Corporate and Financial Markets Law

The *Tercas* Case, State Aid, and Antitrust: Are There Holes in the Warp?

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Abstract

In order to guarantee the existence of competition in the internal market, the rules on State aid and the antitrust provisions are supposed to act in a complementary way, as if the latter were to cover the behaviours that the former do not capture and vice versa. Conversely, taking its cue from the recent *Tercas* case, the article shows that neither State aid nor competition law covers one case: that of solidarity-laden activities carried out by private agents with the intention of keeping failing firms in the internal market. The article discusses the reasons for this gap and its sustainability.

I. Introduction

At the end of October 2013, Banca Popolare di Bari S.C.p.A. (BPB) had a plan to save Banca Tercas S.p.A. (Tercas), head of a troubled Italian banking group that had been subject to special administration since mid-2012 and whose assets were circa 0.1% of total Italian banking assets. BPB wanted to make a capital injection of EUR 230 million on one condition: that one of the Italian Deposit Guarantee Schemes,[1] known as Fondo Interbancario di Tutela dei Depositi (FITD),[2] fully cover Tercas' negative equity for approximately EUR 300 million.[3]

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[1] Updated data on European Deposit Guarantee Schemes are available at https://tinyurl.com/33uvhe6n (last visited 31 December 2022).

[2] Established on a voluntary basis in 1987, FITD is a mutual consortium of banks aiming at pursuing the common interest of its members. Under Art 1 of its Statute (as modified in February 2021), FITD was created for the purpose of guaranteeing the depositors of member banks. In 1996, following the transposition into the Italian legal system of the European Parliament and Council Directive 94/19/EC of 30 May 1994 on deposit-guarantee schemes [1994] OJ L135/5, the Bank of Italy recognized FITD as one of the DGSs authorised to operate in Italy and the only one of which non-cooperative credit associations could become members. At present, FITD is governed by private law, the Italian Banking Act and its own Statute and By-Laws and its financial resources are provided by its members through ex-post contributions. According to Art 32 of the Statues, FITD, operating as DGS, may intervene in: a) the reimbursement of depositors, in cases of compulsory administrative liquidation of member banks licensed in Italy and, for branches of EU banks, under certain circumstances, in cases of intervention by its home deposit guarantee scheme; b) transfers of assets and liabilities, in cases of compulsory

After a few months of negotiation, FITD agreed to support Tercas by granting: (*i*) a non-repayable contribution of EUR 265 million to cover the negative equity of Tercas; (*ii*) a guarantee of EUR 35 million for three years to cover the credit risk associated with certain exposures of Tercas to third parties; and (*iii*) a guarantee of EUR 30 million to cover part of the possible additional costs and losses of around EUR 60 million associated with the tax treatment of the non-repayable contribution of EUR 265 million. Thanks to such intervention, the BPB's plan was put in place in the summer of 2014.

However, in February 2015 the European Commission found that FITD's intervention was unlawful. The Commission qualified it as a form of State aid granted in breach of the notification and stand-still obligations established in Art 108, para 3, of the Treaty on the Functioning of the European Union (TFEU) and, accordingly, ordered its recovery.[4] This gave rise to a legal battle that ended in March 2021 with the decision of the Court of Justice.[5] Confirming what had been established by the General Court on March 2019,[6] the Court of Justice ruled out the possibility that FITD's intervention could be considered a form of State aid within the meaning of Art 107 TFEU. It concurred with the General Court in affirming that FITD's intervention was neither imputable to the Italian State nor financed through its public resources.

This article, after briefly analysing the legal issues lying at the core of the *Tercas* case, moves on to consider whether Deposit Guarantee Schemes (DGSs), grouping together private commercial banks and performing activities similar to those of FITD in *Tercas*, could ever be subject to antitrust law. Indeed, given that antitrust and State aid rules act in a complementary way to ensure the existence of competition within the Internal Market, there is room to question whether DGSs' actions escaping the application of State aid can nevertheless fall within the scope of competition law. To answer this question, the article cannot

administrative liquidation of member banks licensed in Italy; c) preventative interventions, to overcome failing or likely to fail member banks licensed in Italy; d) financing of resolution, in cases of resolution of member banks licensed in Italy. Moreover, according to Arts 43-44 of its Statues, the Voluntary Intervention Scheme – established inside FITD, in the form of an unincorporated association – intervenes in support of its participating banks for the purpose of recovery and in the pursuit of the financial stability of the overall banking sector.

[3] It is worth noting that, from late 2019 to mid-October 2020, BPB itself has been subject to special administration and – following a procedure similar to that which had been previously carried out for the purpose of Tercas' rescue by BPB – in early July 2020 was bought out by Banca del Mezzogiorno – Mediocredito Centrale S.p.A. (a State-owned Italian bank), following a non-refundable equity injection by FITD of around 1.2 billion euros.

[4] Commission Decision (EU) 2016/1208 of 23 December 2015 on SA.39451 (2015/C) (ex 2015/NN) on State aid granted by Italy to the Bank Tercas, OJ L 203, 2016, 28.7.2016, (hereinafter, *Tercas* decision).

[5] Case C-425/19 P *Commission* v *Italy and Others*, Judgement of 2 March 2021, available at https://tinyurl.com/ye2azdwt.

[6] Joined Cases T-98, 196 and 198/16 *Italy* v *Commission* (General Court, Judgement of 19 March 2019). See also General Court of the European Union, Press release no 34/19 of 19 March 2019, available at https://tinyurl.com/ye2azdwt.

help but examine a preliminary and fundamental issue: whether and when DGSs are undertakings within the meaning of European Union (EU) competition law. Interestingly, it is in the development of this analysis that the article remarks a point that has gone unnoticed until now: that neither state aid law nor competition law covers the case of solidarity-laden activities carried out by private agents with the intention of keeping distressed firms in the market.

The article is set out follows. Section 2 opens with a brief description of the role that DGSs are supposed to play within the EU legal framework for the management of banking crisis and Section 3 then concisely recalls the rationale underpinning State aid law and the conditions for the application of Art 107 TFEU. Section 4 discusses the legal issues at the core of *Tercas* and the reasons why FITD's intervention did not qualify as State aid, then considers whether the same intervention could be subject to antitrust scrutiny. Section 5 introduces the antitrust notion of undertaking, while Section 6 discusses whether non-refundable investments of the kind that FITD made in *Tercas* might amount to an economic activity. Section 7 tests the theoretical viability of the idea that non-refundable payments and guarantees cannot come under antitrust scrutiny. Section 8 concludes by indicating that solidarity-laden activities aimed at saving failing firms that should otherwise exit the market are not subject to any competitive assessment when undertaken by private agents.

II. Deposit Guarantee Schemes and Their Intervention in Banking Crises

While the bankruptcy of an ordinary firm tends to favour its own competitors and potentially strengthens the economy as a whole by eliminating an inefficient economic agent, the default of a bank may weaken both its competitors and the market itself. It may put other banks in difficulty, jeopardize the stability of the overall financial system, determine a credit crunch that, in turn, slows down economic growth and even threatens the sustainability of sovereign debts.

This contagion mechanism (also named 'domino' or 'snowball effect') is rooted in the special nature of the banking activity as well as in the complex structure of present-day banks.[7] The essence of banking activity is borrowing capital in order to provide liquidity, lend money on the inter-bank market, and secure payment systems.[8] Therefore, banks bear a severe asset-liability mismatch

[7] E. Fama, 'What's different about banks?' 15 *Journal of Monetary Economics*, 29 (1985); C. Goodhart et al, *Financial Regulation: Why, How and Where Now?* (Abingdon: Routledge, 1998), 10-12.

