TIE-IN LOANS AND SECURITIES – THE BANCA POPOLARE DI VICENZA CASE

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1. THE PROCEEDING

1.1. The commercial practice under investigation

Last year, the Italian Competition Authority (ICA), in relation to unfair commercial practices, carried out for the first time proceedings on a particular aggressive practice linking loans and securities (shares and/or bonds), which was implemented by a bank, playing the role both of the party supplying the loan product and of the issuer of the investment product.

Specifically, the ICA launched an in-depth investigation into Banca Popolare di Vicenza S.p.A. (before Banca Popolare di Vicenza s.c.p.a.)\(^2\) in order to ascertain the selling of combined loan/bank security packages, specifically in the years 2013 and 2014 – i.e. the years in which the capital increase operations of the bank in question were carried out.

More precisely, the ICA complained that the Bank had, de facto, made the supply of loans to customers (mortgages, personal loans, availability of credit to the bank account) conditional upon the acquisition by those customers of its own shares or convertible bonds, with a view to placing these securities with customers and, in the process, increasing its capital, thus achieving its pre-set objectives. The objectives in question were, firstly, to reach certain asset ratios in view of the transfer of the Bank to the sole supervision of the European Central Bank and, secondly, to increase in size through the potential acquisition of other banks.\(^3\)

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1 Italian Competition Authority.
2 See PS/10363 - Banca Popolare di Vicenza - Vendita abbinata finanziamenti-azioni, in Boll. 32/2016.
3 As emerged also from the reports of the board of directors on performance included in the financial statements for 2013 and 2014, the purpose of the capital increase operations in those years was: “to enable, on the one hand, the acquisition of the necessary capital resources to grasp any opportunities for growth through external lines, and on the other, to reach the highest European market standards in terms of capitalisation, in view of the upcoming transfer to the sole supervision of the European Central Bank”.

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1.2. The context of reference of the commercial practice

In 2013 an important – and still ongoing – reorganisation of the legislative, regulatory and supervisory framework has been launched, which involved the national banking system, consequent to: *i)* the start of application of the set of measures referred to as Basel III; *ii)* the incipient participation of a number of Italian banks in the Comprehensive Assessment of the European Central Bank, the preparatory examination prior to Single European Supervision and *iii)* the imminent transfer of those banks to Single European Supervision via the Single Supervisory Mechanism. Starting in that year, Banca Popolare di Vicenza, being affected by these interventions and changes, passed a number of resolutions relating to credit and commerce, including the decisions to increase the amount of its own share capital and to increase the number of its shareholders.

The 2013 capital increase operation envisaged, alongside € 253,000,000 of capital increase and € 253,000,000 of convertible bonds offered on a pre-emptive basis to shareholders, also € 100,000,000 of capital increase set aside for new shareholders. This operation was an initiative geared towards expanding the shareholder base, to be achieved through an ordinary capital increase up to a maximum of € 100,000,000, which would allow individuals only to subscribe to 100 shares in the Bank – an amount set by the Articles of Association as the minimum required for admission as a shareholder. Upon completion of this 2013 capital increase operation, the number of shareholders had been increased by around 24%.

The following year, 2014, this growth trend in the number of shareholders continued, thanks also to the proposal for a new capital increase operation. The 2014 capital increase operation envisaged a capital increase offered on a pre-emptive basis to the shareholders and to bearers of convertible bonds, up to a maximum of around € 607,000,000, and a capital increase of € 300,000,000 geared towards expanding the shareholder base.

