BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

Pandectae. Digest of the case-law on the Banking Union

Jan-Jun 2022

edited by Raffaele D'Ambrosio, Francescopaolo Chirico, Leonardo Droghini and Giuseppe Pala

number 92

December 2022

BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

Pandectae. Digest of the case-law on the Banking Union

Jan-Jun 2022

edited by Raffaele D'Ambrosio, Francescopaolo Chirico, Leonardo Droghini and Giuseppe Pala

Number 92 – December 2022

The series "Quaderni di Ricerca Giuridica", edited by the Legal Services Directorate, publishes the studies conducted by the Bank of Italy's lawyers or by internal and external experts.

The series is focused on legal matters of specific interest to the Bank.

The research papers are selected by an editorial committee which assesses originality, clarity, reasoning consistency, completeness of the information provided.

The opinions expressed and conclusions drawn are those of the authors and do not necessarily reflect the views of the Bank of Italy.

Editorial Board:

Marino Perassi, Olina Capolino, Giuseppe Leonardo Carriero, Stefania Ceci, Raffaele D'Ambrosio, Maria Patrizia De Troia

Editorial Assistants:

Beatrice Scrima, Maria Elisabetta Rizzica

ISSN: 0394-3097 (print)
ISSN: 2281-4779 (online)
Printed by the Printing and Publishing Division of the Bank of Italy

Foreword ... 7

TABLE OF CONTENTS

Introduction ... 13

The case law of the CJEU ... 21

I General Court, Pilatus Bank Plc and Pilatus Holding Ltd. v ECB, Case T-27/19 ... 23

1. Keywords and summary ... 23
2. Withdrawal of authorisation for lack of good repute of shareholder with qualifying holdings ... 24
3. References to "notes de doctrine" ... 26

II General Court, Ernests Bernis and Others v SRB, Case C-364/20 P ... 27

1. Keywords and summary ... 27
2. SRB's non-resolution decision: lack of standing of the shareholders of the credit institution to bring a legal action for its annulment ... 28

III Court of Justice, SRB v Portigon AG and Commission, Case C-664/20 P, SRB v Hypo Vorarlberg Bank AG, Case C-663/20 P ... 31

1. Keywords and summary ... 31

IV Court of Justice Banco Santander, SA v J.A.C. and M.C.P.R., Case C-410/20 ... 33

1. Keywords and summary ... 33
2. Claims of the resolved entity shareholders: an action based on the incompleteness or incorrectness of the prospectus cannot be brought after resolution against the issuer or its universal successor ... 34
3. References to "notes de doctrine" ... 37

V Court of Justice, BPC Lux 2 Sàrl and Others v Banco de Portugal and Others, Case C-83/20 ... 38

1. Keywords and summary ... 38
2. Portuguese national resolution legislation: partial implementation of Directive 2014/59/EU (BRRD) and protection of shareholders of the institution under resolution ... 39
3. References to "notes de doctrine" ... 43

VI General Court, Finanziaria d'investimento Fininvest SpA (Fininvest) and Silvio Berlusconi v ECB, Case T-913/16 ... 44

1. Keywords and summary ... 44
2. Judgment 11 May 2022 of the General Court of the European Union (T-913/16). Dismissal of the appeal against the ECB's decision opposing the acquisition of a qualifying holding in Banca Mediolanum ... 46
3. References to "notes de doctrine" ... 49

VII **General Court, Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v SRB, Case T-481/17, Antonio Del Valle Ruíz and Others v Commission and SRB, Case T-510/17, Eleveté Invest Group, SL and Others v Commission and SRB, Case T-523/17, Algebris (UK) Ltd. and Anchorage Capital Group LLC v Commission, Case T-570/17, Aeris Invest Sàrl v Commission and SRB, Case T-628/17** ... 50

1. Keywords and summary ... 50
2. The admissibility of the action for annulment brought only against the SRB decision and compatibility of the resolution procedure with the "Meroni doctrine" ... 55
3. The scope of the Court's assessment and the Commission and the SRB's duty to state the reasons ... 58
4. The right to be heard and the right of access to the resolution file ... 60
5. Confidentiality and professional secrecy ... 63
6. Substantive aspects of the resolution action ... 64
7. Right to property ... 70
8. Damages ... 71
9. References to "notes de doctrine" ... 73

VIII **General Court, Anglo Austrian AAB AG, anciennement Anglo Austrian AAB Bank AG and Belegging-Maatschappij "Far-East" BV v ECB , Case T-797/19** ... 74

1. Keywords and summary ... 74
2. The withdrawal of AAB Bank's authorisation as a credit institution by the ECB upheld by the General Court ... 75
3. References to "notes de doctrine" ... 79

IX **General Court, Francesca Corneli v ECB, Case T-501/19** ... 80

1. Keywords and summary ... 80

The case law of the EU administrative review bodies ... 83

I **Appeal Panel of the Single Resolution Board, Case 2/2021, Decision of 27 January 2022, Case 3/2021, Decision of 8 June 2022** ... 85

1. Keywords and summary ... 85
2. Appeal Panel of the Single Resolution Board rules on the waiver of iMREL ... 87

II **Appeal Panel of the Single Resolution Board, Case 1/2022, Decision of 29 June 2022** ... 90

1. Keywords and summary ... 90
2. The joint decision on MREL taken by the resolution college can be challenged before the Appeal Panel ... 91

The judgments of the national apical Courts 95

I Corte di Cassazione, sez. II, Judgement of 8 February 2022, No 4006 97
1. Keywords and summary 97

II Corte di Cassazione, sez. II, Judgement of 15 February 2022, No 4923 98
1. Keywords and summary 98

III Corte di Cassazione, sez. II, Judgement of 9 April 2022, No 12435 100
1. Keywords and summary 100

IV Corte di Cassazione, sez. II, Judgement of 9 April 2022, No 12436 102
1. Keywords and summary 102

V Corte di Cassazione, sez. II, Judgement of 31 May 2022, No 17567 104
1. Keywords and summary 104

Appendix. Text of the judgments of the national apical Courts 105

Index 134

I The case law of the CJEU 134
1. Synthesis 134
2. Series of keywords 135
3. Series of legal provisions 137

II The case law of the EU administrative review bodies 140
1. Synthesis 140
2. Series of keywords 140
3. Series of legal provisions 140

III The judgments of the national apical Courts 142
1. Synthesis 142
2. Series of keywords 142
3. Series of legal provisions 143

Foreword

1. With this issue of the “Quaderni della Consulenza legale della Banca d’Italia” we are launching the pubblication of “*Pandectae. Digest of the case-law on the Banking Union*”.