[8] J. de Haan et al, *Financial Markets and Institutions. A European Perspective* (Cambridge: Cambridge University Press, 3rd ed, 2015);E. Hüpkes, 'Form Follows Function. A New Architecture for Regulating and Resolving Global Financial Institutions' *European Business Organization Law Review*, III, 369, 371 (2009); E. Carletti et al, 'Bank Mergers, Competition, and Liquidity' 39 *Journal of Money, Credit and Banking*, 1067 (2003).

that has no equivalent in the balance sheets of ordinary firms: irrespective of the specific business model or corporate governance system adopted, each bank has a low capital-to-assets ratio, a low cash-to-assets ratio, and a high short-term-debt-to-total-debt ratio.[9] Furthermore, present-day banks are large and interconnected.[10] Not only can the volume of their business shoot up to values that far exceed the higher turnover of large industrial firms but they also engage in a range of regulated and unregulated activities,[11] trade in global markets, stand at the heart of the monetary policy transmission chain,[12] and control the access to credit for ordinary firms and households.[13] Therefore, depending on the circumstances, a crisis in just one bank may undermine the stability of the overall financial system.

To restore the long-term viability of banks, confidence in the financial sector, and the ability of ordinary firms to access credit, Governments may use taxpayers' money to help troubled banks via non-structural and structural interventions, such as liquidity injections and loan guarantees[14] or recapitalizations and asset relief measures.[15] However, as the events of the past financial crisis have shown,

[9] G. Kaufman, 'Bank Failures, Systemic Risk, and Bank Regulation' 16 *Cato Journal*, 17 (1996).

[10] G. Sciascia, 'Recovery and resolution in the EU: Devising a European Framework', in E. Chiti and G. Vesperini eds, *The Administrative Architecture of Financial Integration. Institutional Design, Legal Issues, Perspectives* (Bologna: il Mulino, 2015), 93.

[11] R. Lastra and C. Proctor, 'The Actors in the Process: of Supervisors, Regulators, Administrators, and Courts of Justice', in R. Lastra ed, *Cross-Border Bank Insolvency*(Oxford: Oxford University Press, 2011), 74.

[12] P. Davies, 'Liquidity Safety Nets for Banks' 3 *Journal of Commercial Law Studies*, 287 (2013).

[13] M. Knight, 'Mitigating Moral Hazard in Dealing with Problem Financial Institutions: Too Big to Fail? Too Complex to Fail? Too Interconnected to Fail?', in J. LaBrosse et al eds, *Financial Crisis Management and Bank Resolution* (Abingdon: Routledge, 2009), 257; G. Psaroudakis, 'State Aid, Central Banks and the Financial Crisis' *European Company and Financial Law Review*, II, 194 (2012).

[14] Non-structural interventions aim to improve, on a temporary basis, the access that beneficiary banks have to finance, in order to prevent bank runs and the interruption of credit flows to the real economy. States can act directly, lending public funds to troubled banks or opening a line of credit to them, thereby exposing themselves to the risk of net losses should banks not repay the loan. This is the case of Emergency Liquidity Assistance (ELA) aimed at providing central bank monetary resources to (solvent) credit institutions that are facing temporary liquidity problems, Or, States can act indirectly by guaranteeing newly issued debt instruments, which beneficiary banks will use to raise funds from the market, or by lending government bonds, which beneficiary banks will use as collateral to borrow liquidity from the central bank. In both cases, therefore, States undertake to assume the liabilities of distressed banks, should they prove to be defaulting.

[15] Structural interventions are instead meant to produce lasting effects, by addressing capital shortfalls and improving balance sheets. Namely, pursuant to recapitalization plans, States inject new funds into distressed banks, by purchasing their capital and debt instruments at a price above the market price. In a complementary way, by means of asset relief measures, States free the banks in distress from the assets that could lead to losses: public asset relief measures free the beneficiary bank from the need to register either a loss, or a reserve for a possible loss, on its impaired assets and, thus, free a share of the regulatory capital for other

even public actions may be counterproductive; they may trigger a vicious circle (also named 'diabolic' or 'deadly embrace') at the expense of the very same troubled banks that they were supposed to help. By increasing the sovereign distress and reducing the solvency of States – especially of those whose public finances have already deteriorated and been further weakened by decreasing GDPs and tax revenues – governmental interventions funded with taxpayers' money may suppress the value of State debt bonds and, thus, the credit risk of those national banks that have received State bonds precisely to ensure their solvency.[16]

Therefore, in recent years, EU institutions have designed a new legal framework to manage banking crises, with the intention of limiting the use of taxpayers' money by increasing the use of private resources from banks, their shareholders and stakeholders, and other market investors. For what is most relevant here, this new setup mandates that each Member State create at least one private fund within its national boundaries, called a Deposit Guarantee Scheme (DGS), which must be financed each year by the commercial banks operating in that State and must have sufficient resources to intervene in the management of one or more banks in crisis.[17]

uses. To this end, they either purchase those assets via a vehicle owned, funded, or guaranteed by the State – the so-called 'Bad Bank' or 'Asset Management Company' – at a transfer price above the market value of the assets, or they leave the impaired assets under the ownership and the balance sheet of the bank, while committing to indemnify it, if the cumulative credit losses on a well-identified set of assets exceed a certain amount. Therefore, the State partially bears the downside risk linked to the asset but has no upside other than the fee revenue.

[16] E. Farhi and J. Tirole, 'Deadly Embrace: Sovereign and Financial Balance Sheets Doom Loops' 85 *The Review of Economic Studies*, 1781 (2018).

[17] First regulated by Directive 94/19/EC, at present DGSs are subject to the European Parliament and Council Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes (recast) [2014] OJ L 173/149 (Deposit Guarantee Schemes Directive or 'DGS Directive'), which has amended the European Parliament and Council Directive 2009/14/EC of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay [2009] OJ L68/3. The banks' mandatory membership of a DGS was introduced by Directive 94/19/EC which considers it as a precondition for obtaining a banking licence. According to Art 4 of the DGS Directive, each Member State must ensure that within its territory at least one DGS is introduced and officially recognized. DGSs set up and officially recognised in one EU country must cover the depositors at branches of their members in other EU countries. Among some of the main changes introduced by the amended DGS Directive is the duty to provide *ex-ante* financing arrangements (the level of these funds should amount to 0.8% of covered deposits in each Member State by 2025), as well as to ensure that the funds of the guarantee schemes are financed by the banking sector (as opposed to the public intervention funded by taxpayers' money); see Art 10 of the DGS Directive. The amount of the banks' payment is partly determined by the single bank's risk profile: the higher the risks a bank takes, the larger the contribution it has to pay into the fund; see Art 13 of the DGS Directive. DGSs' funding capability is essential for their reliability in the system; see M. Bodellini, 'The Optional Measures of Deposit Guarantee Schemes: Towards a New Bank Crisis Management Paradigm?' *European Journal of Legal Studies*, I, 341, 348 (2021). On the importance of DGSs in the managing of banking crises see also I. Mecatti, 'The Role of Deposit Guarantee Schemes in Preventing and Managing Banking Crises: Governance and Least Cost Principle' *European Company and Financial Law Review*, VI, 657, 661 (2020).

In particular, thanks to their private funds, under Art 108 of the Bank Recovery and Resolution Directive (BRRD),[18] DGSs have to serve the so called 'pay-box' function:[19] they must ensure that covered depositors of failing (or likely to fail) banks will be reimbursed up to a defined limit.[20] Secondly, in accordance with the conditions set out in Art 109 of BRRD, DGSs are required to finance banking resolutions. Finally, DGSscan perform optional functions: they can implement alternative measures aimed at preventing a bank's failure and they can provide financial means in the context of liquidation aimed at preserving access by depositors to covered deposits.[21]

For example, FITD – the Italian DGS involved in *Tercas* – has the discretionary power to take preventive measures to support one of its members when it is placed – as Tercas was – under special administration. In particular, according to its statute, FITD may decide to undertake such a voluntary action when it meets the so-called 'least cost principle', that is, when the cost of the preventive intervention is lower than all possible alternatives (including the cost that the very same FITD would bear to keep the the troubled bank's depositors guaranteed, had the bank failed) and provided that there are concrete prospects

[18] European Parliament and Council Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L173/190.