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4 These regulations envisaged, amongst other measures, a reinforcement of the capital adequacy of banks, both in quantitative and qualitative terms, with the setting of minimal capital thresholds.
5 The so-called “comprehensive assessment” of European banks conducted by the European Central Bank in partnership with the national supervisors.
6 The new Single Supervisory Mechanism (SSM) includes the European Central Bank and the national supervisors of the Eurozone countries, and was launched in November 2014. The SSM is responsible for the prudential supervision of all of the banking institutions in the participating Member States and ensures that the EU policy on the prudential supervision of banking institutions is implemented in a coherent and effective fashion, and that banking institutions are subject to supervision of the highest quality. The European Central Bank is responsible for the effective and coherent functionality of the SSM, and supervises the functionality of the system, on the basis of the sharing of responsibilities between the European Central Bank and the national supervisors, as set out in the SSM regulations. To ensure effective supervision, banking institutions are classed either as “significant” or “less significant”. The former are subject to the direct supervision of the European Central Bank, whereas the national supervisors are responsible for supervising the less significant banks.
7 Banca Popolare di Vicenza was one of the Italian banks that participated in the European Central Bank’s Comprehensive Assessment and is a significant entity that falls under the direct supervision of the European Central Bank.
At the end of this capital increase operation, the number of shareholders in the Bank reached a total in excess of 100,000. In 2014, with respect to the previous year, the number of shareholders had increased by 29%, with a total increase across the two years of around 59%.

1.3. Placing policies

During the course of the proceeding, it emerged that:

i) the positive outcome of the capital increase operations was also achieved through a series of commercial initiatives put in place by the professional and geared towards the placing of its securities with the clientele, which arose out of proposals or requests for loans, made, respectively, to the clients by the Bank or by the clients to the Bank. These initiatives, targeted at reaching the capital objectives and also aimed at customers over the course of 2013-2014 were subject to deliberation at the meetings called by the Markets Division of the Bank’s General Management with the Area and Regional Directors, with the assignment of specific objectives and associated deadlines;

ii) out of the various types of loans, mortgages were those in relation to which there was the greatest focus on selling to customers in combination with Bank securities, and out of the mortgages, efforts were concentrated particularly on one specific type, the so-called “shareholder mortgage”. The investigation found that, during the period in question, the Bank was marketing this product intended for shareholders in such a way that was clearly not geared towards the placing of securities; rather, the approach taken by the Bank was characterised by specific favourable conditions dependent upon the client becoming a shareholder by subscribing to a minimum package of 100 Bank shares. The mortgage in question was granted not only to existing shareholders but also to those who, prior to or at the same time as the submission of the mortgage request, also submitted a request to acquire shareholder status. As such, access to the shareholder mortgage was also envisaged for customers who had submitted a request to acquire shareholder status even though the Bank had yet to give its final confirmation. Since the granting and maintenance of the status of Bank shareholder was the necessary pre-requisite for taking advantage of the preferential terms of the mortgage, the contractual conditions for the shareholder agreement included specific forfeiture clauses that would be applicable if: i) the request to acquire shareholder status were declined, whereas the mortgage had been stipulated prior to the response of the Bank; ii) the status of shareholder were no longer applicable and iii) there were a transfer of the mortgage contract and/or the associated debt to another party that was not a shareholder of the Bank;

iii) with specific reference to the aforementioned shareholder mortgage, a shareholder bank account was also opened at the same time as the subscription of shares. At the time in which the customer was granted the status of shareholder to take out the shareholder mortgage, he or she was also prevailed upon by the Bank to open a shareholder bank account through which to manage the repayment of the mortgage, on the grounds that it was necessary to have a bank account linked to the mortgage and that shareholder status afforded the opportunity to benefit from special financial terms.
2. FINDINGS

In light of the results of the investigation, the ICA ascertained the combined selling of loans and Bank securities, for the purpose of placing Bank securities with customers. Such conduct was strongly encouraged by the senior management of the Bank, particularly in 2013 and 2014, when the capital increase operations were carried out, for the purpose of reaching the pre-set objectives. The combined selling was limited to mortgages on the basis of the information provided above vis-à-vis the fact that the selling procedure was most widely applied in relation to this form of loan. Numerous pieces of evidence confirmed how the Bank forcibly placed its securities with customers requesting mortgages. Evidence of this behaviour was provided by the following:

i) the documentation confirming that the General Management of the Bank, and specifically the Markets Division and the Area and Regional Directors, gave an explicit instruction to the Network to place the maximum number of securities with customers;