“*Pandectae*” aims to offer a periodical review of the case law on the Banking union, focusing on the interpretation of the directly applicable Union law and national law transposing directives concerning the prudential regulation, supervision and resolution of credit institutions. Not surprisingly, not only does it take into account the interpretation of the rules contained in the SSM regulation, the SRM regulation and the CRR, but also that of national legislation transposing CRD and BRRD.

Normally, the publication will be semi-annual, but there may be topics focusing on judgments or groups of judgments with homogeneous subject matter, which may deserve a dedicated edition.

The Digest is made up of three parts. In each part the decisions are ordered chronologically from the oldest to the most recent.

The first part is devoted to the judgments of the Court of Justice of the European Union (CJEU), both of the General Court and the Court of Justice. Insofar as they decide relevant issues concerning due process rights and effective judicial protection in the area of bank supervision and resolution, the rulings of the European Court of Human Rights will also be taken into account.

The second one focuses on the case law of the EU administrative review bodies. More precisely, as against most decisions of the Single Resolution Board (SRB) proceedings are first to be brought before the Appeal Panel (AP), the Digest also gives an account of its decisions and the CJEU’s rulings on appeal. Insofar as they relate to decisions of the EBA that are relevant to the application of the rules on the prudential supervision and resolution of credit institutions, the rulings of the ESAs Board of Appeal will also be taken into account.

On the contrary, the decisions of the Administrative Board of Review (ABoR) of the ECB are not covered for the time being, because they are not public. It should be noted, however, that in its first report on the SSM,[1] the Commission emphasised the desirability of building on the case law of the ABoR on the legitimacy of the ECB’s decisions as a supervisory authority by suggesting the publication of a summary of the relevant decisions. If and to the extent that a summary of the decisions of the ABoR or the principles to be drawn from those decisions are made public, “Pandectae” will take care to adequately report on them.

The third part collects the judgments of the national apical courts, focusing in particular on the Italian ones (Corte di Cassazione and Consiglio di Stato). Looking forward, judgments of apical courts of other Member States participating to the SSM and SRM may be added.

[1] COM(2017) 591 final, p. 5.

Each judgment and decision bears the keywords under which it is classified, the relevant summary (including, where relevant, cross-references to other judgements and decisions of the EU administrative review bodies as well as to the opinions of the Advocate General in the event that the CJEU's rulings depart from them), the rules referred threin and, where available, references to the "*notes de doctrine*".

The most important Courts' judgments and decisions of the EU administrative review bodies are also complemented by a short commentary, which usually (but not necessarily) coincides with the one already published in the Newsletter of the Legal Department of Banca d'Italia – *Consulenza legale*, "Nomos Basileus".

At the end of each publication and in order to facilitate the search for summaries, the judgments of the Courts and the decisions of the EU administrative review bodies are classified by both the keywords and the provisions of EU and national law refered to therein.

2. It is well known the importance of the jurisprudence of the Court of Justice of the European Union and national apical courts of the participating MSs in shaping the Banking Union, which is the reason why the most relevant rulings have been reported in previous issues of the series of "Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia".

We refer among others to the Court's rulings on the following cases: (i) *L-Bank*, where the ECJ introduced the notion of decentralised ECB supervision of less significant credit institutions;[2] (ii) *Tercas*, where the CJEU held that a DGS's preventive and alternative measure do not constitute State aid, unless the Commission adequately proves that the public authorities exercises actual control over the operations;[3] (iii) *Silvio Berlusconi, Finanziaria d'investimento Fininvest SpA (Fininvest)*, where the ECJ found that NCAs' preparatory acts relating to an ECB's decision are non-binding so that it has exclusive jurisdiction in determining whether the legality of the ECB's supervisory decisions is affected by any defects in said preparatory acts.[4]

Among the national Courts' rulings, it is worth mentioning as well as subject of a dedicated issue of the "Quaderni" the judgment of the German Federal

---

[2] ECJ, Case C-450/17 P, *Landeskreditbank Baden-Württemberg v ECB,* referred to in *Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia* No 88, Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials), Chapter V.B., pp. 217 ff., edited by Raffaele D'Ambrosio.

[3] GC, Case T-98/16, *Italian Republic and Others v European Commission*, reported in *Quaderni della Consulenza legale della Banca d'Italia N. 85* - The role of the CJEU in shaping the Banking Union: notes on Tercas (T-98/16) and Fininvest (C-219/17), as well as in *Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia* No 88, Chapter IV.B., pp. 181 ff., quoted in the previous footnote; ECJ, Case C-425/19 P, *European Commission v Italian Republic, Banca Popolare di Bari Società Cooperativa per Azioni, Fondo interbancario di tutela dei depositi, Banca d'Italia*.

[4] ECJ, Case C-219/17, *Silvio Berlusconi, Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia, Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, reported in *Quaderni della Consulenza legale della banca d'Italia, N. 85* quoted in the previous footnote.

Constitutional Court (BVerfG) on the compatibility of the SSM and SRM regulations with the German Basic Law insofar as the powers conferred on the EU authorities are interpreted restrictively.[5]

An increasingly important role in shaping the Banking Union is also being played by the decisions taken on both procedural and substantive issues by the judicial bodies set up within the framework of the ESAs, SSM and SRM regulations. Of particular relevance, as also attested by the publication of a recent overview of the relevant decisions,[6] is the role of the Appeal Panel of the SRB, as it is before it that claims against the decisions of the SRB (with the exception of the adoption of the resolution shemes) must be raised in the first instance within the scope of Article 85(3) of SRM Regulation.

"Pandectae" is therefore part of the continuous monitoring of the jurisprudence of the courts and the decisions of the administrative appeal bodies established within the Banking Union carried out by the Legal Department of Banca d'Italia since the establishment of the SSM.