[19] M. Bodellini, n 17 above, 343-344. After paying out the covered deposits, the DGS is entitled to subrogate to the covered depositors' rights in the assets' liquidation process, benefiting from the same preference given to covered depositors by Art 108.

[20] All depositors, whether individuals or companies, have their deposits protected up to an amount of EUR 100.000 per bank by the DGS of which their bank is a member. Other protected deposits include i) pension schemes of small and medium-sized businesses; ii) deposits by public authorities with budgets of less than EUR 500.000 and iii) deposits of over EUR 100.000 for certain housing and social purposes. See Arts 5 and 6 of the DGS Directive. From mid-2015 depositors are to be reimbursed within a maximum of 20 working days. However, the DGS Directive gradually shortened the time limit for pay-outs to seven days by 2024. See Art 8 of the Directive. At a depositor's request, an emergency amount may made be available earlier if a deposit guarantee scheme is unable to reimburse depositors within the seven day time-limit during the transitional period which ends on 31 December 2023. In addition, according to the new DGS Directive banks must provide more, simpler and clearer information from their bank about the level of their deposit protection before they sign up to a new deposit contract. See Art 16 of the Directive.

[21] See Art 11, paras 3 and 6 of the DGS Directive. According to paragraph 3, '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 provided that the following conditions are met [...]', while paragraph 6 states that 'Member States may decide that the available financial means may also be used to finance measures to preserve the access of depositors to covered deposits, including transfer of assets and liabilities and deposit book transfer, in the context of national insolvency proceedings, provided that the costs borne by the DGS do not exceed the net amount of compensating covered depositors at the credit institution concerned.' See M. Bodellini, n 17 above, 344-345, 352-358. According to the Author such optional functions might end up being even more effective, from a system-wide perspective, in maintaining financial stability and reducing the destruction of value potentially resulting from an atomistic (or piecemeal) liquidation.

that the bank can be restored to health.[22]

As anticipated in the Introduction, the facts of *Tercas* fit into this scenario, because FITD was available to cover its negative equity via a non-repayable contribution and two guarantees. However, the Commission qualified FITD's intervention as State aid and a legal battle began.

III. State Aid Law in a Nutshell

There ain't no such a thing as a free aid: national measures designed to support one or more troubled firms have several drawbacks.[23]

First, they are not fully consistent with the model of market economies that conceives the market as a selection mechanism, which awards firms capable of meeting consumer needs while excluding firms that are not efficient and innovative enough to withstand competition from their rivals.[24]

By the same token, State intervention increases the moral hazard of companies. The awareness that the State will intervene to save firms in difficulty[25] – banks included, especially when they are deemed to be too big, too interconnected, or too complicated to fail[26]– may incentivize risk-taking and imprudent behaviour that puts banks themselves at risk, as well as diminish the importance of due diligence on the part of depositors who should assess the safety and soundness of their banks.[27]

[22] See Art 47 of the FITD Statute. The so called 'least cost principle' regulates the DGSs' optional functions according to the DGS Directive (see Art 11, para 3, letter c) of the DGS Directive).

[23] K. Bacon, *European Union Law of State Aid* (Oxford: Oxford University Press, 3rd ed, 2017); N. Pesaresi et al, *EU Competition Law.State Aid*, (Cheltenham: Claeys and Casteels, 2nd ed, 2016), IV; and C. Quigley, *European State Aid Law and Policy* (London: Bloomsbury, 3rd ed, 2015).

[24] N. Pesaresi, 'Diritto della concorrenza e crisi di impresa', in G.Colombini and M. Passalacqua eds, *Mercati e banche nella crisi: regole di concorrenza e aiuti di Stato* (Napoli: Editoriale Scientifica, 2012), 156.

[25] F. Carbonetti, 'La gestione delle crisi bancarie in Italia: prospettive e problemi di una riforma', in F. Belli et al eds, *Banche in Crisi (1960-1985)* (Bari: Laterza, 1987), 176 (arguing that the risk of bank run incentivizes banks to operate in a prudent and careful way); I. Atanasiu, 'State Aid in Central and Eastern Europe' 24 *World Competition*, 257 (2001); J. Kornai et al, 'Understanding the Soft Budget Constraint' 41 *Journal of economic literature*, 1095 (2003).

[26] M. Knight, n 13 above, 257. The doctrine is indeed understood to mean that, if a bank is big, complex, or interconnected enough, it will receive financial assistance to the extent necessary to keep it from failing, although this last may induce banks to disregard inefficiencies and undertake overly risky behaviours. This is why maintaining a vague policy in relation to large banks that will be rescued ensures sufficient incentive for risk-averse behaviour of economic agents – see P. Molyneux, 'Banking Crises and the Macro-Economic Context', in R. Lastra and H. Schiffman eds, *Bank Failures and Bank Insolvency Law in Economies in Transition* (Alphen aan Den Rijn: Kluwer Law International, 1999), 5.

[27] K. Dowd, 'Moral Hazard and The Financial Crisis' 29 *Cato Journal*, 141 (2009); A. Antzoulatos and C. Tsoumas, 'Institutions, Moral Hazard, and Expected Government Support of Banks' 15 *Journal of Financial Stability*, 161 (2014). More generally, as to the many sources

In addition, the model of market economies takes as a benchmark the scenario in which rivals compete against each other on equal footing or – better – a scenario in which no firm takes advantage of any support other than its own resources, business acumen, and good luck. If only a few firms could benefit from 'exogenous' help, as happens in cases of selective State measures, not only would the market mechanism not be revealing their different levels of efficiency and innovation, but even non-aided firms would lose the incentive to compete fiercely.

Finally, and irrespective of any conceptualization of the functioning of the market, any State measure produces a direct or indirect impact on the coffers of the State. In other words, State measures do not neutralize losses and debts, they collectivize them, transferring them from the balance sheets of private firms, banks included, to the balance sheets of the State.[28] Accordingly, any decision to support private firms in difficulty has a twofold cost in terms of public financing: it involves not only the use of taxpayers' money, but also the increase in public debt or its removal from the pursuit of other public interest objectives.

Besides, if one considers national public support in the framework of the formation of the European single market and the Eurozone, State intervention produces further distortive effects. It jeopardizes the integrity of the internal market, by inducing subsidy races and by favoring Member States whose margin of action in the use of taxpayers' money is broad. Furthermore, given the fiscal rules underlying the Euro zone, if a Member State seriously deteriorates its public debt to support its banks, the sustainability of the whole monetary union can be jeopardized due to the degree of interdependence and integration among markets using this same currency.[29]

At the same time, however, State measures can produce positive effects, not only in single Member States, but also at EU level.[30] As it was clear especially from mid-1990s onwards,[31]public support can serve a fully-fledged economic

of moral hazard in the banking sector, see R. Grossman, 'Deposit Insurance, Regulation, and Moral Hazard in the Thrift Industry: Evidence from the 1930s' 82*American Economic Review*, 800 (1992); T. Hellmann et al, 'Liberalization, Moral Hazard in Banking, and Prudential Regulation: are Capital Requirements Enough?' 90 *American Economic Review*, 147 (2000); and A. Haldane and J. Scheibe, 'IMF Lending and Creditor Moral Hazard'*Bank of England Working Paper No. 216*, (2004), available at SSRN.

[28]*Mutatis mutandis*, this idea recalls that of 'socialization of losses' that informed the law and mechanisms on banking resolution before the BRRD and the SRM came into force. See, on this point, F. Capriglione, 'La nuova gestione delle crisi bancarie tra complessità normativa e logiche di mercato', in V. Troiano and G. Uda eds, *La gestione delle crisi bancarie. Strumenti, processi, implicazioni nei rapporti con la clientela* (Padova: CEDAM, 2018), 7.

[29] M. Merola, 'La politica degli aiuti di Stato nel contesto della crisi economico finanziaria: ruolo e prospettive di riforma', in G. Colombini and M. Passalacqua eds, n 24 above, 219.

[30] L. Tosato, 'L'evoluzione della disciplina sugli aiuti di Stato', in C. Schepisi ed, *La "modernizzazione" della disciplina sugli aiuti di Stato* (Torino: Giappichelli, 2011), 3.

