INSIGHT

THE GENERAL COURT'S RULING IN *TERCAS*: BETWEEN IMPUTABILITY OF THE AID TO THE STATE AND USE OF STATE RESOURCES

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ABSTRACT: This *Insight* examines the clarification provided by the General Court's ruling in *Tercas* (namely, judgment of 19 March 2019, joined cases T-98/16, T-196/16 and T-198/16, *Italy and Others v. Commission*) with regard to two constituent elements of the notion of State aid: the "imputability to the State" and the "use of State resources". As to the "imputability to the State" element, the General Court in *Tercas* called for a stricter standard of proof in cases where the alleged aid is granted not by the State, but by a State-owned company or a private entity. This statement is based on a sound methodological approach. Indeed, mere circumstantial evidence would not be enough to prove the exercise, on the part of the State, of a decisive influence on a private or State-owned entity's decision to adopt the aid measure and on the disposal of the resources through which the contested measure is financed. As to the "use of State resources" element, *Tercas* suggests that the proof of that element might be inextricably linked to the proof of the "imputability to the State" element. Indeed, the issue of whether the State has exercised a decisive influence on the adoption of the aid measure is inherently connected to the issue of whether the State had the power to dispose of the resources employed to finance that measure. Thus, the cumulative nature of the two elements at issue boils down to what can be referred to as "evidentiary circularity", in that proof of one element is often also proof of the other and *viceversa*.

KEYWORDS: Tercas – Art. 107 TFEU – imputability to the State – use of State resources – burden of proof – evidentiary circularity.

I. INTRODUCTION

The aim of this *Insight* is to discuss the General Court's contribution to the understanding of two constituent elements of the notion of State aid within the meaning of Art. 107, para. 1, TFEU: the "imputability to the State" of the alleged aid measure and the "use of State resources" in the financing of said measure.[1]

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[1] C. CELLERINO, F. MUNARI, *Art. 107 TFUE*, in A. TIZZANO (ed.), *Trattati dell'Unione europea*, Milano: Giuffrè, 2014, p. 1147 *et seq.*; K. BACON, *European Union Law of State Aid*, Oxford: Oxford University Press, 2017; F.J.

A recent case has sparked interest in this matter again and has contributed to giving a better framework to the notion of State aid in "difficult" cases, i.e. cases in which the nature of the entity providing the aid raises doubts as to the legal qualification of the contested measure. That is the *Tercas* case, on which the General Court handed down a judgment[2] that was subsequently appealed before the Court of Justice (the proceedings are is still pending). This *Insight* will not examine every aspect of the above judgment of the General Court,[3] but will focus on the passages which directly concern the "imputability to the State" and the "use of State resources" of the measure, so as to determine whether an appreciable shift in the understanding of those elements by the judges in Luxembourg has taken place.

To this end, this *Insight* will first provide a short description of the *Tercas* case, with a particular focus on the relevant passages of the judgment of the General Court and of the impugned decision of the European Commission.

Without seeking to analyse in detail the contents of the Commission decision and its implications in the field of banking law, this *Insight* will focus on two aspects, which clearly emerge from the Commission's appeal against the General Court's judgment.[4]

The first aspect concerns the stricter standard of proof that the Commission must meet in assessing the compatibility of a measure with the common market in cases where said measure is adopted not by the State, but by a State-owned company or a private entity. This aspect will be examined having regard to the element of Art. 107, para. 1, TFEU concerning the "imputability to the State", although it is clear that those insights also apply to the "use of State resources" element.

The second aspect concerns the "method" of ascertaining the two cumulative elements of "imputability to the State" and of the "use of State resources". From this point of view, it will be highlighted that the cumulative nature of those elements boils down

SÄCKER, F. MONTAG (eds), *European State Aid Law. A Commentary*, Oxford, München, Baden-Baden: C.H. Beck, Hart, Nomos, 2016; J.J. PIERNAS LÓPEZ, *The Concept of State Aid under EU Law. From Internal Market to Competition and Beyond*, Oxford: Oxford University Press, 2015; H.C.H. HOFMANN, C. MICHEAU, *State Aid Law of the European Union*, Oxford: Oxford University Press, 2016.