3. By providing the state of the art of the interpretation of the banking law in the context of the SSM and SRM, regardeless of its European or national source, "Pandectae" aims to facilitate the relevant participating authorities (both UE and national) in the legitimate fulfilment of the tasks entrusted to them. Hence the choice of English also for the summaries of the judgments of the national apical courts, which are in any case reproduced in full in the Appendix in their original language.

The above objective is all the more useful where one considers that the interpretation of both directly applicable EU law and national law transposing directives is becoming increasingly important irrespective of the European or national status of the authority participating in the SSM or the SRM.

Not only is the ECB (Article 4(3) SSMR) and, albeit to a lesser extent, the SRB (Articles 17(1) and 23 SRMR), called upon to apply national law transposing directives,[7] but at the same time national authorities are more and more bound by Union law rather than the national one. Consider in this latter respect the provision contained in Article 7(3) of the SRM Regulation, according to which NRAs, in the performance of their resolution duties, are expected to comply with the rules contained in said regulation and only to a limited extent with the national law transposing BRRD.

---

[5] BVerfG, 2 BvR 1685/14, 2 BvR 2631/14, 30 July 2019, *EBU,* reported in *Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia* No 91 of 24 March 2021, The German Federal Constitutional Court and the Banking Union edited by Raffaele D'Ambrosio and Donato Messineo.

[6] A comprehensive survey of the AP's rulings is reported in *Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia*, No 88, Chapter X.C., referred to above.

[7] See, among the others, Cases T-712/15 and T-712/16, Joined Cases C-152/18 P and C-153/18 P, *Crédit Mutuel Arkéa*, as well as Joined Cases T-133/16 to T-136/16, *Crédit Mutuel*, where EU Court interprets national law in the light of the case law of the French Conseil d'Etat.

Apart from this undeniable benefit, “Pandectae” also helps verify the fulfilment of an important precondition for the realization of an effective Banking Union. Allowing an easy check of the orientations of the EU and national Courts in interpreting the banking law in the context of the SSM and SRM, the Digest makes it possible to show whether and to what extent a homogeneous interpretation has been reached, which help achieving a genuine level playing field and an equal treatment of the supervised entities.

Moreover, insofar as “Pandectae” also reports on the decisions of the EU administrative review bodies, it makes it possible to highlight their specific contribution in ensuring the legality of the acts of the EU authorities acting in the context of the Banking Union.

The Editorial Board

Introduction

1. Among the judgments of which this first issue of "Pandectae" reports the summaries and comments,[1] the pilot cases related to the resolution of Banco Popular stand out first.[2] In rejecting the claimants' positions and confirming the full lawfulness of the contested acts and rules, the General Court stated principles of paramount relevance set to represent a milestone not only for the decision of the other appeals, but more in general for the interpretation of the EU banking crisis framework and its future applications.

Since these judgments deal with various issues, some common to all the decisions, others peculiar to one or more judgments, we have chosen to adopt a transversal approach, i.e. not to analyse decision by decision, but to extrapolate the following issues touched upon in the General Court's judgements: (i) the admissibility of the action for annulment brought only against the SRB decision and the compatibility of the resolution procedure with the 'Meroni doctrine'; (ii) the scope of the Court's assessment and the Commission and the SRB's duty to state the reasons; (iii) the right to be heard and the right of access to the resolution file; (iv) the confidentiality and the professional secrecy; (v) the substantive aspects of the resolution action; (vi) the right to property; (vii) the damages.

Among the others, the following points should be underlined.

In the Court's view, the SRB's decision under Article 18 SRM Regulation (adoption of the resolution scheme) is not a merely preparatory act so that an action for annulment brought only against that decision and not also against the Commission's endorsement under Article 18(7) of the same Regulation is admissible. Such an arrangement is consistent with the "Meroni doctrine", since the endorsement mechanism does not imply that the subsequent Commission's act purely absorbs the decision of the SRB.

As for the scope of the judicial assessment, the margin of appreciation granted to the SRB and the Commission in the resolution procedure must not keep the Court from reviewing the interpretation of the economic data on which the decision of the competent authorities is grounded.

The duty to state the reasons is not breached if the resolution scheme explains every element that the SRB was required to take into account, without being necessary that all parts of the scheme were made public.

As the adressee of the resolution scheme is the credit institution only and not its shareholders and creditors, the right of access to the resolution file in the contest of the relevant proceeding, may be exercised only by the former and

---

[1] Elisabetta Coronel Vera, Ignazio Corte, Matteo Passeri and Stefano Rosato contributed to the drafting of the summaries. The comments on the main rulings are the same as those already published in the relevant issues of Nomos Basileus. Elisabetta Coronel Vera also provided the linguistic review of the summaries.

[2] Cases T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno and othersv SRB*; T-510/17, *Del Valle Ruiz and Others v Commission and SRB*; T-523/17, *Eleveté Invest Group and Others v Commission and SRB*; T-570/17 – *Algebris (UK) and Anchorage Capital Group v Commission*; T-628/17, *AerisInvest v Commission and SRB*.

not also by the latter. Nevertheless, as the substantive rights of shareholders and creditors could be adversely affected by the resolution action, their right to be heard cannot be ruled out but rather restricted under the conditions laid down under Article 52(1) of the Charter.

As for the substantive aspects of the resolution action, the Court clarifies the following: (i) not only full insolvency but also illiquidity of the credit institution can be sufficient to declare its FOLFT; (ii) the reasons why supervisory or private sector measures suitable to avoid resolution were not available are irrelevant in the assessment of the condition under Article 18(1)(b) of the SRM Regulation; (iii) an ex post definitive valuation serves no practical purpose for the adoption of the resolution decision when the latter is legitimately based on a provisional valuation as per Article 20(13) of the SRM regulation.

Rights to property of the shareholders and creditors of the entity in resolution are not absolute and may be subject to restrictions under Article 52(1) of the Charter. In particular, given that the interest in protecting investors (albeit relevant) does not always prevail over the public interest in ensuring the stability of the financial system, proportionality is guaranteed by the rules concerning compensation, as they preserve the essence of the right to property.

