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**The resolution of Banca delle Marche by the Italian authorities was in essence determined by that bank's failure**

*The Commission cannot be held responsible for having prevented its rescue*

The applicants were shareholders and subordinated creditors of the Banca delle Marche, which was the main banking institution in the Regione Marche (Marche region, Italy).

On 9 January 2012, the Banca d'Italia (Bank of Italy) stated that the checks carried out within the Banca delle Marche had revealed serious shortcomings in the internal control systems which led to inevitable knock-on effects on its 'significant exposure ... to credit and financial risks'. On 15 October 2013, Banca delle Marche was placed under extraordinary administration on account, *inter alia*, of 'serious ... deficiencies and irregularities'.

On 10 October 2014, in the context of a preliminary examination stage initiated of its own motion concerning the support measures envisaged by the Fondo interbancario di tutela dei depositi (Interbank Deposits Protection Fund, Italy; 'the FITD'), the Italian deposit guarantee scheme in the form of a consortium governed by private law between banks managing own funds, in favour of another Italian bank, Banca Tercas<sup>1</sup> and Banca delle Marche, the European Commission made a request for information to the Italian authorities making it clear that it could not be excluded that those measures amount to State aid. If the Banca d'Italia were to consider authorising such a measure, it was appropriate, according to the Commission, for those authorities to notify the measure in question before it is approved.<sup>2</sup>

By letter of 21 August 2015, concerning the procedure relating to the Banca delle Marche, the Commission drew attention to the possible existence of State aid and requested the Italian authorities to provide it with updated information in that regard and to refrain from implementing any measure of the FITD before notifying it and receiving a decision from the Commission.

On 8 October 2015, the FITD fixed and approved the key elements of a second attempt at a measure to support Banca delle Marche and informed the Banca d'Italia thereof.

By letter of 19 November 2015, the Commission, *inter alia*, drew the attention of the Italian authorities to the fact that the use of a deposit guarantee scheme to recapitalise a bank<sup>3</sup> was subject to the State aid rules.

On 21 November 2015, **the Banca d'Italia initiated a resolution procedure, the draft of which was notified to the Commission beforehand. In that draft, the Banca d'Italia noted, *inter alia*, the fact that it had not been possible for the FITD to recapitalise Banca delle Marche, in the absence of a 'prior positive assessment by the Commission ... of the compatibility of [that transaction] with the [EU] State aid rules'.**

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<sup>1</sup> See judgment of 2 March 2021, *Commission v Italy and Others*, [C-425/19 P](#) (see also [Press Release No 30/21](#)).

<sup>2</sup> In accordance with the requirements of Article 108(3) TFEU.

<sup>3</sup> Article 11(3) of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149).

Taking the view that the Commission prevented, by means of unlawful instructions sent to the Italian authorities, the rescue by means of the recapitalisation of Banca delle Marche by the FITD, the applicants brought an action before the General Court of the European Union seeking to establish and find that the European Union incurred non-contractual liability. According to the applicants, the Commission prevented such a rescue and led the Italian authorities to initiate a resolution procedure in respect of Banca delle Marche under the Italian law rules transposing Directive 2014/59.<sup>4</sup>

By its judgment, **the Court dismisses the applicants' action on the ground that they have not established a causal link between the Commission's allegedly unlawful conduct and the alleged damage**, with the result that the conditions for the European Union to incur non-contractual liability are not fulfilled.

### **Findings of the General Court**

As a preliminary point, the Court notes that the European Union may incur non-contractual liability<sup>5</sup> only if a number of conditions are fulfilled, namely the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals, the fact of damage and the existence of a causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties. That latter condition relates to the existence of a sufficiently direct causal nexus between the conduct of the EU institutions and the damage, the burden of proof of which rests on the applicant, so that the conduct complained of must be the determining cause of the damage. Furthermore, non-contractual liability on the part of the European Union cannot be held to be incurred unless all the conditions which thus govern the obligation to provide compensation are fulfilled, with the result that failure to fulfil one of those conditions is sufficient for the action to be dismissed.

In the context of the assessment of the condition relating to the existence of a sufficiently direct causal link, the Court rejects the applicants' argument that, in essence, the Commission's letters and provisional views which led to the adoption of the Banca delle Marche resolution decision are the result of a failure by the Commission to have regard to the concept of 'aid' in that it wrongly held that, notwithstanding their private nature, the measures adopted by the FITD constituted measures attributable to the Italian State and involving State resources. According to the Court, **since the Commission reminded the Italian authorities of the need to give prior notification of, and not implement, possible aid measures in favour, inter alia, of that bank, those letters and views do not contain any legal assessment in the light of the concept of 'aid' criteria. The Commission did not therefore express therein its views on a specific measure or on the precise manner in which it interprets the concept of 'aid'**. Accordingly, the Commission neither threatened the Italian authorities to block or prohibit possible measures by the FITD for the benefit of Banca delle Marche, nor did it exert pressure in that respect.

In that regard, the Court considers that **the applicants are not justified in relying on the decision to open the formal investigation procedure concerning the measures adopted by the FITD for the benefit of Banca Tercas, adopted on 27 February 2015, in which the Commission had found that that measure met the criteria of imputability and State resources**. Unlike those support measures for Banca Tercas, before the adoption of the Banca delle Marche resolution decision, **there was no definite proposal for a measure by the FITD for the benefit of Banca delle Marche, or request for authorisation of such a proposal addressed to the Banca d'Italia, or formal notification of that proposal, or any other reason for the Commission to open a formal investigation procedure in that regard**. Therefore, according to the Court, it was impossible for the Commission to know with sufficient precision

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<sup>4</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, 2007/36/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 2014 L 173, p. 190).

<sup>5</sup> Article 340, second paragraph, TFEU.

whether the possible measure envisaged by the FITD for the benefit of Banca delle Marche was capable of meeting the State aid criteria.

The Court points out **that the decisive factors in favour of the Banca delle Marche resolution decision were the failing nature of that bank, as evidenced by the total losses of € 1 445 billion, a reported financial deficit of € 1 432 billion** as at 30 September 2015 and the fact that, during the extraordinary administration procedure, it had not been possible to decide measures by the private sector capable of resolving its crisis situation.

Moreover, even before the transposition into Italian law of Directive 2014/59 which would have made such a support measure possible, the Banca delle Marche's extraordinary commissioners informed the Banca d'Italia of the imminent suspension of payment by that bank and stated that they feared that its rescue could not take place in good time given its financial situation. According to the Court, that **in itself** indicates that **it is impossible for the FITD to intervene rapidly, irrespective of the possible need to give prior notification of that intervention to the Commission.**<sup>6</sup>

Furthermore, the Court rejects the applicants' claims that the allegedly unlawful conduct of the Commission prevented the rescue of Banca delle Marche and was the actual and exclusive cause of the damage that they suffered. According to the Court, even though that conduct played a certain role in the investigation process which led the Italian authorities to decide the resolution of that bank, their **decision to initiate the resolution procedure of Banca delle Marche, adopted in the exercise of their own powers and of their discretion, was still autonomous, not decisively influenced by the Commission's attitude, and was essentially based on their finding of that bank's failure**, which was the decisive reason for that resolution. Accordingly, the Court finds that the applicants have not demonstrated to the requisite legal standard that, in the absence of the allegedly unlawful conduct of the Commission, the FITD, with the consent of the Italian authorities, in particular the Banca d'Italia, would actually have been able to rescue Banca delle Marche in November 2015.

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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<sup>6</sup> Article 108, paragraph 3, TFEU.