[2] General Court, judgment of 19 March 2019, cases T-98/16, T-196/16 and T-198/16, *Italy et al v. Commission* (hereinafter, *Tercas*); on this subject see B. STROMSKY, *Le Tribunal de l'Union européenne annule une décision de la Commission européenne qui considérait comme une aide d'État l'intervention d'une banque en difficulté, et estime que cette intervention n'est pas imputable à l'État, ni financée par des ressources d'État*, in *Concurrences*, 2019, p. 13 *et seq.*; G. BRANCADORO, *La sentenza Tercas in tema di aiuti di Stato: è necessaria una rilevazione di dati concreti e univoci nelle operazioni sotto esame*, in www.federalismi.it, 17 April 2019. For an extremely critical view see P. NICOLAIDES, *The Boundary Between State and Private Resources*, in *State Aid Hub.eu*, 19 April 2019, stateaidhub.eu; S. AMOROSINO, *La Commissione europea e la concezione strumentale di "mandato pubblico" (a proposito del "caso FITD/Tercas" – Sentenza del Tribunale UE 19 marzo 2019)*, in *Diritto della banca e del mercato finanziario*, 2019, p. 364 *et seq*.

[3] This *Insight* will not examine another crucial topic arising from the judgment, i.e. "compensation for damages".

[4] Case number C-425/19 P has been attributed to the appeal.

to a sort of "evidentiary circularity" so that the proof of one element is inextricably link to the proof of the other.

II. The *Tercas* case

The *Tercas* decision was adopted in a very particular context, that of the aids granted by Member States to the financial sector.[5]

Starting from 2012, a bank named "Tercas", was placed under special administration following several managerial irregularities. Another banking institution, BPB, expressed an interest in the subscription of additional capital of *Tercas* on condition that the Interbank Deposit Protection Fund (hereafter: "the Fund") would cover its deficit. The Fund is a private consortium and operates as a mutual benefit body. The Fund can intervene in favour of its members in two ways: first, by providing a legal guarantee of the deposits envisaged in case of compulsory administrative liquidation of one of them ("compulsory intervention"); second, on a voluntary basis, in accordance with its statute, if it is possible by means of such intervention to reduce the burden which may originate from the guarantee of deposits falling on its members ("voluntary intervention").[6]

However, the Italian government did not apprise the Commission of the Fund's voluntary intervention in favour of *Tercas*. The Commission took the view that said intervention met all the requirements of the notion of State aid under Art. 107, para. 1, TFEU,

[5] This *Insight* will not focus on this specific context in order to avoid lengthy references. In general, on the subject of State aid in the banking system see P.Bonetti, *Brevi note sui profili costituzionali dell'interpretazione conforme del decreto-legge n. 99/2017,* in *Rivista di Diritto Bancario*, 2018, p. 1 *et seq.*; F. Croci, *L'impatto della crisi finanziaria sugli aiuti di Stato al settore bancario*, in *Il Diritto dell'Unione europea,* 2014, p. 733 *et seq.*; M. Liberati, *La crisi del settore bancario tra aiuti di Stato e meccanismi di risanamento e di risoluzione*, in *Diritto pubblico comunitario*, 2014, p. 1339 *et seq*.; D. Diverio, *Le misure internazionali di sostegno al mercato bancario: un'applicazione à la carte della disciplina degli aiuti di Stato alle imprese?*, in *Diritto del commercio internazionale*, 2017, p. 603 *et seq.*; B. Inzitari, *Brrd, "bail in", risoluzione della banca in dissesto, condivisione concorsuale delle perdite (d.lgs. n. 180 del 2015)*, in *Giustizia Civile*, 2017, p. 197 *et seq.*; A. Antonucci, *Gli "aiuti di Stato" al settore bancario: le regole d 'azione della regia della Commissione,* in *Studi sull'integrazione europea*, 2018, p. 587 *et seq*.; V. Giglio, *Gli aiuti di Stato alle banche nel contesto della crisi finanziaria*, in *Mercato concorrenza regole*, 2009, p. 23 *et seq*.; L. Wagner, *Aides d'Etat: la Commission européenne confrontée au risque systémique*, in *Europe*, 2009, p. 4 *et seq.*; P. Werner, M. Maier, *Procedure in Crisis? Overview and Assessment of the Commission's State Aid Procedure during the Current Crisis*, in *European State Aid Law Quarterly*, 2009, p. 177 *et seq*.; J. Fingleton, *La politica della concorrenza in tempo di crisi*, in *Mercato concorrenza regole,* 2009, p. 7 *et seq*.; K. Lannoo, C. Napoli, *Bank State Aid in the Financial Crisis. Fragmentation or Level Playing Field?*, *CEPS Task Force Report* 20 October 2010, www.ceps.eu; A. Dell'Atti, *Gli aiuti di Stato alle banche in tempo di crisi*, in *Concorrenza e mercato,* 2012, p. 569 *et seq*.; A. Argentati, *I salvataggi di banche italiane e l'Antitrust europeo*, in *Mercato concorrenza regole*, 2016, p. 109 *et seq.*; L. Scipione, *Crisi bancarie e disciplina degli aiuti di Stato. Il caso italiano: criticità applicative e antinomie di una legislazione d'emergenza*, in *Innovazione e Diritto –Rivista di diritto tributario e dell'economia*, 2017, p. 284 *et seq*.

