italia, avendo riguardo alla tutela dei risparmiatori e alla stabilità del Sistema bancario [...] riconosce i sistemi di garanzia, approvandone gli statuti...").

<sup>26</sup> "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;"

<sup>27</sup> Article 71 and 72 of the TUB.

<sup>28</sup> Article 84 paragraph 1 of the TUB.

<sup>29</sup> See recital 47).

<sup>30</sup> Article 16, paragraph 6, and 19, paragraph 2, of FGDC's Statutes.

<sup>31</sup> See recital 38).

FGDCC remained under constant public control, which was effectively performed<sup>32</sup>, over objectives that are specific, fixed and defined by the public authorities, going beyond a mere formal control of the validity and lawfulness of the FGDCC's behaviour<sup>33</sup>.

- 50) The Commission considers that those elements are indicators showing that the FGDCC's intervention at issues involve State resources and is imputable to the State.

#### 6.2.2. *Selective advantage*

- 51) As regard the existence of an undue selective advantage, the FGDCC will not carry out its intervention acting in the capacity of a market economy operator. In that respect, the Commission notes that the FGDCC plans to award support through a non-repayable contribution to cover the negative difference between assets and liabilities transferred to ICCREA. Such an action, for which there is no expectation of any return and indeed for which no return is possible, is not that of a market economy operator and shows that the FGDCC acted in its capacity as a body fulfilling a public remit rather than in the capacity of a market economy operator<sup>34</sup>. Such interventions constitute grants of assistance, whose effect was that it was possible to transfer the identified assets and liabilities to the buyer, hence avoiding a disorderly winding down of BRC as would have happened in the absence of such an intervention.

- 52) Even if those features of the interventions by the FGDCC (i.e., the absence of any repayment obligation and the absence of any fee for the capital contribution and the guarantees) could allow it to limit costs to which it would otherwise be exposed (namely, the costs to the FGDCC of reimbursing depositors at the stage of compulsory administrative liquidation of BRC), those costs cannot be taken into account in assessing if the intervention of the FGDCC was in line with the conduct of a market economy operator. It appears that the costs in question arise from obligations imposed on the FGDCC as a DGS which is required to act in the public interest by protecting depositors. Those costs would not have been relevant for a market economy operator in deciding whether to undertake such interventions since it would not be exposed to the costs of directly paying out covered depositors in the event of the liquidation of BRC and therefore would not seek to limit such costs by providing support to BRC which would not be repaid to it and from which it would obtain no return. Such costs are not to be taken into account in the application of the market economy operator test<sup>35</sup>.

- 53) As such, the Commission concludes that the interventions of the FGDCC provided an advantage to the economic activity transferred to ICCREA, namely a non-repayable contribution to cover the negative unbalance between assets and liabilities that avoided disorderly winding down of BRC.

- 54) The intervention at issue is selective in nature given that it relates to BRC only.

#### 6.2.3. *Distortion of competition and affectation of trade between Member States*

- 55) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other

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<sup>32</sup> See recital 48).

<sup>33</sup> See recital 38).

<sup>34</sup> See Case C-124/10 P *Commission v EDF* EU:C:2012:318, paras 80 and 81.

<sup>35</sup> 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, para 52.

undertakings with which it competes<sup>36</sup>. Since the measure under assessment grants a financial advantage to an individual undertaking (see recital 53), active in a highly competitive market, it can be concluded that the condition of distortion of competition is present. Moreover, financial institutions based in Italy are in competition with domestic as well as foreign undertakings. On that basis, the Commission considers that the FGDCC measure is liable to affect trade between Member States.

#### 6.2.4. Conclusion on the presence of aid

56) In view of the above, the Commission concludes that the FGDCC measure entails State aid in the sense of Article 107(1) of the Treaty.

### 6.3. Compatibility assessment

57) The primary legal basis for the compatibility assessment is Article 107(3)(b) of the Treaty.

58) The FGDCC measure is implemented in the context of the national insolvency proceedings provided for under title IV section III of the TUB<sup>37</sup>, which under Italian law is the only insolvency procedure applicable to banks<sup>38</sup>. The main features of this insolvency procedure are the following:

- (a) The Ministry of Economy, on proposal of the BOI, revokes the banking licence of the bank and put it under the insolvency procedure<sup>39</sup>; the main consequences are the suspension of the payment of any kind of liability by the bank, and a ban for the bank's creditors to undertake enforcement actions<sup>40</sup>;
- (b) Liquidators are appointed by the BOI. Their function is to assess the bank's liabilities, to liquidate the assets and to distribute the proceeds of the liquidation among the creditors<sup>41</sup>;
- (c) Liquidators have the power to transfer assets and liabilities, business or parts of business, and goods and contracts "en bloc", upon authorisation of the BOI<sup>42</sup>.