2. Worth mentioning is also the General Court's ruling on the Fininvest and Berlusconi case on the acquisition of a qualifying holding in Banca Mediolanum.[3] Among other aspects, noteworthy is the point in which the Court upholds the autonomy of the notion of qualified holding in the light of Union law, which cannot be interpreted restrictively including on the contrary all kinds of transactions that allow both direct and indirect acquisitions such as those resulting from a merger and, in general, all the situations that alter the legal structure of the holding. Under this respect the change in the likely influence that the proposed acquirer may have on the credit institution concerned is accidental, as it has to be taken into account for the sole purpose of assessing the suitability of that acquirer.

3. Other General Court's judgments reported in this Digest ruled on two cases of ECB's withdrawals of authorisation for lack of good repute of shareholders with qualifying holdings[4] and on an ECB's decision refusing access to its decision to place a significant credit institution under special administration.[5]

As for the withdrawal cases, the Court clarified that: (i) shareholders of a credit institution whose authorisation has been withdrawn are not directly concerned by the withdrawal and, therefore, are not entitled to challenge the ECB's relevant decision (both *Pilatus Bank* and *Anglo Austrian AAB AG* cases); (ii) good repute is an indeterminate legal concept and has to be appreciated by the competent authority with a margin of appreciation, taking into account also the perception

---

[3] Case T-913/16, *Finanziaria d'investimento Fininvest SpA (Fininvest) and Silvio Berlusconi v ECB.*

[4] Cases T-27/19, *Pilatus Bank Plc and Pilatus Holding Ltd. v ECB* and T-797/19, *Anglo Austrian AAB AG, anciennement Anglo Austrian AAB Bank AG and Belegging-Maatschappij "Far-East" BV v ECB.*

[5] Case T-501/19, *Francesca Corneli v ECB.*

of the shareholders' conduct and reputation by the public and the participants in the financial market (*Pilatus Bank* case); (iii) for the purpose of withdrawing the authorisation of a credit institution, the fact that the credit institution's conduct in breach of AML/CTF rules occurred in the past or that corrective measures have been implemented by the credit institution after the breach was discovered has no impact on the legitimacy of the withdrawal of the authorisation (*Anglo Austrian AAB AG* case).

As for the case on the refusal of access to the special administration measure, the ECB's relevant decision needs, in the Court's view, to follow a case-by-case analysis and be grounded on the circumstances that: (i) the information held is not public; (ii) its disclosure is likely to adversely affect the interests of the natural or legal person who provided it, or the interst of third parties, or the one of the proper functioning of the system of prudential supervision.

4. As regards the rulings of the ECJ, is first of all worth noting the *Bernis* judgment, where the Court, confirming the GC's reasoning, ruled that the shareholders of a credit institution do not have a right of standing in order to bring an action for the annullment of the SRB's non resolution decision for lack of direct concern.[6] In the same judgment, the ECJ also clarified that the decision adopted by the SRB establishing that a FOLTF entity shall not be placed under resolution does not in itself require the winding-up of that entity according to the national insolvency procedure and that consequently the winding-up may not be considered as an implementation of the decision adopted by the SRB.

Also relevant are the orders of the ECJ on SRB's decision fixing the ex ante contribution to the Single Resolution Fund.[7] With particular regard to the obligation to state the reasons, the Court ruled that the latter is fulfilled where the SRB's decision fixing said contribution provides the concerned entity with sufficient information to understand how its situation was taken into account in relation to that of all other entities, without providing any information protected by business secret. For this purpose, the SRB may provide in a collective and anonymised form the information relating to other entities that was used to calculate the ex ante contribution of the concerned entity.

5. In deciding two preliminary ruling cases, the ECJ expressed its view on the compatibility with EU law of the Portuguese law on resolution[8] and on the rights of shareholders of a resolved entity.[9]

In the first judgement, the Court held that the Portuguese legislation on the resolution of credit institutions, on the basis of which the resolution of Banco Espírito Santo was decided, is compatible with the right to property (Article 17

---

6 Case C-364/20 P, *Ernests Bernis and Others v SRB.*

7 Cases C-664/20 P, *SRB v Portigon AG and Commission, and C-663/20 P, SRB v Hypo Vorarlberg Bank AG.*

8 Case C-83/20, *BPC Lux 2 Sàrl and Others v Banco de Portugal and Others.*

9 Case C-410/20, *Banco Santander, SA v J.A.C. and M.C.P.R.*

of the Charter). The European Court also ruled that, in principle, the partial transposition by a Member State of some of the provisions of a directive before the transposition deadline is unlikely to seriously jeopardize the result prescribed by the directive itself.

In the second one, the ECJ ruled that, following the exercise of the power of write-down of shares by the resolution authority, shareholders alleging a breach of the rules of transparency in relation to the marketing of financial instruments are precluded from bringing an action for damages as well as an action for annulment of the purchase contract against the entity which succeded to the resolved issuer.

6. As for the case law of the EU administrative review bodies, this issue of "Pandectae" records the decisions of the Appeal Panel of the SRB on the cases 2/2021 of 27 January 2022, 3 of 2021 of 8 June 2022 and 1/2022 of 29 June 2022, all concerning the SRB's decisions setting the minimum requirements for own funds and eligible liabilities (MREL).

In deciding the cases 2 and 3 of 2021, the Appeal Panel ruled that, in light of Article 12h(1) of SRM Regulation, the SRB still enjoys a margin of discretion in granting or not the waiver to Internal MREL, despite the fact that the relevant conditions set out therein are met. Against this background, the SRB can still deny the waiver unless a suitable guarantee by either the parent or the resolution entity has been provided according to Article 45f of BRRD, although this further requirement is not provided for under Article 12h(1) of the SRM regulation.

The Appeal Panel's decision on the case 1/2022 deals, among others, with the nature of the joint decision on MREL taken under (national law transposing) Article 45h of BRRD and the nature of the subsequent SRB's decision instructing the NRA on MREL. Under the Appeal Panel's view, the joint decision of the resolution college under Article 45h of BRRD is not a preliminary or intermediate act but a final decision binding on the resolution authorities concerned, unless they have disagreed, also producing legal effects on the relevant credit institution. In light of the above, within the SRM, from the perspective of said credit instituion, the subsequent SRB's decision instructing the NRA is a merely confirmatory act.

7. Finally, worth mentioning are some rulings of the Italian Corte di Cassazione on the administrative sanctions applied by Banca d'Italia to members of management and controlling bodies of credit institutions.[10] The Court reiterates some principles on the subject matter that can be summarised as follows.