[6] F. Ferraro, *Il Tribunale dell'Unione riconsidera la decisione sul caso Tercas in tema di aiuti (non) di Stato alle banche*, in *I Post di AISDUE – Sez. Note e Commenti*, 2019, www.aisdue.eu, spec. pp. 2-3, which considers the reasons for an economic convenience of the given operation.

namely "imputability to the State", "use of State resources", "effect on trade between Member States", "selectiveness", and "distortion of competition".[7] As to the first of those elements, the Commission claimed that the intervention of the Fund was attributable to the Italian government and that the resources employed in that context were subject to public control, as the Fund operated on the basis of a public mandate. As a consequence, the Commission ruled that the Fund's intervention in favour of *Tercas* constituted an illegal State aid.[8]

The Commission's decision was appealed before the General Court by Italy (T-98/16), BPB (T-196 /16) and the Fund (T-198/16). In addition, the Bank of Italy was allowed to intervene in support of the Fund. The cases were joined for the purposes of judicial proceedings, which culminated with the General Court's judgment of 19 March 2019, which annulled the Commission's decision.[9]

The General Court in the above judgment re-examined the elements which had prompted the Commission to characterize the Fund's intervention in favour of *Tercas* as an illegal State aid. In particular, while the Commission had referred generically the State origin of the resources concerned, the General Court carried out a separate analysis of the "imputability to the State" element and of the "use of State resources" element.

[7] The Court of Justice has expressed itself on such elements multiple times. See Court of Justice: judgment of 21 December 2016, joined cases C-20/15 P and C-21/15 P, *Commission v. World Duty Free Group and Others*, para. 53; judgment of 18 May 2017, case C-150/16, *Fondul Proprietatea,* para. 13.

[8] Commission Decision (EU) 2016/1208 of 23 December 2015 on State aid granted by Italy to the bank Tercas (Case SA.39451 (2015/C) (ex 2015/NN). It has been noticed that the decision emanated by the Commission in the *Tercas* case has recorded a change of course compared to the one assumed previously when the Commission itself considered as "legal" an intervention, which was similar to the one in question, of the Interbank Fund with relation to the compulsory administrative liquidation of Sicilcassa (Commission Decision of 10 November 1999 conditionally approving the aid granted by Italy to the public banks Banco di Sicilia and Sicilcassa). In order to define the potential reasons of this change of course see F. FERRARO, *Il Tribunale dell'Unione riconsidera la decisione sul caso Tercas*, cit., p. 3 *et seq*. On this matter also see F. FERRARO, *L'evoluzione della politica sugli aiuti di Stato a sostegno dell'accesso al finanziamento nell'attuale situazione di crisi economica e finanziaria*, in *Il Diritto dell'Unione europea*, 2010, p. 335 *et seq*.; M. CLARICH, *Sostegno pubblico alle banche e aiuti di Stato*, in *Giurisprudenza Commerciale*, 2017, p. 702 *et seq*.; B. RAGANELLI, *Gli aiuti di Stato alle banche nel contesto della crisi finanziaria,* in *Giornale di diritto amministrativo,* 2016, p. 773 *et seq*.; V. FERRARO, *La risoluzione delle crisi bancarie e gli aiuti di Stato: alcune riflessioni sui principi delineati dalla recente giurisprudenza della Corte di Giustizia dell'Unione Europea*, in *Rivista italiana di diritto pubblico comunitario*, 2016, p. 1591 *et seq*. The last two works focus on cases in which the Court has responded to preliminary requests of the Slovenian Constitutional Court regarding "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')" – (Court of Justice, judgment of 19 July 2016, case C-526/14, *Kotnik and Others*).