59) Therefore, the Commission considers that the FGDCC intervention implemented on this basis is aimed at undertaking an orderly liquidation of the bank. Hence the secondary legal basis is the 2013 Banking Communication, and more specifically section 6 on liquidation aid.

60) Recitals (71) to (78) of the 2013 Banking Communication set forth the compatibility conditions for aid measures in the context of an orderly liquidation. Recital (70) states that the Commission will assess the compatibility of liquidation aid measures aimed at resolving credit institutions on the same lines *mutatis mutandis* as set out in Sections 2, 3

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<sup>36</sup> Case 730/79 *Phillip Morris* ECLI:EU:C:1980:209, para 11; and Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and others v Commission* ECLI:EU:T:2000:151, para 80.

<sup>37</sup> Liquidazione coatta amministrativa.

<sup>38</sup> See paragraph 6 of article 80 of the TUB: le banche non sono soggette a procedure concorsuali diverse dalla liquidazione coatta prevista dalle norme della presente sezione.

<sup>39</sup> See Article 80 paragraph 1 of the TUB.

<sup>40</sup> See Article 83 of the TUB.

<sup>41</sup> See Articles 81, 84, 86 and 90 of the TUB.

<sup>42</sup> See Article 90 paragraph 2 of the TUB.

and 4 of the Restructuring Communication<sup>43</sup>. Finally, recitals (79) to (82) specify rules to be complied with in case a credit institution is sold during the orderly liquidation procedure.

- 61) Therefore, the Commission considers that, in order for the notified aid measure to be compatible under Article 107(3)(b) of the Treaty, it must comply with the following criteria:
- (a) *Limitation of liquidation costs*: aid amounts should enable the credit institution to be wound up in an orderly fashion, while limiting the amount of aid to the minimum necessary;
  - (b) *Limitation of distortions of competition*: aid should not result in longer-term damage to the level playing field and competitive markets and measures to limit distortions of competition due to State aid have to be taken as long as the beneficiary credit institution continues to operate;
  - (c) *Own contribution (burden-sharing)*: appropriate own contribution to liquidation costs should be provided by the aid beneficiary, particularly by preventing additional aid from being provided to the benefit of the shareholders and subordinated debt holders. Therefore, the claims of shareholders and subordinated debt holders must not be transferred to any continuing economic activity;
  - (d) *Restoring long-term viability*: the sale of an ailing bank to another financial institution can contribute to the restoration of long-term viability, if the purchaser is viable and capable of absorbing the transfer of the ailing bank, and may help to restore market confidence.

### 6.3.1. *Limitation of liquidation costs*

- 62) The amount of aid needed to wind up the institution in an orderly fashion has been determined by the outcome of the competitive process described above with the aim of minimising the negative price of the assets and liabilities to be sold. In that context the offer that was selected minimised the charges to be borne by the FDGCC (see recital 16)).
- 63) In addition, the FDGCC becomes the only senior creditor of the entity remaining in liquidation and the exclusive beneficiary of the recovery of the residual assets (see recital 21)). This simplifies the management of the insolvency procedure, minimises its costs and provides a clear incentive for the liquidation process to be concluded in an efficient and timely manner.
- 64) Finally, as mentioned in section 4, the FDGCC's intervention is carried out under the national DGS framework, going beyond the minimum requirements of Directive 94/19/EC.

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<sup>43</sup> 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.

### *6.3.2. Limitation of distortions of competition*

- 65) According to the estimates of the Italian authorities, the resolution measure amounts to a sum between EUR 248.9 million and EUR 260.8 million. This corresponded to around 29% of the total assets of BRC as of 31 May 2015.
- 66) The Commission notes that BRC is very small (about [0.01-0.05]% share of Italian banks' total assets). Consequently, the size of assets and liabilities acquired by ICCREA are negligible both compared to the size of the Italian banking system and the size of ICCREA itself (more than 50 times larger than BRC). The Commission considers the marginal impact on competition through the acquisition of the activities by ICCREA as small.
- 67) Moreover, the activities of BRC were offered to competitors through an open auction providing opportunity to any competitor to acquire the corresponding market share.
- 68) Finally, following the liquidation and the transfer of assets and liabilities, BRC will cease to exist entirely as a stand-alone competitor. The acquired activities will be fully integrated into ICCREA and those assets and liabilities excluded from the acquisition will be liquidated following the ordinary insolvency procedure.
- 69) Given the very small size of the transferred activities, the open sales process, the full absorption of the part of BRC's activities acquired by ICCREA and the disappearance of BRC in its entirety, the Commission concludes that there are no undue distortions of competition, despite the large amount of aid in relation to the size of BRC and the absence of remuneration.