Pecuniary penalties applied by Banca d'Italia pursuant ot Article 144 of the Italian Banking Law in the version prior to the transposition of CRD IV are not criminal in nature. Consequently, neither the principle of *favor rei*, in the abence

[10] Corte di cassazione, sez. II civ., judgments 8 February 2022, No 4006, 15 February 2022, No 4933, 9 April 2022, No 12435, 9 April 2022, No 12436 and 31 may 2022, No 17567.

of an explicit legal provision, is applicable nor a question of their compatibility with Article 6 ECHR arises.

The verification of a violation does not coincide with the moment when the "fact" is ascertained in its materiality, but must be understood as including the time necessary for the evaluation of the data acquired concerning the elements (objective and subjective) of the offense, and therefore the time necessary for the deliberation, in light of the complexity of the investigation. The determination of the time reasonably necessary for the public authority to conduct such an assessment falls within the remit of the Court of merit, taking into account the greater or lesser complexity of the individual case. As a rule, the time limit for the notification of findings begins to run on the date of the signature of the inspection report by the the Head of the Directorate General for Financial Supervision and Regulation.

As regards the substantive law aspects, the Court reiterates its settled stance, according to which the duty of the members of the management body to act in an informed manner, even if they are non-executive, provided for under Article 2381 of the Italian civil code, entails a duty to be proactive, by exercising all the powers connected with the office in order to prevent or mitigate critical situations of which they are, or should be, aware.

As to the proof of the elements of the infringement, while the supervisory authority must ascertain and prove the objective ones, it is the offender that has to prove the absence of negligence, due to the presumption of guilt laid down in Article 3 of Law No 689/1981.

The case law of the CJEU

Pilatus Bank Plc and Pilatus Holding Ltd. v ECB

1. Keywords and summary

Pilatus Bank Plc and Pilatus Holding Ltd. v ECB

General Court – Case T-27/19 – Judgement of 2 February 2022 – ECLI:EU:T:2022:46

European Central Bank's decision to withdraw a credit institution's authorisation

DECISION TO WITHDRAW A CREDIT INSTITUTION'S AUTHORISATION – Action brought by shareholders – Lack of direct concern – Inadmissibility

Shareholders of a credit institution the authorisation of which has been withdrawn are not directly concerned by the withdrawal and, therefore, are not entitled to challenge the ECB's relevant decision.

DECISION TO WITHDRAW A CREDIT INSTITUTION'S AUTHORISATION – Good repute – Discretion – Case-by-case analysis – Perception by the market – Indictment of the main shareholder in a third country

As good repute is an indeterminate legal concept, competent authorities enjoy a margin of appreciation in the assessment of whether or not it occurs. The assessment is conducted on a case-by-case basis, taking into account the relevant facts, the underlying reasons and the objectives the good repute aims to secure. The ESAs Guidelines on the prudential assessment of qualifying holdings provide support for such assessment.

The good repute of the shareholders of credit institutions must be assessed by taking account of whether their conduct complies with the applicable laws and regulations and also of the perception of that conduct and their reputation by the public and by the participants in the financial markets.

While the indictment of a shareholder indirectly possessing a qualifying holding in a credit institution is not sufficient, in itself, to call into question his good repute, the negative perception of that repute by the public and the clients and partners of that credit institution, following such an indictment, may, provided that it is demonstrated on the basis of specific evidence, justify the withdrawal of the authorisation of the institution concerned, in so far as it is such as to create a risk for that credit institution and the banking market as a whole.

In the case at hand, the indictment in the United States of America of the main shareholder of a Maltese credit institution had a negative impact on the assessment of the risk ratio established by a rating agency for the Maltese banking sector as a whole and led to withdrawals of deposits and the termination of the correspondent banking relationships as well as the early termination of the contracts of the same credit institution's main borrowers.

PROCEDURE FOR WITHDRAWAL OF AUTHORISATION – Time limits for authorising qualifying holdings – Impossibility of application by analogy

The requirements, in particular in terms of time limits, laid down for the procedure for authorising qualifying holdings cannot be applied by analogy to the procedure for the withdrawal.

2. Withdrawal of authorisation for lack of good repute of shareholder with qualifying holdings

by Anna Gardella (*)

The judgement rendered by the General Court in *Pilatus Bank*[1] on 2 February 2022 arises out of the withdrawal of authorisation for matters not directly related to the breach of prudential requirements and follows the recent ruling rendered by the GC in *Versobank*[2] dealing with the withdrawal of authorisation for serious breaches of AML/CFT rules by the credit institution.

The judgment stands out for at least four aspects: i) first, the authorisation has been withdrawn for failure to continue meeting the conditions for granting authorisation, namely the suitability of the (sole) shareholder; ii) second, it clarifies that the notion of good repute concerns not only the conduct of the person, but also the perception of the public about the integrity of that person; iii) third, and in the light of point two, a criminal conviction is not necessary to negatively affect the good repute of the (sole) shareholder, where the negative public perception triggers customers' lack of confidence evidenced by the deterioration of the bank's capital and liquidity position; iv) the reliance by the GC (and by the ECB in its withdrawal decision) on the ESAs Joint Guidelines on the prudential assessment of acquisitions or increase of qualifying holdings ("ESAs Joint GL on QH"),[3] fostering the important decision rendered by the CJ

(*) Senior Legal Expert, European Banking Authority. The considerations expressed are the author's only and not of the EBA.

1 GC, 2 February 2022, T-27/19, *Pilatus Bank Plc and Pilatus Holding Ltd. v ECB*, ECLI:EU:T:2022:46.

2 GC, 6 October 2021, T-351/18 and 584/18, *Ukrselhosprom PCF LLC and Versobank AS v European Central Bank* (hereinafter *Versobank*), ECLI:EU:T:2021:669, currently subject to appeal: *Versobank v ECB and Ukrselhosprom PCF*, Case C-803/21 P.

3 JC/GL/2016/01 of 20 December 2016, available at https://esas-joint-committee.europa.eu/Publications/Guidelines/JC_QH_GLs_EN.pdf

in *FBF v ACPR*[4] as to the relevance of Guidelines as part of the EU financial legal sources.