[31] European Commission, Community guidelines on state aid for small and medium-sized enterprises (SMEs), OJ C 213/4, 23.07.1996; Community framework for state aid for Research and Development, OJ C 45, 17.2.1996; Guidelines on aid to employment, OJ C 334, 12.12.1995; Framework on training aid, OJ C 343/10, 11.11.1998.

policy intended to pursue objectives of common EU interest,[32] ranging from social cohesion to environmental protection;[33] from job creation to financial sustainability.[34]

Luckily enough, the structure of Art 107 TFEU serves well this trade-off between the negative and positive effects of State measures. While the second and third paragraphs of Art 107 set forth two kinds of derogation,[35] its first paragraph includes the prohibition, which applies if and only if: an undertaking[36] within the meaning of EU law receives, on a selective basis,[37] an economic advantage,[38]

[32] A. Biondi and E. Righini, 'An Evolutionary Theory of EU State Aid Control', in D. Chalmers and A. Arnull eds, *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), 671-673; J. Jorge Piernas López, *The Concept of State Aid under EU Law: From Internal Market to Competition and Beyond* (Oxford: Oxford University Press, 2015), 45; D. Diverio, 'Le misure nazionali di sostegno al mercato bancario: un'applicazione à la carte della disciplina europea degli aiuti di stato alle imprese?'*Diritto del commercio internazionale*, 630 (2017).

[33] M.L. Tufano, 'La disciplina degli aiuti di Stato nell'Unione Europea: dal controllo all'enforcement' *Il diritto dell'Unione Europea*, II, 381 (2010); C. Schepisi, 'La modernizzazione della disciplina sugli aiuti di Stato secondo l'Action Plan della Commissione europea: un primo bilancio', in C. Schepisi ed, n 30 above, 17.

[34] Indeed, during the financial crisis of 2008-2013, financial stability – and therefore the intent to prevent the failure of a single bank from threatening the financial system as a whole, the real economy, and public debt – has become one of the objectives of the European Union. – See 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'), OJ C 216, 30.7.2013, para 7.

[35] To be sure, the Treaty provides for other exceptions as well: Art 106, para 2, which deals with undertakings delivering services of general interest, and Arts 107(3)(e) and 108(2), which grant the Council the power to create lawful categories of State Aid.

[36] In other words, the beneficiary of any aid must be an undertaking: any aid must be conceptualized as a *vertical* measure affecting *horizontal* business relations, as it comes come from a Member State, but it impacts on the rivalry among undertakings. Thus, it is true that Art 107 addresses Member States and their use of their taxpayers' money. However, one of the reasons why Art 107 exists is to prevent Member States from preventing firms from competing on an equal footing.

[37] In order to be characterized as a State Aid, a State measure must favour certain undertakings or the production of certain goods. True, this requirement may seem trivial. Indeed, where the aid at stake is granted to an individual undertaking, it is presumed. However, in case of interventions that apply broadly, to more than one undertaking, the selectivity requirement is what serves to distinguish general measures of fiscal or economic policy, which do not fall within the scope of Art 107, para 1, from aid schemes, which instead are subject to State Aid law.

[38] To be deemed as State Aid, the measure in question must constitute an 'un-market-like' advantage for the beneficiary undertaking. In other words, the measure must lead to an improvement in the economic and/or financial position of the beneficiary, which the undertaking would not have received under normal market conditions. See, eg, Case C-206/06 *Essent Netwerk Noord and Others*, [2008] ECR I-5497, para 79; Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, [2003] ECR I-7747, para 84; Joined Cases C-34/01 to C-38/01 *Enirisorse SpA* v *Ministero delle Finanze*, [2003] ECR I-14243, para 30; and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl* v *Giuseppe Calafiori*, [2006] I-02941, para 59; Case C-533/12 P, *SNCM and France* v *Corsica Ferries France*, 4.9.2014,

which is imputable to the State *and* is financed, directly or indirectly, through State-resources,[39] and which is likely to distort competition and affect trade between Member States.[40]

IV. The Requirements of Imputability and State Resources in *Tercas*

In *Tercas*, the only legal question at issue was whether the intervention of FITD, meant to guarantee financial sustainability, was actually imputable to[41] the Italian Republic and was financed, directly or indirectly, through the money of Italian taxpayers. This was the case because the party granting the alleged aid – FITD – was not a direct emanation of the State, but a consortium of private banks, and the funds transferred to the beneficiary bank – Tercas – did not came from the coffers of the Italian Republic, but from the budgets of those private agents. After all, the imputability requirement is automatically verified only when the aid results from a piece of national legislation[42] or consists in the action of a public administration.[43] In all the other cases, even when the measure is adopted by a public undertaking, imputability must be assessed by looking at the circumstances and the context of the case.[44] Likewise, any time

ECLI:EU:C:2014:2142, para 30 and Case C-39/94; *Syndicat Français de l'Express International (SFEI) and others* v *La Poste and others*, 11.7.1996, ECLI:EU:C:1996:285, para 60.

[39] See Section 4 below.

[40] The measure at issue must be capable of distorting competition and affecting trade among Member States. These conditions, although often analysed together, address two different issues – Joined Cases T-298, 312/97 and others *Alzetta Mauro and Others* v *Commission*, [2000] ECR II-2319, para 81; Case C-372/97 *Italian Republic* v *Commission*, [2004] ECR I-3679,para 44; and Case C-148/04 *Unicredito Italiano SpA* v *Agenzia delle Entrate*, [2005] ECR I-11137, para 55. As for the distortion of competition, the case law of the Court of Justice does not require any sophisticated market analysis: it is enough that the State measure puts the rivals of the beneficiary at a competitive disadvantage. Instead, as for the interstate commercial clause, case law does not require a threshold or a percentage below which the State measure is assumed not to affect trade between Member States – a fact, that, for example has justified the application of Art 107, para 1, to even minor domestic banks. Differently, to better administer its resources, the Commission has identified a *de minimis* threshold below which the State measure is supposed to have a negligible impact on trade and competition and, accordingly, does not require any notification. See, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Arts 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24/12/2013, 1.

[41] Case C-482/99 *French Republic* v *Commission*, [2002] ECR I-4397, para 24 and Joined Cases C-182 and 217/03, *Belgium and Forum 187 ASBL* v *Commission*, [2006] ECR I-5479, para 127.

[42] Differently, if the measure directly derives from a piece of EU legislation and leaves a Member State without any choice or leeway, the measure in question cannot be deemed State Aid. See Case C-460/07 *Sandra Puffer* v *Unabhängiger Finanzsenat*, [2009] ECR I-03251, para 70.

[43] Joined Cases C-182 and 217/03 n 41 above, para 128.

[44] See, in this regard, Commission Notice on the notion of State Aid as referred to in Art 107, para 1, of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, paras 39-40 and 42-43.

the employed resources do not directly come from the public sector or from intra-State entities, such as decentralised, federated, or regional bodies, the Commission must proceed with a case-by-case analysis to understand whether the State financed the aid.[45]

In their judgments, the General Court and the Court of Justice explain that, to show imputability, demonstrating that the State is potentially able to exercise a decisive influence on the operations of the undertaking granting the aid is not enough. On the other hand, proving that the State has urged the undertaking to adopt the measure in question by giving it detailed instructions about such measure would be too cumbersome. Therefore, what the Commission must prove is that the State *actually* exercised *substantial control* over the entity granting the aid and the specific measure adopted.[46] In practical terms, this means that the Commission must look at a set of indicia *both* resulting from the circumstances of the case and the context in which the measure at issue was taken, *and* suggesting that, in the specific case, the State was involved with respect to the entity granting the aid and the very same measure.

In relation to the facts of *Tercas*, the General Court and the Court of Justice found that the Commission had not proven to the requisite legal standard that any Italian public authorities were involved in FITD's intervention.[47] In particular, according to the Courts, such a failure did not depend on the existence of a standard of proof different from that which always applies whenever an entity distinct from the State grants the alleged aid,[48] but on the specific pieces of evidence that the Commission decided to use.