### *6.3.3. Burden-sharing*

- 70) According to the legal basis of the assessment, shareholders and subordinate debt holders have to contribute to a maximum to the cost of the intervention.
- 71) Because BRC has currently negative equity, its shareholders will be fully written down. Furthermore, subordinated debt is not transferred to ICCREA but remains in the entity in liquidation. While the subordinated debt holders are in principle entitled to proceeds from the liquidation the FDGCC has first claim on repayment of the cost of the intervention before other creditors will be served. Given that the FDGCC claim exceeds the book value of the residual assets (see Table 1), subordinated debt holders will in all likelihood not benefit from the proceeds of the liquidation.
- 72) As a result the Commission considers that shareholders and subordinated debt holders will have contributed to the maximum extent possible.

### *6.3.4. Long-term viability of the resulting entity*

- 73) BRC is not viable on a standalone basis and no offer has been received to buy BRC as a going concern business. From BRC in liquidation, a part of assets and liabilities as well as staff and buildings will be transferred to ICCREA. The transferred entity has no capital. Hence the Commission will assess the viability of the entity resulting from the transfer of assets and liabilities, that is, ICCREA including the transferred activities.
- 74) The Commission considers ICCREA to be capable of absorbing the assets and liabilities transferred from BRC. ICCREA is 50 times larger than the transferred economy activity

in terms of total assets. In addition ICCREA will acquire BRC through its subsidiary Banca Sviluppo, a vehicle specialised in managing and restoring the viability of distressed mutual banks that has the appropriate expertise and management to carry out an operation of that kind.

- 75) Furthermore ICCREA is a systemic Italian bank, and as such is under the supervision of the ECB. The comprehensive assessment conducted by the European Banking Authority and the ECB between November 2013 and October 2014 confirmed the solidity of ICCREA. More specifically, the aggregate adjustments due to the outcome of the Asset Quality Review (AQR) were limited to 44 basis points, with an AQR-adjusted Core Equity Tier 1 (CET 1) ratio of 10.64%. Under the adverse scenario of the stress test the adjusted CET 1 ratio was 7.36%, above the requested ratio of 5.5%.
- 76) Hence the Commission concludes that the acquisition of the assets and liabilities transferred from BRC by ICCREA does not pose significant risks to the viability of the latter.

#### 6.3.5. Conclusion on the compatibility of the FGDCC measure

- 77) On the basis of the analysis above, the Commission concludes that the sale of transferred activities and their integration into ICCREA ensure that those activities return to long-term viability, that the aid is limited to the minimum necessary and that there are no undue distortions of competition, in line with the 2013 Banking Communication.

### 7. COMPLIANCE OF THE LIQUIDATION OF THE BANK WITH THE PROVISIONS OF DIRECTIVE 2014/59/EU ON BANK RECOVERY AND RESOLUTION<sup>44</sup> (BRRD)

- 78) In addition, although Italy has not yet transposed BRRD into national law, the Commission needs to assess whether the measure violates indissolubly linked provisions of BRRD.
- 79) That obligation is in line with the jurisprudence of the Union Courts, which have consistently held<sup>45</sup> "*that those aspects of aid which contravene specific provisions of the Treaty other than [Articles 107 and 108 TFEU] may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately to that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in [Article 108]".<sup>46</sup>*
- 80) To ascertain whether a violation of a provision of Union law is indissolubly linked to the object of the aid, a relation of necessity has to be established. It means that the State aid measure has to be connected with a national measure in a way that necessarily breaches a specific provision of Union law which is relevant for the compatibility analysis under paragraphs 2 and 3 of Article 107 TFEU.

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<sup>44</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and EU No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190.

<sup>45</sup> See *inter alia* Joined Cases C-134/91 and C-135/91 *Keramina-Keramische v Greece* ECLI:EU:C:1992:434, para 20; Case T-184/97 *BP Chemicals v Commission* ECLI:EU:T:2000:217, para 55; and Case T-289/03 *BUPA and others v Commission* ECLI:EU:T:2005:78, paras 313 and 314.

<sup>46</sup> Case 74/76 *Ianelli v Meroni* EU:C:1977:51 para 14 (emphasis added).

- 81) The Commission has not identified BRRD provisions which would be indissolubly linked to the specific aid measure under examination.
- 82) This is without prejudice to the prerogative of the Commission to initiate infringement procedures against a Member State for breach of Union Law, including breach of BRRD provisions.
- 83) Finally, the Commission notes that Italy agreed to have the present decision adopted and notified in English.

## 8. CONCLUSION

The Commission has accordingly decided:

- not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

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Yours faithfully,  
For the Commission

Margrethe VESTAGER  
Member of the Commission

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