As background information, a press release of the US Department of Justice was published on 19 March 2018 stating that Mr Ali Sadr, who indirectly held 100% of the capital and voting rights of *Pilatus Bank* – established and authorised in Malta in 2014 – was arrested in the United States for his alleged participation in an illegal business in violation of the US sanctions against Iran. The release of such news impacted Mr Sadr's reputation and negatively affected the bank, which experienced liquidity outflows and the early termination of loans representing a material part of the bank's assets. Following EBA's investigation in the matter for breach of Union law, and upon proposal of the Malta Financial Surveillance Authority (MFSA), the ECB – which has exclusive competence to grant and to withdraw authorisation – revoked the license on 2 November 2018. Subsequent action for annulment was brought by Pilatus Holdings (the bank's sole shareholder) and by Pilatus Bank against the ECB.

The GC has upheld the withdrawal of the authorisation by the ECB in accordance with Article 18(c) CRD for the failure of the bank's sole shareholder to continue meeting requirement of good repute, considering the negative impact that the lack of integrity had on the sound and prudent management of the institution. In line with the previous decision rendered in *Versobank*,[5] the GC found that the withdrawal of authorisation is a last resort measure, subject to proportionality requirements and discretionary assessment by the supervisor. The GC ruled that the revocation of the license was justified in the case at hand, considering the irreversible damage to the bank's reputation and its business model determined by the spread of the news relating to Mr Sadr, and absent any alternative supervisory or private measure (eg. the sale of the bank or of its business to a third-party purchaser) to remedy the situation.

Based on Article 14(2) CRD, which cross-refers to Article 23 CRD, the integrity of shareholders with qualifying holdings is a requirement for granting authorisation, failing which the license has to be refused. The criteria for the prudential assessment of acquisition or increase in qualifying holdings set out in Article 23, letters a) to e) CRD – which are applicable also for the assessment to be undertaken at the moment of authorisation – are specified in the ESAs Joint GL on QH. Interestingly, the GC upheld the ECB reliance on paragraph 10.9 of such GL stating that "a proposed acquirer should be considered to be of good repute if there is no reliable evidence to suggest otherwise and the target supervisor has no reasonable grounds to doubt his or her good repute" and that "all relevant information available for the assessment should be taken into account". In the light of this, the GC ruled that "good repute depends not only on a person's conduct, but also on the perception of that conduct by others" (paragraph 77 of the judgment). The GC also noted that the rationale

[4] CJ, C-911/19, 15 July 2021, ECLI:EU:C:2021:599.

[5] Paragraphs 276 and 314 – 322.

for the assessment of good repute of shareholders at authorisation is to "ensure the sound and prudent management of the institutions and the preservation and stability of the financial system" (paragraph 78 of the judgment). Consequently, the attainment of such objectives is "closely dependent on the confidence which the public and the participants in the banking market have in credit institutions. The loss of such confidence may lead to a loss of funding for those institutions and thus create a risk not only for the institution in question, but also for the financial system within the European Union and each Member State". To note that the deterioration of the solvency and funding conditions is framed as an effect and evidence of the loss of the good repute, rather than a ground per se for the withdrawal of the authorisation. So much so that the ground for the withdrawal of authorisation is letter c) of Article 18 CRD, rather than letter d) of that same provision relating to the breach of prudential requirements.

In the light of the above, the GC justified the ECB's decision to withdraw the authorisation based on the negative effects that the indictment of Mr Sadr in the US determined on the public confidence. This notwithstanding the circumstance that a) Mr Sadr had not yet been convicted; b) US sanctions are not directly applicable in the EU; c) the conduct for which Mr Sadr was charged was not illegal and actionable in the EU. Their illegality under US law was also doubtful. However, the GC overcame these objections, including the interaction with the presumption of innocence, by focusing on the effects in the EU triggered by the news of the US indictment on the good repute of the sole shareholder "as perceived by the public". This is consistent with the ESAs Joint Guidelines on QH stating that "[i]ntegrity requirements imply, but are not limited to, the absence of 'negative records'" and that "the target supervisor retains discretionary power to determine which other situations cast doubt on the integrity of the proposed acquirer". In line with this, the GC also underscored that the ECB decision to withdraw the authorisation does not amount to recognising or rendering "enforceable the sanctions adopted by the United States against operators engaged in trade with Iran" (paragraph 120).

In the light of the considerations above, it may be concluded that this decision sheds significant light on the supervisory power to withdraw the authorisation for failure to continue meeting the conditions for authorisation and on the notion of good repute based on the public perception of the integrity, absent a criminal conviction. It also restates the soundness and reliability of ESAs Guidelines as a legal source of the EU financial law framework.

3. References to "notes de doctrine"

Christy Ann Petit, *Bank's license withdrawal following shareholder's damaged reputation and market confidence loss – Judgment of the General Court in Pilatus Bank and Pilatus Holding v ECB*, "EU Law Live", 1st march 2022.

Ernests Bernis and Others v SRB

1. Keywords and summary

Ernests Bernis and Others v SRB

Court of Justice – Case C-364/20 P – Judgment of 24 February 2022 – ECLI:EU:C:2022:115

Procedure to adopt a resolution scheme by the Single Resolution Board

ACTION FOR ANNULMENT – Act not addressed to the applicant – Conditions of admissibility – Direct concern – Lack of discretion

Article 86 of Regulation (EU) No 806/2014 does not have the purpose or effect of derogating from Article 263 TFEU as regards the conditions according to which proceedings may be brought against decisions of the SRB. Therefore, the admissibility of an action for annulment brought against an act adopted by the SRB, which is not addressed to the applicant, is subject to the condition that such an act is of direct concern to the same applicant. According to the case law of the CJUE, this condition requires two cumulative criteria to be met. First, the contested act must directly affect the legal situation of the individual and, second, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules.

DECISION NOT TO ADOPT A RESOLUTION SCHEME – Action brought by shareholders – Lack of direct concern – Discretion – Inadmissibility

The SRB's decision not to adopt any resolution scheme in respect of a credit institution does not directly affect the legal position of shareholders of such credit institution, also considering that such decision leaves discretion to national authorities as regards the winding-up of that entity. It follows that the action for annulment of said decision brought by the shareholders is inadmissible (see also the judgment of the Court of Justice of 5 November 2019, ECB and Others v Trasta Komercbanka and Others, C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 114).