Indeed, according to the Commission, FITD operated in execution of the public mandate included in Art 96-*bis*, para 1, TUB, the Italian consolidated text of the laws on banking and credit,[49] with the intent to protect a clear public interest, that is, the savings and banking system's reputation. In addition, for the entire duration of the procedure, FIDT was always subject to Bank of Italy's directives because: (*i*) the Italian central bank appointed the commissioner of Tercas who requested FITD's intervention and interacted with FITD for the whole duration of the procedure; (ii) during informal meetings, Bank of Italy invited FITD and Tercas to reach a balanced agreement and coordinate their actions; (iii) through its officials, Bank of Italy participated in FITD meetings; and (iv) the Italian central bank authorized FITD's intervention, at a time when

[45] ibid para 48.

[46] See paras 65-67 and 83 of the judgment of the Court of Justice and paras 132 of the judgment of the General Court.

[47] See paras 114 to 131 and 132 of the judgment of the General Court and paras 27 and 72-73 of the judgment of the Court of Justice. See paras 68, 69 and 89 to 91 of the judgment of the General Court and para 26 of the judgment of the Court of Justice.

[48] See paras 38-40 of the judgment of the Court of Justice.

[49] Under Art 96-*bis*, para 1, of the TUB, the FIDT may undertake support interventions in favour of members that are subject to special administration under certain conditions.

the very same FITD would still have been free to change its mind.

In contrast, according to the General Court and the Court of Justice, pursuant to Art 96-*bis*, para 1, TUB, FIDT had no organic link with the Bank of Italy and was not subject to any legal obligation, but acted freely, according to independently-defined purposes and modalities. In particular, the Courts recognized that FITD intervened for the sake of their members interested in protecting financial stability, but they also acknowledged that the convergence between private and public interests does not, in itself, give any indication as to the possible involvement of the State in the adoption of a specific measure. Finally, the General Court and the Court of Justice affirmed that the Bank of Italy did not exercise any actual and substantial control over FITD and its intervention because: (*i*) the appointment of Tercas' special administrator was not linked to the possible intervention of FITD, which BPB requested afterwards to subscribe the capital increase; (*ii*) the informal invitations of the Bank of Italy consisted of mere wishes, without any binding character; (*iii*) representatives from the Bank of Italy participated in FITD's meetings as observers, with no voting rights, and did not even act in an advisory capacity; (*iv*) the Bank of Italy authorized the intervention measures adopted by FITD as part of its monitoring and supervision tasks in order to ensure the sound and prudent management of banks which is entrusted to it by law.

That said, it has long been established that, notwithstanding the text of Art 107, para 1, the nature of a measure cannot be evaluated separately from the way in which it is financed.[50] In other words, the inquiry as to the imputability requirement does not exhaust the analysis, which has to establish whether the intervention was made 'through State resources'.

To qualify some funds as State resources, it is not necessary to show that the resources in question belong permanently to the State's assets, but – at the same time – it is necessary to prove that they remain permanently under public control and, therefore, are permanently available to the competent national authorities. In the Commission's view, since FITD's intervention was to be imputed to the State, the use of FITD's resources was also to be conceptualized

[50] See Case C-379/98 *PreussenElektra AG* v *Schhleswag AG*, [2001] ECR I-2099, para 58; and C-345/02 *Pearle and Others* v *Hoofdbedrijfschap Ambachten*, [2004] ECR I-7139, para 35. Accordingly, a measure is not State Aid unless it is financed through public resources, that is, unless it entails a burden on the public finances – see Case C-379/98 *PreussenElektra AG* v *Schhleswag AG*, ibid, Opinion of AG Jacobs, paras 137-145. For example, an ad hoc liquidity measure that is taken at the central bank's initiative and is not backed up by any counter-guarantee of the State is not State Aid. In such a situation, indeed, the State's coffers are not charged, even indirectly, with the onus of the liquidity support. See Communication from the Commission - The application of State Aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, GU C 270, 25.10.2008, para 51, which lists the other conditions that a liquidity measure must meet in order not to be characterized as State Aid. In the same vein, see also the current 2013 Banking Communication, n 34 above, para 62.

as if the State ordered it. According to the General Court, instead, in *Tercas* the Commission failed to establish to the requisite legal standard that the resources at issue were at the disposal of the Italian State. In other words, the Commission was not entitled to conclude that the private funds of FITD actually were under the control of the Italian public authorities that decided to use them to finance Tercas.[51] The Court of Justice also confuted the finding of the Commission, but from a different perspective: it remarked that neither the Commission in its appeal nor the General Court in its judgment sought to draw a clear distinction between the requirement relating to the imputability of a measure to the State and that relating to State resources, failing to devote sufficient attention specifically to the latter. Therefore, according to the Court of Justice, the failure to prove imputability also resulted in the failure to prove the State origin of the measures.[52]

In short, in their judgments, the Court of First Instance and the Court of Justice have ruled out the possibility that the intervention of FITD could be qualified as State aid within the meaning of Art 107.[53]

However, this position does not preclude the application of antitrust law, ie, of the other branch of EU law aimed at ensuring competition within the Internal Market. Indeed, *prima facie*, it could be argued that FITD or any other DGS, which does not merely execute mandatory legal provisions, but instead operates on a voluntary basis, qualifies as consortium between competing undertakings, ie, as an agreement subject to Art 101 TFEU.[54] Furthermore, *prima facie*, it is also true that, in order to compare the different business scenarios justifying either their compulsory or voluntary interventions, DGSs' member banks need to undertake a potentially anticompetitive activity: they would need to exchange sensitive commercial information.[55] Thus, driving DGSs and their actions under antitrust scrutiny could be the correct and right thing to do to preserve competition within the banking industry.

However, *closer examination* shows that antitrust rules, such as Art 101, can never be applied to DGSs and their activities, such as the exchange of sensitive information, if banks operating within DGSs do not qualify as competing firms under EU competition law.

Therefore, the next few paragraphs focus on this preliminary, but

[51] See paras 139-161 of the judgment of the General Court and para 28 of the judgment of the Court of Justice.

[52] See paras 58 and 63-64 of the judgment of the Court of Justice.

[53] This outcome is of paramount importance in the national panorama, as FITD has since made significant capital injections similar to those involving Tercas (see, *inter alia*, the aforementioned BPB rescue transaction of 2019-2020).

[54] V. Minervini, 'La regolazione delle crisi bancarie dopo la sentenza Tercas' I *Mercato concorrenze regole*, 73 (2020).

[55] Guidelines on the applicability of Art 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (2011/C 11/01) ('Horizontal Guidelines'), see para 58.

fundamental, issue.

V. Antitrust Law Applies to Undertakings

When thinking about the system of European rules that guarantee competition in the single market, a distinction is usually made between the rules on State aid and the antitrust provisions. While the former are aimed at Member States to prevent them from employing their powers and resources to favour one or more undertakings in spite of market mechanisms, the latter are aimed directly at undertakings to prevent them from using their market power via agreements and abuses of dominance to alter the free interplay of supply and demand. This means that EU competition law only applies to physical and legal persons that can be qualified as undertakings.

Traditionally, the antitrust notion of undertaking is described as functional,[56] because its boundaries are defined in light of the goals that EU institutions pursue when they apply Arts 101 and 102 TFEU. More to the point, given that EU competition law sanctions unilateral or multilateral business practices that are capable of altering the functioning of the market, an undertaking is any natural or legal person capable of putting in place those business practices; that is, of behaving so as to limit the available output, increase the market price, reduce the quality and variety of the offer, and/or slow down the rate of innovation.

On the basis of existing case law, it can be argued that to qualify a person as an undertaking one should consider several issues.