[9] For a general outline of the case see D. DOMENICUCCI, *Il salvataggio di Banca Tercas non è un aiuto di Stato secondo il Tribunale dell'Unione europea*, in *Eurojus.it*, 2019, p. 174 *et seq.*, rivista.eurojus.it.; A. ARGENTATI, *Sistemi di garanzia dei depositi e crisi bancarie: c'è aiuto di Stato?*, in *Mercato Concorrenza Regole*, 2015, p. 315 *et seq.*; P. DE GIOIA CARABELLESE, *Crisi bancarie e aiuti di Stato. La sentenza Tercas: Brussels versus Italy?*, in *Ordine Internazionale e diritti umani*, 2019, p. 686 *et seq*.

As to the former, the General Court clarified that the mandate conferred upon the Fund by Italian legislation consisted exclusively in reimbursing the depositors within a certain limit (100,000 euros) when one of the banks belonging to the consortium was subject to compulsory administrative liquidation. This means that beyond such threshold, the Fund acts on its own motion, rather than on the basis of a public mandate envisaged or imposed by Italian legislation. *In casu*, the General Court pointed out that the intervention in favour of *Tercas* pursued goals (e.g. to avoid spillover effects for the entire banking sector) which were different from the ones underlying the system of deposit protection envisaged by the Italian legislation and, therefore, did not fall within the Fund's public mandate.

Moreover, the intervention in favour of *Tercas* could not be regarded as having been adopted under the supervision of State authorities for at least two reasons. First, the Fund was a consortium governed by private law acting in the interest of its members and pursuant to its own statute; moreover, its governing bodies were elected by the General Assembly of the Fund among the representatives of its members. Second, the involvement of the Bank of Italy was negligible, as its delegates to the meetings of the governing bodies of the Fund acted merely as observers and as the Bank of Italy had only been involved in the adoption the Fund's statute and in reviewing the Fund's continued compliance with Italian law.

III. "Imputability to the State": a stricter standard of proof for aids granted by private entities?

In its appeal lodged on 29 May 2019, the Commission claimed that the General Court's judgment was based on incorrect legal considerations and distortion of the facts, which irremediably invalidated its findings.

The Commission, first, argued that the General Court had erred in ruling that the standard of proof of the existence of State aid must be stricter when the entity that adopts the contested aid measure is private in nature. As the Commission firmly believes that the Fund is a public entity, the application of such a stricter standard of proof in the case at hand constitutes, in the Commission's view, an error in law on the part of the General Court. The Commission also argued that the General Court erred in assessing the circumstances outlined in the Commission decision individually, rather than in conjunction with one another. That is the case, in particular, of the authorization granted by the Bank of Italy and of the compulsory character of the banks' involvement in the Fund.

Whilst only the Court of Justice can rule conclusively on these matters, at this juncture it can nonetheless be observed that the arguments put forward in the Commis-

sion's appeal are unpersuasive if placed within the broader context of the State aids jurisprudence of the Court of Justice.[10]

In the *Tercas* judgment, the General Court focused on the two cumulative elements of "imputability to the State" and of "use of State resources".[11] To this end, as the General Court aptly underlined, the notion of State aid has a legal nature and has to be interpreted on the basis of elements of objective nature, such as the public or private nature of the entity which has granted the contested measure.

It is this context that the General Court made a 'strong' statement, that seems to depart from the prior jurisprudence of the Court of Justice: in para. 67 of the *Tercas* judgement, indeed, the General Court averred that if the entity adopting the alleged aid has a private or independent status *vis-à-vis* the public authorities, the Commission must, subject to review by the EU Courts, meet a stricter standard of proof, by stating the reasons that allow it to ascertain the imputability of the contested measure to the State and the latter's power to dispose of the resources involved.

In sum, the General Court placed upon the Commission a more onerous burden of proof in cases where the contested measure is formally adopted by a State-owned company or by a private entity. Indeed, in such cases, according to the General Court, it cannot be presumed that the State controls that entity or can exercise a decisive influence on its conduct. Accordingly, the Commission to prove a sufficient level of engagement of the State in granting the measure in question, by showing not only that the State has the possibility to exercise a significant influence on entity adopting the measure, but also that the State was able to exercise such an influence in the case concerned.[12]

In spite of the apparent novelty of this statement, the General Court has not added anything significant to what could be inferred from the existing jurisprudence of the EU Courts. The Court of Justice, for example, had already clarified that the State's ability to exercise a decisive influence cannot be presumed and that it is for the Commission to prove the degree of involvement of the State authorities.[13] In addition, in another case, taking into consideration the fact that the contested measure had been adopted by a private entity, the General Court had required the Commission to provide a full assessment of the State's potential influence on that entity.[14]

[10] It is worth remembering that the Court presented the same considerations also for the element of the "use of State resources", as it will be better seen in the following section concerning the cumulative character of the two elements.