DECISION NOT TO ADOPT A RESOLUTION SCHEME – Failing or likely to fail – Winding-up of a credit institution – Discretion

The decision adopted by the SRB establishing that an entity, even though it was assessed as failing or likely to fail, shall not be placed under resolution,

does not in itself require the winding-up of that entity according to the national insolvency procedure. Indeed, Regulation (EU) No 806/2014 does not include any provision for the winding-up of a credit institution in respect of which the SRB decided not to adopt a resolution scheme. Therefore, the winding-up may not be considered as an implementation of the decision adopted by the SRB.

2. SRB's non-resolution decision: lack of standing of the shareholders of the credit institution to bring a legal action for its annulment

by Edoardo Muratori (*)

With the judgment of 24 February 2022, the Court of Justice of the European Union rejected the appeal (case C-364/20 P)[1] of some ABLV Bank AS' shareholders against the order of the General Court of 14 May 2020 (T-282/18),[2] which declared inadmissible the action for the annulment of the Single Resolution Board's (hereinafter 'SRB') decisions not to place the bank and its subsidiary ABLV Bank Luxembourg SA under resolution.[3]

For the first time, the Court of Justice ruled on the standing of the shareholders of a credit institution to bring an action for annulment against a decision of the SRB not to adopt a resolution scheme.

The ABLV banking group consisted of the parent company ABLV Bank AS, established in Latvia (hereinafter 'ABLV Latvia'), and its subsidiary ABLV Bank Luxembourg SA, established in Luxembourg (hereinafter 'ABLV Luxembourg'). The ABLV group was under the European Central Bank's direct supervision and under the SRB's responsibility for resolution matters.

Due to a rapid and severe liquidity crisis faced by ABLV group in February 2018, the European Central Bank considered the condition under Article 18(1)(a) SRMR[4] to be satisfied, coming to the conclusion that both ABLV Latvia and ABLV Luxembourg were failing or likely to fail. After receiving this communication from the European Central Bank, on 23 February 2018, the SRB decided not to take resolution action in relation to ABLV Latvia and ABLV Luxembourg, adopting two separate decisions.

(*) Legal Expert at the Single Resolution Board's Legal Service and agent in the case in question. The opinions expressed in this article are those of the author and do not necessarily reflect the position of the organization for which the author works.

1 ECLI:EU:C:2022:115.

2 ECLI:EU:T:2020:209.

3 On the order, *cf.* "Sindacato giurisdizionale unitario nel contesto del procedimento di risoluzione: la dichiarazione di FOLTF non è autonomamente impugnabile", on Nomos Basileus No 5.

4 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010. OJ L 225/1 30.7.2014.

ABLV Latvia and its shareholders brought two separate actions before the General Court, seeking the annulment of the SRB's decisions (case T-280/186 and case T-282/18[5]). ABLV Luxembourg did not bring any action for the annulment of the decision adopted against it, whereas the actions brought by ABLV Latvia and some of its shareholders sought the annulment of both decisions of the SRB. The case filed by ABLV Latvia is still pending before the General Court. The case lodged by ABLV Latvia's shareholders was instead dismissed as inadmissible, with the General Court's order of 14 May 2020 mentioned above, subsequently subject to appeal before the European Court of Justice (case C-364/20 P).

With the judgment at hand, the Court of Justice followed the interpretation of the General Court, according to which the two decisions of the SRB do not directly concern the legal position of ABLV Latvia's shareholders.

The Court of Justice confirmed the adequacy of the General Court's reasoning where it concluded that the application was inadmissible for lack of direct concern, as the legal situation of the plaintiffs was not affected by the two decisions of the SRB, which only had effects of economic nature on them.

In this regard, the General Court argued that the two decisions of the SRB did not affect the rights of the shareholders to receive dividends and to participate in the management of ABLV Latvia, directly, and of ABLV Luxembourg, indirectly, thus applying by analogy the Court of Justice's reasoning of the judgment in joined cases C-663/17 P, C-665/17 P and C-669/17 P (*Trasta Komercbanka and others v ECB*).[6] It so maintained despite the different nature of a non-resolution decision and of a decision to withdraw a banking authorisation.

The Court of Justice held that the two decisions of the SRB did not order the winding-up of ABLV Latvia and ABLV Luxembourg nor the withdrawal of their banking authorisation, but, in light of the wording of the two decisions, the SRB only decided not to adopt a resolution scheme, as not all the conditions under Article 18(1) SRMR were satisfied (in particular, the condition of the public interest for the resolution action was not fulfilled pursuant to Article 18(1)(c) and 18(5) SMR Regulation). In this regard, the Court of Justice recalled the finding of the General Court that the applicable European legal framework does not provide for the automatic winding-up of a credit institution in respect of which the SRB decided not to adopt a resolution scheme.

The Court of Justice also supported the General Court's position on the references (included in the two SRB's decisions) to normal insolvency procedures under Latvian and Luxembourg law.

The General Court pointed out that the winding-up of ABLV Latvian and ABLV Luxembourg could not be considered as the automatic implementation

---

[5] OJ C 259 23.07.2018, p. 37.

[6] ECLI:EU:C:2019:923.

exclusively based on European law of the two SRB's decisions, as specified by the European Court of Justice (cf. case C-15/06 P *Regione Siciliana v Commission of the European Communities*,[7] C-463/10 P e C-475/10 P *Deutsche Post AG and Federal Republic of Germany v European Commission*[8]). It is indeed based also on Latvian and Luxembourg law and left to the discretion of the national authorities, with the consequence that the action brought by ABLV Latvia's shareholders was inadmissible.

In light of the General Court's findings, which are upheld by the judgment at hand, the SRB's interpretation, according to which shareholders of a credit institution have no standing to bring an action for annulment of a SRB's non-resolution decision, is confirmed. This judgment is an important step in the interpretation process of the legal framework concerning the European Banking Union.

---

[7] ECLI:EU:C:2007:183.

[8] ECLI:EU:C:2011:656.