For example, when faced with scenarios in which several persons are involved in a given practice, one must identify the minimum combination of natural and legal persons who are autonomously and independently engaged in that conduct.[57] In other words, in characterizing a person as an undertaking the 'criterion of the minimum efficient unit' must be respected,[58] because it would be ineffective – to say the least – to apply the prohibitions set out in Arts 101 and 102 TFEU to those who, because of the role that they play in the economic process, belong to the same centre of economic interests and are not bound

[56] F. Thepot, The Interaction Between Competition Law and Corporate Governance (Cambridge: Cambridge University Press, 2019), 33. See Joined Cases C-264, 306, 354 and 355/01 AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), and Others v Ichthyol-Gesellschaft Cordes and Others,[2003] ECR I-2493, Opinion of AG Jacobs, para 25; Case C-205/03 P FENIN v Commission, [2005] ECR I-6295, Opinion of AG Maduro, para 11.

[57] Case C-48/69 *ICI Ltd.* v *Commission*, Judgement of 14 July 1972, available at https://tinyurl.com/2sampsf8, para 140; and Case C-66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs e V*, [1989] ECR 803, para 35. A. Jones, 'The Boundaries of an Undertaking in EU Competition Law' 8*European Competition Journal*,301 (2012).

[58] O. Odudu and D. Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' 51 *Common Market Law Review*, 1721 (2014).

together in a competitive relationship that they could limit or distort.[59] Under the existing case law, in fact, the notion of an undertaking within the meaning of Art 101 TFEU refers to a single economic unit which consists of a unitary organization of personal, material and immaterial elements which pursues on a stable basis a certain economic end and which may contribute to the infringement of competition law.[60] Thus, the EU institutions consider as belonging to the same single economic entity: (*i*) legal entities that, subject to the effective (legal and factual) control of another legal entity, pursue the latter's commercial and strategic interests;[61] (*ii*) an entrepreneur and their commercial agents when, in dealings with third parties, the agents do not bear any autonomous business risk and therefore have no financial–commercial interest distinct from that of their principal;[62] and (*iii*) the employer and its employees, as the relationship of subordination requires the latter to act as auxiliary instruments of the former in commercial relations with third parties.[63]

In addition, when faced with the same person carrying out several activities, one must categorize that person as an undertaking in relation to each of those activities. For EU competition law the concept of an undertaking is indeed a relative one, because the same person carrying out different activities may and may not, at the same time, be an undertaking, depending on the specific activity taken into consideration.[64]

But, first of all, qualifying a legal or natural person as an undertaking means establishing whether the specific activity it carries out is indeed an *economic activity*,[65] that is an activity that consists of offering goods or services in a given

[59] Case C-170/83 Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli and C. Sas,[1984] ECR 2999, para 11.

[60] Case T–112/05 *Akzo Nobel NV and Others* v *Commission*, [2007] ECR II-5049, paras 57–58; Case T–9/99 *HFB and Others* v *Commission*, [2002] ECR II-1487, para 54; and Case T-11/89 *Shell International Chemical Company Ltd* v *Commission*, [1992] ECR II-757, para 311.

[61] Case C-521/09 P Elf Aquitaine v Commission, [2011] ECR I-8947, paras 54-72; Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA, [2006] ECR I-11987,para 44; Case C-22/71, Beguelin Import Co. v S.A.G.L. Import Export, [1971] ECR 949, paras 5–9; and Joined Cases 40–48, 50, 54–56, 111, 113 and 114/73, Suiker Unie UA and Others v Commission, [1975] ECR 1663, para 173.

[62] Case C-266/93 Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH, [1995] ECR I-3477, para 19.

[63] See also Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73 n 61 above, paras 539-542, clearly observing that 'if such an agent works for his principal he can in principle be regarded as an auxiliary instrument forming an integral part of the latter's undertaking bound to carry out the principal's instructions and thus, like a commercial employee, forms an economic unit withthis undertaking.' See also M. Maggiolino, 'Even employees are undertakings in the labour market, but granting social rights is not Antitrust's job' 10 *Journal of Antitrust Enforcement*, 365 (2022).

[64] Case C-82/01 P *Aéroports de Paris* v *Commission*, [2002] ECR I-9297, para 74, according to which 'the fact that, for the exercise of part of its activities, an entity is vested with official powers does not, in itself, prevent it from being characterized as an undertaking within the meaning of Article [102].' See also Case C-49/07 *Motosykletistiki Omospondia Ellados NPID(MOTOE)* v *Elliniko Dimosio*, [2008] ECR I-4863, para 25.

[65] An often-recurring sentence in the judgments of the CJEU is: 'in the context of

market.[66] To put it another way, if competition law must chase legal and natural persons capable of harming the proper functioning of the market, there is no point in applying competition law to those who act outside the market, ie, independently from any competitive rationale. By definition, those who do not obey the market mechanism are not in the position to undermine its functioning.

Therefore, in order to subject DGSs to antitrust scrutiny, one has to verify that DGSs actually qualify as undertakings within the meaning of Art 101 TFEU whilst carrying out their activities. More exactly, given that DGSs perform both statutory and optional functions, one should only answer this research question with respect to the activities that DGSs *voluntarily perform*.

Indeed, their compulsory activities are excluded from the scope of EU competition law *in any case*, ie, irrespective of any consideration as to the application of the notion of undertakings to DGSs, because compulsory activities result from express legal provisions. Namely, pursuant to Arts 108 and 109 BRRD, DGSs must both reimburse covered depositors of failing (or likely to fail) banks up to a defined limit and finance banking resolutions. However, DGSs do not choose to serve these functions: they are required to do so, with the ultimate intent of using private funds in lieu of taxpayers' money to save troubled banks. Thus, even if these activities were to be deemed economic, and DGSs performing them, undertakings, EU competition law would never be applied. EU competition law is concerned with privately initiated restraints of competition and without those restraints being compelled by, or effectively controlled by, the State and its branches, even when these activities consist in offering goods and services to the market. Under EU competition law, firms are liable not when their potential infringing practices strictly and expressly result from some legal provisions, but as long as they have scope to decide their own commercial conduct.[67]

competition law ... the concept of an undertaking encompasses every entity engaged in an economic activity.' See Case C-41/90 *Klaus Höfner & Fritz Elser* v *Macrotron GmbH*, [1991] ECR I-1979, para 21; Joined Cases C-159 and 160/91 *Christian Poucet* v *Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon*,[1993] ECR I-637, para 17; Case C-244/94 *Fédération française des sociétés d'assurances and Others* v *Ministère de l'Agriculture et de la Pêche*,[1995] ECR I-4013, para 14; Case C-55/96 *Job Centre coop arl*, [1997] ECR I-7119, para 21; Joined Cases C-180to 184/98 *Pavel Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten*, [2000] ECR I-6451; Case C-309/99 *J. C. J. Wouters and Others* v *Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, para 46; Joined Cases C-264, 306, 354 and 355/01, *AOK Bundesverband and Others* v *Ichthyol-Gesellschaft Cordes and Others*,[2004] ECR I-2493, para 46.

[66] In relation to this issue there is another recurring sentence in CJEU decisions: 'any activity consisting in offering goods and services on a given market is an economic activity.' See Case C-475/99 *Firma Ambulanz Glöckner* v *Landkreis Südwestpfalz*,[2001] ECR I-8089, para 19; Case C-118/85 *Commission* v *Italian* Republic,[1987] ECR 2599, para 7; Case C-35/96 *Commission* v *Italian Republic*, [1998] ECR I-3851, para 36; Joined Cases C-180 to 184/98 n 65 above, para 75; Case C-309/99 n 65 above, para 47; Case C-218/00 *Cisal di Battistello Venanzio and C. Sas* v *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)*, [2002] ECR I-691, para 22.