[11] As it can be discovered in the text of Art. 107 TFEU, as well as clarified by the Court of Justice itself in the following rulings: judgment of 13 September 2017, case C-329/15, *ENEA*, para. 20; judgment of 16 May 2002, case C-482/99, *France v. Commission*, para. 24; judgment of 19 December 2013, case C-262/12, *Association Vent De Colère and Others*, para. 16.

[12] *Tercas*, cit., para. 69.

[13] In this regard, for all, *France v. Commission*, cit., paras 52 and 55.

[14] See General Court, judgment of 25 June 2015, case T-305/13, *SACE and Sace BT v. Commission,* para. 48.

Therefore, albeit the General Court's statement as to the Commission's standard of proof was perhaps too emphatic, its underlying methodology is entirely consistent with the previous jurisprudence of the EU Courts. Arguably, therefore, no change of course by the Court of Justice can be expected in that regard.

In addition to methodology, also the substance of the General Court's statement is in line with the existing case-law. Indeed, there are cases – such as *Tercas* – where the imputability of an aid measure to the State is objectively difficult to determine, i.e. when the aid is not granted directly by the State, but by a State-owned company controlled by the State as majority shareholder. In such cases, indeed, it is impossible to establish the existence of an aid without ascertaining whether the State has actually exercised a decisive influence – for instance, via the directors of the State-owned company – on that company's decision to adopt the contested measure. The imputability to the State of a measure adopted by a controlled company, in other words, cannot be presumed on the basis of circumstantial evidence, but must be proven on the basis of solid and unequivocal evidence. Whilst the private nature of the entity adopting the contested measure, on its own, cannot rule out the imputability of that measure to the State, the Commission must nonetheless prove the involvement of the State in the decision-making process that led to the adoption of the contested measure, and this should be achieved by taking into account the specific characteristics of that process associated with the private nature of the entity concerned.

In its judgment in *Tercas*, instead, the General Court referred to a number of circumstantial elements that ruled out the imputability of the contested measure to the State: the consortium had acted independently, without being influenced in a decisive way by public authorities. In order to establish the degree of influence of the Italian public authorities, the General Court focused, as noted above, on the scope of the public mandate entrusted to the Fund and on the independence of the Fund in the adoption of the measures in favour of *Tercas*.

There is another aspect that seems noteworthy.

The General Court annulled the Commission's decision not so much because the Commission failed to meet the required standard of proof, but because the circumstances put forward by the Commission were inherently inadequate to classify the contested measure as a State aid. For instance, the General Court ruled that the Commission did not prove the involvement of the Italian authorities in the adoption of the contested aid measure, because the Fund was a consortium regulated by private law that acted, as per its statute, in the interests of its members. Arguably, the General Court's conclusion would have been the same even if the EU judges had carried out a global assessment of the evidence, [15] rather than examining one by one the circumstances put forward by the Commission.

[15] *Tercas*, cit., para. 103.

In conclusion, it is submitted that the General Court in *Tercas* made none of the methodological mistakes alleged in the Commission's appeal. Indeed, it seems entirely appropriate to impose a more onerous standard of proof in cases where the legal nature of the entity adopting the contested measure casts doubt as to the imputability of that measure to the State. Moreover, a holistic (rather than an atomistic) assessment of such circumstantial elements would have led to the same conclusion as that reached by the General Court.

