



EU General Court Annuls Commission's Banca Tercas State Aid Decision

IN SHORT

The Situation: The EU General Court annulled the European Commission's ("Commission") decision that Fondo Interbancario's support payment to financially distressed Banca Tercas breached EU State aid rules. Fondo Interbancario is a mandatory deposit guarantee scheme in Italy.

Background: To eliminate competitive advantage gained from government support, the Treaty on the Functioning of the European Union prohibits State aid to undertakings unless it is justified by special reasons (e.g., economic development in special areas or sectors, social aids, natural disasters, etc.).

Looking Ahead: Rescue interventions to distressed banks from private deposit guarantee schemes are likely to increase because this case diminishes the risk of an adverse State aid decision from the Commission.

The Commission's Decision

Fondo Interbancario di Tutela dei Depositi ("FITD") is an Italian mandatory deposit guarantee scheme constituted by a consortium of private banks, whose public mandate is to reimburse the depositors of failing banks. FITD can intervene to rescue distressed banks, with a view to restoring the bank's viability and averting the need to reimburse depositors. In 2015, the Commission held that FITD's €300 million rescue intervention to financially distressed Banca Tercas violated EU State aid rules and had to be repaid.

According to the Commission, FITD acted under a "public mandate" (the protection of depositors) and under the influence of Bank of Italy, Italy's central bank. The Commission therefore imputed FITD's decision to grant support to Banca Tercas to the Italian State. The Commission found that FITD funded the support intervention with mandatory contributions from the member banks, which were considered equivalent to State resources under State aid rules.

The central bank's general regulatory approval of a deposit guarantee scheme rescue measure to a distressed bank cannot be regarded as evidence of the "public nature" of such rescue measure.

Moreover, the Commission found that FITD's rescue intervention in favor of Tercas could not be approved as a compatible State aid since it did not comply with the so-called burden-sharing rules set forth in its banking guidelines. According to these guidelines, banks in distress can be rescued with public aid provided that shareholders and subordinated bond-holders bear part of the costs of the rescue plan (burden sharing).

The General Court's Ruling

The parties appealed, and the General Court annulled the Commission's decision. The court held that FITD did not operate under a public mandate and that the support payment could not be imputed to the Italian State. According to the General Court, FITD acts under a public mandate only when reimbursing depositors of failing banks. In this case, FITD provided an

alternative rescue measure to a distressed bank with the goal of restoring the bank's viability and minimizing the financial burden that would have fallen on member banks if they were required to reimburse depositors following a bank failure.

The court also found that the Commission failed to prove that the Italian public authorities were involved in FITD's decision to rescue Banca Tercas. Under Italian law, FITD is free to decide whether or not to implement preventive rescue measures in favor of a bank in distress. Thus, the court found that FITD, as a consortium of private banks governed by private rules, decided to intervene on behalf of a member without any influence from the Bank of Italy.

The court also rejected the Commission's argument that Bank of Italy's authorization of FITD's rescue intervention proved the government's "involvement" in the decision. Bank of Italy's mission is to protect depositors and the stability of the Italian banking system, which includes approving rescue measures to distressed banks. Accordingly, while Bank of Italy had authority to ensure that the intervention met regulatory requirements, it had no role in FITD's decision to carry out the rescue intervention.

Jones Day assisted Bank of Italy in the judicial proceedings before the General Court.

THREE KEY TAKEAWAYS

1. As long as the public authorities have not imposed the intervention, a deposit guarantee scheme's rescue payment to a distressed bank designed to avert failure and restore viability is not State aid.
2. The central bank's general regulatory approval of a deposit guarantee scheme rescue measure to a distressed bank cannot be regarded as evidence of the "public nature" of such rescue measure.
3. Prior to this case, the risk of an adverse State aid decision led deposit guarantee schemes to avoid support interventions designed to help banks in distress and avert compulsory reimbursement of deposits. This is likely to change in the future.



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