[67] Case C-198/01 *Consorzio Industrie Fiammiferi* (CIF) v *Autorità Garante della*

VI. The Antitrust Notion of Economic Activity and DGSs' Non-Refundable Investments

As aforementioned, according to the existing case law, under competition law an activity is economic when it consists of offering goods or services in a given market. In particular, as Advocate General Maduro explained in *FENIN*, what is decisive in determining an economic activity:

> 'is not the mere fact that the activity may, in theory, be carried on by private operators (…) but the fact that the activity is carried on under *market conditions*'.[68]

Thus, to be subject to antitrust scrutiny, the activities at issue must make economic sense: they must be theoretically capable of producing profits, although in some practical cases it may happen that they do not. In other words, activities obey the market rationale when they are worthwhile for rational agents that, at least, are interested in covering the costs of their conduct, although under the circumstances of the case at hand those agents may happen to fail in realizing these goals. For example, the activity of collecting data is economic even when data collectors, such as digital platforms, do not re-sell those data,[69] but instead use them to design new products or to add value to the goods and services they already supply. Indeed, in such a scenario, while not re-selling data, digital platforms obey the market logic on two counts:[70] because they improve the variety and quality of their offer and because they continually attract users, who are among the most important sources of the data they have.[71] Likewise, the same platforms are performing an economic activity, even if they sell the named goods and services at a zero-price,[72] because within their multi-sided business models such an offer is not really for free, but happens in exchange for attention, data,[73] and advertisers' money.[74] More explicitly, the prices of social networking or search services are not zero because firms want to be charitable and satisfy users' needs irrespective of their business revenues and profits; those prices are zero in order to efficiently exploit the indirect network effects that link the several

Concorrenza e del Mercato, [2003] ECR I-8055.

68 Emphasis added. See Case C-205/03 P *FENIN* v *Commission*, n 56 above, para 13.

69 D.S. Tucker and H. B. Wellfod, 'Big Mistakes Regarding Big Data' *The Antitrust Source*, 5 (2014).

70 D. Sokol and R. Comerford, 'Antitrust and Regulating Big Data' 23 *George Mason Law Review*, 1129 (2016).

71 D. Solove, 'Privacy and Power: Computer Databases and Metaphors for Information Privacy' 53 *Stanford Law Review*, 1393 (2001).

72 M. Sousa Ferro, 'Ceci N'est Pas un Marché': Gratuity and Competition Law' 1 *Concurrences*, (2015), available at https://tinyurl.com/2a3xmpcz (last visited 31 December 2022).

73 T. Hoppner, 'Defining Markets for Multi-Sided Platforms: The Case of Search Engines' 38 *World Competition*, 349 (2015).

74 Case C-352/85 *Bond van Adverteerders* v *State of the Netherlands*,[1988] ECR 2085, paras 54–72.

sides of social network or search markets together.[75] Thus, as these examples show, under EU competition law any activity that in a given context a rational agent interested in maximizing profits considers to be worthwhile is economic, even if the given agent fails to make a profit in the particular case at hand.[76]

In sharp contrast, according to the Court of Justice, there are two scenarios in which physical and legal persons do not perform any economic activity.[77] *First*, when their behaviour 'is connected with the exercise of the powers of a public authority'. In particular, a person is said to exercise 'public powers' when their activity is 'a task in the public interest which forms part of the essential function of the State' and when that activity

> 'is connected by its nature, its aim and the rules to which it is subject with the exercise of public powers … which are typically those of a public authority'.[78]

After all, pursuant to the classic dichotomy between the State and the Market, there can be some activities that the State removes from the competitive arena, by including them among its own prerogatives.

Second, there is no competition to be distorted nor undertaking that can distort it, when the activities at issue are solidarity-laden,[79] that is, 'inherently uncommercial'.[80] The case law on pension funds, social security schemes, health care and insurance services indicates that the classification of an activity as solidarity-laden is 'necessarily a question of degree',[81] depending on the specific circumstances of the case taken into consideration. However, at present, the very same case law clearly establishes that the mechanisms whereby one group of individuals subsidises another do not obey any market logic:[82] they are not economic.

For example, in *Poucet* v *Assurances Générales de France*,[83] *Cisal di*

[75] T. Hoppner, n 73 above, 353.

[76] Joined Cases C-96-102, 104, 105, 108 and 110/82, *N.V. IAZ International Belgium and others* v *Commission*, [1983] ECR 3369; and Case C-155/73, *Giuseppe Sacchi*, [1974] 409.

[77] R. Whish and D. Bailey, *Competition Law* (Oxford: Oxford University Press, 10th ed, 2021), 89 and J. Faull and A. Nikpay, *The EU Law of Competition* (Oxford: Oxford University Press, 3rd ed, 2014), 193-197.

[78] Case C-30/87 *Corinne Bodson* v *SA Pompes funèbres des régions libérées*, [1988] ECR 2479, para 18.

[79] Joined Cases C-159 and 160/91 n 65 above, paras 18–19. See also, Case C-237/ 04 *Enirisorse SpA* v *Sotacarbo SpA*,[2006] ECR I-2843, para 31; and Case C-222/04 *Cassa di Risparmio di Firenze SpA and others* [2006] ECR I-289, paras 120–121.

[80] Case C-70/95 *Sodemare SA and Others* v *Regione Lombardia*, [1997] ECR I-3395, Opinion of AG Fennelly, para 29.

[81] Joined Cases C-264, 306, 354 and 355/01 *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), and Others* v *Ichthyol-Gesellschaft Cordes and Others* n 65 above, para 36.

[82] Case C-70/95 *Sodemare* v *Regione Lombardia*n 80 above, para 29.

[83] Joined Cases C-159 and 160/91 *Christian Poucet* v *Assurances Générales de France*

Battistello Venanzio & C Sas v *INAIL*,[84] and *AOK Bundesverband*,[85] the Court of Justice excluded that entities administering some social security schemes could be regarded as undertakings, first because such schemes were entered into on a compulsory basis and second because, whereas all the beneficiaries of those schemes received the same rights and economic advantages, their contributions were proportionate to their incomes, so that the luckiest among such beneficiaries financed those who had financial difficulties or low incomes.[86] According to the Court, this sympathetic attitude does not make any economic sense, as it happens in a different case, that is when an entity provides health services 'free of charge to its members on the basis of universal cover'.[87] Differently, in cases such as *Fédération Française des Sociétés d'Assurance*,[88] and *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie*,[89] the Court of Justice found that the entities administering pensions schemes were undertakings, because they have to convince individuals to adhere to those schemes and because they grant benefits depending on the contributions of those individuals as well as on the financial results that their managing bodies were capable of obtaining by investing individuals' funds.[90]

In light of this, one should conclude that DGSs implementing non-refundable financial measures aimed at preventing banking crises are carrying out a solidarity-laden activity that cannot fall within the scope of EU competition law. Indeed, such measures do not obey market logic, because rational agents interested in maximizing their profits would never choose to waste their capital by giving third parties financial resources that will not give them any return. As in cases of some pension and social security schemes, granting non-repayable contributions and free-of-charge guarantees is a clear form of subsidization that is undertaken by a group of wealthy agents – the healthy banks which are part of the DGS in question – to support a group of agents in need, the one or more banks of the very same DGS which instead are in trouble.

Hence, in *Tercas* the decision of FITD to make non-refundable investments in

and Caisse Mutuelle Régionale du Languedoc-Roussillon n 65 above.

[84] Case C-218/00 *Cisal di Battistello Venanzio & C. Sas* v *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (INAIL), [2002] ECR I-691.

[85] Joined Cases C-264, 306, 354 and 355/01 n 65 above.

[86] ibid para 52 reading that 'sickness funds are compelled by law to offer to their members essentially identical obligatory benefits which do not depend on the amount of the contributions. The funds therefore have no possibility of influence over those benefits'.

[87] Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN)* v *Commission of the European Communities*, [2003] ECR II-357, para 39.

[88] Joined Cases C-319, C-40 and 224/94 *Hendrik Evert Dijkstra* v *Friesland (Frico Domo) Coöperatie BA and Others*, [1995] ECR I-4471.

[89] Cases C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751.

[90] See R. Whish and D. Bailey, n 77 above, 89 and J. Faull and A. Nikpay, n 77 above, 195-196.

favour of Tercas qualify neither as State aid, nor as an agreement among competing firms, because banks choosing to implement non-refundable financial measures are not undertakings within the meaning of Art 101 TFEU. In other words, although *prima facie* DGSs and their activities may seem to fall within the scope of EU competition law, they do not, at least when they implement non-refundable financial measures to prevent failing banks from exiting the market.