IV. "Use of State resources" and "imputability to the State": an "evidentiary circularity"?

The characterisation of a given measure as a State aid requires not only its "imputability to the State", but also that the measure is financed through the "use of State resources". This means, in other words, that the notion of State aid includes not only the advantages granted directly by the State, but also those granted through public or private bodies which have been established or entrusted by such a State with the task of managing the aid. The rationale underlying the "use of State resources" element is twofold: on the one hand, that of avoiding situations where the existence of independent bodies, which are entrusted with the distribution of the aid, enables the circumvention of the prohibition on State aids (the so-called "risk of under-inclusion");[16] on the other hand, that of avoiding situations where the prohibition of State aid is applied to advantages which are not actually imputable to the State or which do not involve the use of public resources (the so-called "risk of over-inclusion").[17]

It is indeed well-established in the case-law of the Court of Justice that the "imputability to the State" and the "use of State resources" elements must be understood as cumulative. In practice, this means that the two aforementioned elements are often considered in conjunction for the purpose of determining whether a given measure should be regarded as a State aid, so that they both contribute to the definition of the public origin of the contested measure. The distinction, in the wording of Art. 107 TFEU, between the "imputability to the State" and the "use of state resources", means that not any economic advantage granted by a State[18] constitutes a State aid regardless of whether it is financed through State resources or not. Such a distinction, rather, en-

[16] Court of Justice: judgment of 9 November 2017, case C-656/15 P, *Commission v. TV2/Denmark*, paras 44 and 45; judgment of 13 March 2001, case C-379/98, *PreussenElektra*, para. 58; judgment of 30 May 2013, case C-677/11, *Doux Élevage and Coopérative agricole UKL-ARREE*, para. 26; *France v. Commission*, cit., para. 23.

[17] Very explicative of this dual need is the opinion of AG Saugmandsgaard Øe delivered on 22 March 2017 in *ENEA*, cit., paras 68 and 69.

[18] Court of Justice: judgment of 14 October 1987, case C-248/84, *Germany v. Commission*, para. 17; judgment of 21 March 1991, case C-303/88, *Lanerossi*, para. 11; General Court, judgment of 24 March 2011, joined cases T-443/08 and T-455/08, *Freistaat Sachsen and Others v. Commission*, para. 143.

sures that the notion of State aid includes both advantages granted directly by the State and advantaged granted by public or private bodies appointed or established by the State by using, in both cases, public resources.[19]

The notion of "State resources", according to the Court of Justice's case-law, includes all the financial instruments which public authorities can employ to support companies, regardless of whether those instruments belong permanently to the State or not. The thresholds question, in order to qualify a given measure as employing 'State resources', is whether the relevant financial instruments remain under public control, i.e. are at the disposal of the relevant State authorities.[20] EU Courts have clarified that the threshold question is whether the public authorities can exercise a decisive influence over the use of the relevant resources; their management by private authorities or their private origin is, instead, irrelevant for the purposes of Art. 107, para. 1, TFEU.[21]

In contrast, the Court of Justice ruled that a national provision requiring private energy companies to purchase energy from renewable resources at predetermined minimum prices was not a State aid, since the economic advantage resulting from the application of that provision was not imputable to a transfer of State resources, neither directly nor indirectly.[22] Moreover, with respect to measures established in support of companies producing renewable energy, the Court of Justice clarified that the notion of State aid does not include national provisions that merely set the conditions for the exercise of a business activity, without effecting the transfer of resources of private origin to one or more undertakings.[23]

In *Tercas*, the General Court ruled that the "use of State resources" element was not met by relying upon arguments similar to those used with reference to the "imputability to the State" element. For instance, the General Court observed that the resources employed had a private nature and had been granted to the banks on the basis of the statute of a private entity (voluntary intervention), rather than on the basis of a statutory provision (compulsory intervention). The sums in question, as the General Court underlined, were granted in the interest of the members of the Fund, as it was less bur-

[19] Court of Justice: judgment of 17 March 1993, joined cases C-72/91 and C-73/91, *Sloman Neptun*, paras 19 and 20; judgment of 7 May 1998, joined cases from C-52/97 to C-54/97, *Viscido v. Ente Poste Italiane,* para. 13; judgment of 17 June 1999, case C-295/97, *Rinaldo Piaggio s.p.a. v. Ifitalia s.p.a. and Others*, para. 35; General Court, judgment of 5 April 2006, case T-351/02, *Deutsche Bank v. Commission,* para. 103.

[20] Court of Justice, judgment of 7 July 2008, case C-206/06, *Essent Netwerk Noord and Others*, para. 70.

[21] Court of Justice, judgment of 8 May 2003, joined cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v. Commission*, para. 33.

[22] *PreussenElektra*, cit., paras 59-62. For a comment on the decision see L. RUBINI, *Brevi note a margine del caso PreussenElektra ovvero come "prendere seriamente" le norme sugli aiuti di Stato e la tutela dell'ambiente nel diritto comunitario*, in *Diritto comunitario e degli scambi internazionali*, 2001, p. 473 *et seq*.

