

The ‘White Knight’ Returns (?): *Tercas* and the role of DGS in managing banking crises

By Andrea Vignini (*)

In the aftermath of the global financial crisis, the European legislator has “miraculously” (1) created the Banking Union, re-shaping banking supervision and resolution at the Eurozone level.

In this context, Deposit Guarantee Schemes (‘DGS’) were asked to exercise a new role in managing banking crises and were provided by Directive 2014/49/EU (‘DGSD’) with new powers to ease the effects of banks’ liquidation and to prevent them from failing. According to Article 11.3 of the Directive, ‘*Member States may allow a DGS to use the available financial means for alternative measures in order to prevent the failure of a credit institution*’, given that some specific conditions are met (2).

Notwithstanding the explicit conferral made by the DGSD, the use of DGS has been strongly limited in recent years, because of the denial opposed in 2015 by the European Commission (‘EC’) to the intervention of the Italian Fondo Interbancario di Tutela dei Depositi (‘FITD’) in favor of Cassa di Risparmio di Teramo (‘Tercas’), which was considered as State aid, incompatible with the internal market.

After many years of uncertainty, on 19 March 2019 the General Court finally annulled the Commission’s decision, rendering a judgment (3) which is certainly relevant from many perspectives. Indeed, the ruling represents a benchmark on the use of DGSs after the introduction of the BRRD and the DGSD, as it (implicitly) defines the principles according to which a national DGS can intervene in banking crises without breaking EU State aid law. Moreover, the ruling contradicts the European Commission’s interpretation of the role of the Italian FITD in the measure for the benefit of Tercas, excluding that the Bank of Italy (‘BoI’) had exercised any control over the operation. In this respect, the EU competition authority’s opposition was critical for the Italian Republic because, at the time, the possibility to involve the FITD in the rescue of four regional banks (namely Banca Etruria, CariFerrara, CariChieti, and Banca Marche) was being assessed. The prohibition on the use of the FITD took that option off the table and, as a result, the four banks were resolved under the newly implemented BRRD framework.

Facts of the case

(i) Tercas-Cassa di Risparmio della Provincia di Teramo S.p.A. was the holding company in a banking group (Tercas) operating in the South of Italy, put under special administration by the Italian Ministry of Finance on 30 April 2012. On 1 July 2014, the FITD submitted a request of authorization to the BoI to grant a support intervention to Tercas, which was authorized by the BoI on 7 July 2014. With the following acquisition of the bank by Banca Popolare di Bari (‘BPB’), the special administration of Tercas came to an end and the BPB appointed the new directors and auditors on 1 October 2014.

(ii) On 23 December 2015, the Commission adopted the Decision on Tercas, stating the unlawfulness of the aid granted by the Italian DGS on 7 July 2014. The EU competition authority

recognized the nature of State resources and the imputability to the Italian Republic of the FITD's financial assistance, because of the alleged control exercised by the BoI on the intervention. In order to show the existence of a permanent control of the BoI over the activities carried out by the FITD, the Commission gave relevance to the set of powers conferred to the Bank of Italy by the Italian Banking Act, and in particular to the BoI's authorization of the FITD's interventions and the approval of its by-laws. Moreover, the competition authority recognized an indicator of the public control also in the prerogatives conferred to the special administrator of the bank, appointed by the BoI.

(iii) The Italian Republic, BPB and the FITD, with the intervention of the Bank of Italy, challenged the Commission's position. The applicants brought actions for annulment against the Decision, alleging the infringement of Article 107 TFEU for the erroneous reconstruction of the facts concerning *inter alia* the public nature of the resources and the imputability to the State of the contested measures.

The Judgement

1) In order to assess the '*imputability to the State*' of the intervention, the Court examined whether the public authorities were involved in the financial support granted to Tercas.

First, in considering whether the FITD was entrusted with a public mandate to intervene in favor of Tercas through measures alternative to the reimbursement of the depositors, the CJEU stated that those interventions are carried out only in the interest of the FITD's contributors. Moreover, it recognized that no domestic provision obliges the FITD to adopt those measures in any form, given that it is an autonomous choice of the members to decide if, when and how financial support in the way of an alternative measure can be granted. In this sense, **the fact that the private interest of the participants can coincide with the public interest of depositors' protection and financial stability cannot constitute itself as a proof of any involvement of the public authorities in the adoption of the contested measure**, as affirmed by the Commission.