Further arguments support this conclusion.

VII. The Theoretical Sustainability of the Thesis

DGSs aim at using private resources to rescue banks in difficulty, with the final intent of preserving the stability of the overall financial system. Therefore, to counter what is argued above, one could maintain that such an ultimate goal is what gives economic sense to the activity of making non-refundable investments. In other words, one could contend that, while using their funds to save banks in crisis, DGSs still act as self-interested agents. They carry out an economic activity, because their non-refundable investments are intended to prevent any mechanism of contagion and, therefore, to ensure the sustainability of the entire banking system on which their own viability also depends.

However, this argument tries too hard. Even the aforementioned solidarity-laden activities that no one wants to bring under the scrutiny of antitrust law might find similar self-interested, indirect justifications. Namely, if we assume that social stability is in the interests of wealthy people because it ensures that their social position is not challenged, then even compulsory social security schemes producing wealth redistribution and national health systems providing universal coverage are in the interests of the upper classes, because they keep social conflict in check. Likewise, even activities that no one would find difficult to qualify as charitable, such as donations to research organizations or welfare associations, can be portrayed as self-interested, when they confer some kind of tax benefit. In short, those who accept this argument would have to argue that the only activities that can be said to be 'non-economic' are those that are self-defeating, ie, those for which no agent would find any rational justification. On the other hand, under EU competition law there can be activities that, although self-interested, are not economic because they do not obey market logic. There may be an element of self-interest in deciding to use the resources of high-income people to provide low-income people with a certain level of social security or health services and in choosing to subsidize charity associations, but those resources are not capable of covering the costs entailed. In summary, there may be rational, self-interested decisions that still are not economic within the meaning of EU competition law.

In a slightly different way, one could take direction from *Tercas* and

maintain that for the banks grouped in a DGS, choosing to adhere to a DGS and to save a troubled bank via non-refundable investments may be more convenient than being obliged to reimburse the depositors of that bank, were it liquidated.[91] In *Tercas*, FITD voluntarily decided to grant non-repayable contributions and free-of-charge guarantees to the bank in crisis because under the 'least cost principle' the costs of such a preventive intervention were lower than the costs that the very same FITD would have had to bear to keep the depositors of that troubled bank guaranteed. Still, the fact that one solidarity-laden activity may be less costly than another does not change the uncommercial nature of both. Neither the act of making non-refundable investments nor the act of reimbursing some categories of depositors obeys the market rationale, although the former may be less expensive than the latter.

Moreover, to further support the idea that non-refundable investments are not economic activities, one could consider how the very same European Commission qualified them in *Tercas*. There, the Commission was clear in stating that the non-repayable contributions and the unremunerated guarantees that FITD made to the benefit of Tercas, the troubled bank, would never be made by an investor acting under ordinary market conditions.[92] Namely, the Commission noted that FITD's

> 'actions, for which there [was] no expectation of any return and indeed for which no return [was] possible, [were] not those of a market economy operator'.[93]

Under State aid law, the market economy operator test applied to capital injections into profit-seeking companies aims at understanding whether the beneficiary of the alleged State aid would have obtained the same funds on the same terms in the private capital market.[94] Thus, if the Commission establishes that it is not the case, it means that the entity granting funds is not acting in light of the risks and expected returns of its investments, that is, it is not acting

[91] Tercas decision, paras 68-69 and 71. There, the Commission decided that: (*i*) under the MEO test, costs due to reimbursements should not be included in those of a market operator, because no market operator would ever be required to save a failing bank; and (*ii*) there was still a less costly alternative to the non-refundable investments that a true market operator, interested in making profits, would have chosen.

[92] See also Case C-39/94 *Syndicat Français de l'Express International (SFEI) and others* v *La Poste and others*, [1996] ECR I-3547, para 60; Case C-256/97 *Déménagements-Manutention Transport SA (DMT)*, [1999] ECR I-3913, para 22; Joined Cases C-197 and 203/11 *Eric Libert and Others* v *Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others* v *Vlaamse Regering (C-203/11)*, Judgement of 8 May 2013, available https://tinyurl.com/ye2azdwt, para 83.

[93] Tercas decision, para 67.

[94] If it were the case, State Aid law could not find application, because in the EU Member States also retain the right to operate in the market just as any other economic agent – see Joined Cases T-228 and 233/99 *Westdeutsche Landesbank Girozentrale e Land Nordrhein-Westfalen*, [2003] ECR II-435, paras 208-214.

as a rational agent obeying the market rationale. In other words, if the Commission ascertains that a firm has received capital other than under the current market conditions, the Commission must also find that the act of granting those funds cannot be deemed to be an economic activity within the meaning of competition law.

Finally, to counter the conclusion that non-refundable investments are not economic activities, one could argue that excluding DGSs from the scope of application of antitrust law would allow banks to exchange strategic information when they meet to decide how to invest DGSs' funds. However, as stated above, the notion of undertaking is relative: the same entity is or is not an undertaking depending on the activity it carries out. Thus, nothing in theory prevents one from arguing that, while banks making non-refundable investments via DGSs are not undertakings for the purpose of Art 101, they acquire such qualification when they try to use DGSs' meetings to exchange strategic information that could serve to form cartels or other concerted practices. As a matter of practice, the idea that DGSs making non-refundable investments are not consortia of competing undertakings within the meaning of EU competition law does not exclude that, while exchanging information, the member banks of DGSs should comply with non-disclosure obligations as well as put in place 'Chinese walls' to prevent any infringement of Art 101. For example, the bank employees actively engaged in the activity of a DGS should be prevented from communicating or carrying out functions related to the marketing and commercial strategy of their own bank.

In summary, many arguments concur in supporting the idea that DGSs choosing to make non-refundable funds do not perform an economic activity and, thus, cannot fall within the scope of EU competition law.

VIII. Concluding Remarks

Within the EU legal framework for the management of banking crises, DGSs are the private instruments with which Member States' banks demonstrate that they *can be willing to* react to the crises hitting their sector without resorting to using taxpayers' money. Thus, DGSs play a key role within the European banking system, not only because they can save one or more troubled banks, but also because they can consolidate people's trust in that system by conveying the idea that the banks of that very same system are the first to commit themselves to ensuring its proper functioning.

As this article has shown, such activity is covered neither by State aid nor by competition law. Although these rules are often conceived as legal instruments that work in a complementary way to ensure competition in the internal market, DGSs' non-reimbursable investments, firstly, cannot necessarily be charged to Member States and debited from their coffers and, secondly, do not

qualify as economic activities. As a consequence, DGSs that freely choose to bail out a failing bank using their own non-reimbursable resources are free from any competitive control. In other words, at present, the competitive consequences of rescue activities benefiting a firm that would otherwise exit the market are screened out in only two scenarios: (*i*) when they are attributable to the State, because in this case State aid law still might find application; or (*ii*) when they consist in economic activities within the meaning of EU competition law and take the form of either rescue cartels or mergers to save failing firms.

This result may be due to an underlying assumption, which, however, the experience of DGSs refutes, namely, the idea that private economic agents are incapable of performing solidarity-laden activities in defiance of the selection mechanism inherent in the market. Or, this result could be due to a policy choice, that of not assessing the competitive consequences of activities that keep failing firms in the market when the costs of such a rescue are borne by private agents transferring non-repayable capital.

Either way, the protection of financial stability is what justifies this loophole when the troubled firms are failing banks. In other words, the public interest in defending the banking system from crises, snowball effects, and vicious circles is what makes tolerable the lack of competitive checks in cases where agents donate their private funds to rescue a failing bank.

The question that remains unsolved and should be the subject of further researches is what other policy goals could ever justify the existence of this loophole in relation to the cases of agents operating solidarity activities for the benefit of non-financial failing firms that would otherwise exit the market.