ii) the declarations of certain branch managers, who confirmed that the Bank’s policy was to place financial products (in particular, mortgages) in combination with the purchase of company securities;

iii) the instances highlighted by customers to the ICA and a number of complaints made by the professional in which a necessary and indispensable condition of obtaining a loan/mortgage was the acquisition of Bank shares and, in particular, the purchase of an amount of shares that would result in the granting of the status of shareholder;

iv) the details on the growth of the shareholder base, which in the period 2013-2014 reached the level of around 59%;

v) the close examination of the quantitative data produced by the professional on the combined selling of mortgages and securities in the period covered by the investigation. Specifically, high percentages of mortgages combined with securities were detected in the period 2013-early 2015; a fact that is symptomatic of this commercial policy, pursued with conviction by the Bank, of placing its securities as a condition of every loan request from customers.

In addition, it was ascertained that, in order to ensure the success of the aforementioned capital increase operations and to reach the pre-set objectives of said operations, customers/individuals requesting a mortgage product were offered the shareholder mortgage, on the grounds that it was a particularly good-value solution, even though it obliged them to purchase minimum packages of Bank shares (100 shares) to obtain shareholder status, and not to sell those shares in order to maintain that status and, therefore, to continue to benefit from the favourable terms associated with that mortgage. Within the context of the more generalised encouragement to place Bank securities, this offer was strongly promoted by the senior management in relation to clients in the retail sector, to such an extent that the percentage of subscriptions was extremely high in the period 2013-early 2015.
Last of all, it was also ascertained that at the same time as the shareholder mortgage was taken out, a shareholder bank account was also opened. The Bank managed to implement this linking practice by purporting that it was necessary to open a new bank account with it in order to obtain the most benefit from the shareholder mortgage, while also enticing customers with the possibility of exploiting the advantages of shareholder status to the greatest possible extent. This approach derived both from the demands made by the senior management to open new bank accounts and from the fact that the bank accounts contributed to the reaching of the objectives set for Bank employees in the 2013 incentives system, and was confirmed by the considerable percentages of combined shareholder mortgage/bank account solutions recorded in the period 2013-early 2015.

3. CONCLUSION

As such, the commercial practice under examination was deemed to be unfair pursuant to the terms of Articles 20 (2), 21 (3-bis), 24 and 25 of the Consumer Code.

By subordinating the supply of the mortgages requested by customers to the underwriting by those customers of its securities, Banca Popolare di Vicenza was unduly coercing them, in breach of Articles 24 and 25 of the Consumer Code. In the case of the shareholder mortgages, this undue coercion involved requiring non-shareholder customers to subscribe to minimum share packages in order to attain shareholder status and, thus, to access the mortgage products reserved for shareholders. Moreover, these securities were difficult to negotiate and liquidate, given the Bank’s unlisted status at the time, and in addition, during the period of the loan they could not be divested, otherwise the preferential financial terms envisaged would no longer be applicable. In addition, again in reference to this specific case of the shareholder mortgages, the Bank also required customers to open one of its own bank accounts, linked to the mortgage: this was a bank account reserved for shareholders, in contravention of the terms of Article 21 (3-bis) of the Consumer Code.

Pursuant to Article 20 (2) of the Consumer Code, the commercial practice in question was deemed to run counter to the professional diligence that can legitimately be expected of an operator in the banking sector, and was considered likely to distort to an appreciable extent the financial conduct of the average consumer. In particular, it should be stressed that through the conduct in question Banca Popolare di Vicenza did not demonstrate the normal level of fairness, skill or attention that may reasonably be expected, taking account of the nature of its field of activity and of the fact that it is an important operator in the Italian banking context, as the parent company of the Banca Popolare di Vicenza Group, currently tenth in the Italian banking system by total assets.

For its breach of Articles 20 (2), 21 (3-bis), 24 and 25 of the Consumer Code, the ICA, taking account of the financial situation of the professional, has imposed on Banca Popolare di Vicenza a fine of €4,500,000.