[23] Court of Justice, judgment of 28 March 2019, case C-405/16 P, *Germany v. Commission*. Similarly, Court of Justice, judgment of 15 July 2004, case C-345/02, *Pearle and Others*, paras 35-38.

densome than the potential implementation of the legal protection in favour of the depositors of the bank, in case of compulsory administrative liquidation of the latter.

Therefore, the General Court ruled that, in order to prove the "use of State resources" element, it is not the origin of the resources or their formal classification that matters but, similarly to what has been observed as regards the "imputability to the State" element, the degree of State influence in defining the measure and the methods of financing it. The cumulative nature of those two constituent elements of the notion of State aid within the meaning of Art. 107 TFEU, therefore, must be understood as implying a sort of "evidentiary circularity", insofar as the influence of the State on the decision-making process culminating in the contested measure is inextricably connected to the State's ability to dispose of the resources through which that measure is financed.

V. Conclusions

In light of the above, the ruling of the General Court in *Tercas* appears well-reasoned, both in terms of methodology and substance.

As to the methodology, it seems entirely appropriate to impose a more onerous standard of proof on the Commission when the contested measure is adopted by a State-owned or private entity. In those situations, indeed, merely circumstantial evidence is not enough to prove the existence of a decisive influence by the State on the decision-making process culminating in the adoption of the contested measure and on the use of the resources through which the measure is financed.

As to the substance, it is submitted that the *Tercas* case is essentially a case of a "private" nature, which lies beyond the scope of State aid control. A number of elements point in this direction: the contractual origin of the Fund; the independence with which the Fund takes its decisions; the type of supervision exercised on the Fund by the Bank of Italy; the private nature of the Fund's resources; the lack of effects of Fund's measures on the public purse.

It should be added that the Commission has failed to meet the required standard of proof not only because the evidence put forward to characterize the contested measure as a State aid was insufficient, but also because that evidence was inherently flawed. Indeed, the final result of the judicial assessment would not have been different even if the General Court had carried out – as the Commission requested –a holistic (rather than an atomistic) assessment of the evidence provided by the Commission.

It follows that, barring an unexpected plot twist, it is likely that the Court of Justice will uphold the ruling of the General Court by dismissing also the Commission's second ground of appeal, alleging serious material and interpretative inaccuracies on the part of the General Court. For instance, the Commission claimed that the General Court erred in finding that the Bank of Italy had confined itself to reviewing the legality of the contested measure, as in fact the relevant legal framework entrusted the Bank of Italy with the task of authorizing the contested measure, with a view of protecting the depos-

itors and the stability of the banking system. Also, the Commission argued that the General Court wrongly drew a distinction between the Fund's compulsory and voluntary interventions, both types of intervention are financed in the same manner.[24]

In conclusion, the *Tercas* judgment is praiseworthy because it provides a clearer picture of the relationship between the "imputability to the State" and the "use of State resources" elements of the notion of State aid. The "evidentiary circularity" between those elements suggests that their cumulative character must be understood in terms of interdependence. In other words, the proof of both elements revolves around the assessment of the degree of influence that the State can exercise on the decision-making process underlying the adoption of the aid measure and on the disposal of the resources through which that measure is financed.

[24] The challenges brought by the Commission against the General Court's ruling in *Tercas* are certainly appealing, but are nevertheless unpersuasive in light of the General Court's overall understanding of the State aid rules as applied to the banking sector. Arguably, the legitimacy of the contested measures could be challenged in the future on the basis of EU competition rules: indeed, the consortium could be regarded as an association of undertakings and its resolutions could be regarded as decisions of that association within the meaning of Article 101, para. 1, TFEU. Certainly, that assessment could lead to multiple scenarios – which will not be examined at this juncture – as a scheme of this kind could be regarded as compatible with antitrust rules insofar as it has a negligible impact on the internal market and as it pursues the interests of the consumers and seeks to ensure the stability of the financial sector. For these arguments see F. Ferraro, *Il Tribunale dell'Unione riconsidera la decisione sul caso Tercas in tema di aiuti (non) di Stato alle banche,* cit., p. 10-11, which cites, for a reconstruction of the matter, Court of Justice, judgment of 11 September 2014, case C-67/13, *Groupement des cartes bancarie v. Commission*.