Second, concerning the autonomy of FITD when deciding on the intervention, the CJEU underlined that **the FITD is a private consortium of banks, which acts on behalf and in the interest of its participants**. Considering the BOI's authorization of the FITD's intervention, the CJEU acknowledged that the power to approve the financial support granted by the scheme must be considered just as one of the supervisory prerogatives conferred to the BOI, in order to safeguard the sound and prudent management of the banks and the stability of the financial system. Thus, **the Bank of Italy has no power to order the adoption or the execution of the measure**, as proved by the fact that, after the authorization received by the Authority, the FITD did not ultimately undertake the first support intervention in favor of Tercas.

2) The Court finally considered if the FITD's financial support was granted through State resources. As a premise, the CJEU stated that, according to Article 107 TFEU and to its settled case-law (namely *Stardust Marine*), the notion of '*State resources*' is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid. Furthermore, Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings. Thus, even if the sums used 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 categorized as '*State resources*'.

In the Judgement, the General Court acknowledged that the FITD's assistance resulted from an expressed will of its participants, autonomously deciding: a) to entrust the DGS with the power to

carry out alternative interventions, through the approval of its by-laws; b) to finance the assistance specifically granted to Tercas, pursuing their own private interest in avoiding the more expensive depositors' reimbursement in case of an orderly liquidation.

Findings of the General Court

In its reasoning, the CJEU concluded that EC did not sufficiently prove that the resources were under control and at disposal of the Italian public authorities. In particular, the Commission gave no evidence of the fact that, even though the FITD's resources were certainly private and administered by the governing bodies of the consortium, the Italian Republic had exercised a dominant influence over the DGS in carrying out the financial support granted to Tercas.

For these reasons, given the fact that the Commission failed to prove that the intervention was imputable to the State and financed through State resources, the Court annulled the contested decision without assessing the other conditions provided by Article 107 TFEU and ordered the EC to pay the costs of the proceedings.

Tercas and the role of DGS in banks' crises management, in a nutshell

On 29 May 2019, the European Commission decided to appeal against the General Court decision. Thus, the CJEU will give its final say on the filed case C-425/19.

As we can infer from the ruling, DGSs' preventive and alternative interventions do not constitute State aid, unless the Commission proves that the conditions set out in Article 107 TFEU (as defined by the CJEU case-law) are met. This conclusion confirms the wording of Paragraph 63 of the Commission's Banking Communication (2013), according to which '*Interventions by deposit guarantee funds to reimburse depositors [...] do not constitute State aid*', so that they **may** constitute state aid only '*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*' (4). In the ruling, the Court denied the imputability to the Italian Republic of the aid and the public nature of the resources used by the DGS, acknowledging that the supervisory powers exercised by the Bank of Italy didn't envisaged any actual nor permanent control over the FITD's interventions.

As stated by Andrea Enria, Chair of the ECB Supervisory Board, the judgment opens new scenarios, considering that '*(...) the potential role of DGSs in playing a function in cases of banks that go into difficulty in a pre-emptive fashion could be a very important change in the overall framework*' (5). Time will tell us if the DGS will be able to play a relevant role in managing banks' crises in the coming years.

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(1) As recently stated by Lorenzo Bini Smaghi (Chairman of Société Générale and former member of the ECB's Executive Board) while participating at the conference '*Banche e aiuti di Stato: quale modello dopo la sentenza Tercas?*', jointly organized by Assonime and Sapienza — Università di Roma (10 July 2019).

(2) Directive 2014/49/EU of the European Parliament and of the Council on deposit guarantee schemes, 16 April 2014.

- (3) Court of Justice of the European Union, *Italian Republic and Others v European Commission*, Joined Cases T-98/16, T-196/16 and T-198/16, Luxembourg, 19 March 2019.
- (4) European Commission, *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')*, Brussels, C 216/15, 30 July 2013.
- (5) Parliament of the European Union, *Public hearing with Andrea Enria, Chair of the ECB Supervisory Board, presenting the SSM Annual Report 2018*, ECON, 21 March 2019.