SRB v Portigon AG and Commission, SRB v Hypo Vorarlberg Bank AG

1. Keywords and summary

SRB v Portigon AG and Commission

Court of Justice – Case C-664/20 P – Order of 3 March 2022 – ECLI:EU:C:2022:161

SRB v Hypo Vorarlberg Bank AG

Court of Justice – Case C-663/20 P – Order of 3 March 2022 – ECLI:EU:C:2022:162

Single Resolution Board's decision fixing the *ex ante* contribution to the Single Resolution Fund

AUTHENTICATION OF A SINGLE RESOLUTION BOARD'S DECISION – Handwritten signature

The authentication of a decision constitutes an essential procedural requirement, the infringement of which may result in the annulment of the relevant act and may be raised by the Court of its own motion.

The handwritten signature of the SRB's Chair on the body of the contested decision and on a routing slip is sufficient to ensure the authentication of the annex to the decision, since the routing slip expressly refers to that annex and it has the same identification number of a corresponding electronic file, containing the same body of the decision and the same annex.

DECISION FIXING THE EX ANTE CONTRIBUTION TO THE SINGLE RESOLUTION FUND – Duty to state reasons – Duty to protect confidentiality and professional secrecy – Need of weighing up – Sufficient information in a collective and anonymised form

The SRB's obligation to state reasons for the decision fixing the ex ante contribution to the SRF must be weighed against the principle of the protection of business secrets of the other institutions concerned.

The obligation to state reasons has to be regarded as fulfilled where the SRB's decision fixing the ex ante contribution to the SRF provides the concerned entity with sufficient information to understand how its situation was taken into account in relation to that of all other entities, without providing any information protected by business secret. For this purpose, on the basis of Art 88(1) of Regulation (EU) No 806/2014, the SRB may provide in a collective and anonymised form the information relating to other entities that was used to calculate the ex ante contribution of the concerned entity.

DECISION FIXING THE EX ANTE CONTRIBUTION TO THE SINGLE RESOLUTION FUND – Consequences of annulment – Maintenance of effects until a new decision is adopted

The annulment of the SRB's decision fixing the *ex ante* contribution to the SRF without providing for its effects to be maintained until it is replaced by a new act would likely undermine the implementation of Directive 2014/59/EU, Regulation (EU) No 806/2014 and Commission Delegated Regulation (EU) No 2015/63, which form an integral part of the banking union, thereby contributing to the stability of the euro area. In light of the circumstances of the case, the effects of the contested decision should be maintained until the entry into force, within a reasonable period of time, which cannot exceed six months, of a new decision of the SRB.

Banco Santander, SA v J.A.C. and M.C.P.R.

1. Keywords and summary

Banco Santander, SA v J.A.C. and M.C.P.R.

Court of Justice – Case C-410/20 – Judgement of 5 May 2022 – ECLI:EU:C:2022:351

Admissibility of claims brought by investors following the resolution of the issuer

SCOPE OF RESOLUTION – Public interest – Financial stability – Ordinary insolvency proceedings

The resolution procedure, which constitutes an exceptional regime derogating from the ordinary insolvency proceedings, should be applied to address situations of extreme urgency, only to credit institutions and investment firms that are failing or likely to fail, and only when necessary to pursue the objective of financial stability in the public interest. In particular, the resolution procedure should only apply where the credit institution or investment firm cannot be wound up under the ordinary insolvency proceedings without destabilising the financial system.

EFFECTS OF RESOLUTION – Prevalence over some other provisions of the Union law

The derogatory nature of the resolution, as regulated by Directive 2014/59/EU, implies that the application of other provisions of Union law, such as those concerning investors' protection according to Directive 2003/71/EC, may be excluded where those provisions are likely to hinder or undermine the effectiveness of the resolution.

EFFECTS OF RESOLUTION – Bail-in – Write down and conversion power – Action for liability on the grounds of the incorrectness of the prospectus – Action for annulment of the share subscription contract – Actions brought against the resolved entity or its successor

In accordance with Article 53(3) of Directive 2014/59/EU, where a resolution authority reduces to zero the principal amount of a liability of the credit institution in resolution, any obligations or claims arising in relation to it that are not accrued at the time when the power is exercised must be treated as discharged for all purposes, and must not be provable in any subsequent proceedings in relation to the institution in resolution or any successor entity in any subsequent winding up. Moreover,

as provided for by Article 60(2) of the same Directive, no liability towards the holder of the relevant capital instrument shall remain under, or in connection with, that amount of the instrument which has been written down, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write down power.

In light of these provisions, the liability of the credit institution in resolution stemming from the incorrectness of the information contained in a prospectus, pursuant to Article 6 of Directive 2003/71/EC, falls within the obligations or claims that must be treated as discharged for all purposes if they have not accrued at the time when the resolution occurs. Therefore, the action for liability cannot be brought against the resolved entity or its successor.

The same principle applies to the action for annulment of the share subscription contract brought against the entity that issued the prospectus or against its successor after the execution of the resolution. Indeed, such action would bring the resolved entity or its successor to compensate the shareholders for the losses suffered as a result of the write-down resolution power or to the full repayment of the investment, calling into question the whole assessment on which the resolution decision is based and frustrating the objectives pursued by Directive 2014/59/EU.

ADVOCATE GENERAL'S OPINION – Request to reopen the oral procedure – Inadmissibility

The content of the Advocate General's opinion does not constitute in itself a new fact within the meaning of Article 83 of the Rules of Procedure compelling the Court to reopen the oral part of the procedure. Indeed, the role of the Advocate General is to make, in open court, acting with complete impartiality and independence, reasoned submissions in order to assist the Court in performing its tasks. The Advocate General's opinion, which opens the stage of deliberation by the Court, may not be considered as an opinion addressed to the judges or to the parties stemming from an authority outside the Court, but rather as the individual and reasoned opinion of a member of the Court of Justice itself.

2. Claims of the resolved entity shareholders: an action based on the incompleteness or incorrectness of the prospectus cannot be brought after resolution against the issuer or its universal successor

by Francescopaolo Chirico

With its judgement of 5 May 2022, in case C-410/20 (Banco Santander, SA v J.A.C. and M.C.P.R.), the Court of Justice decided on the requests for preliminary ruling raised by a Spanish Court (Audiencia Provincial de A Coruña)

on the relationship between resolution, as regulated by Directive 2014/59/EU (hereinafter "BRRD") and Regulation (EU) 806/2014 (hereinafter "SRMR"), and the protection of shareholders claiming the violation by the issuer later placed under resolution of the transparency obligations provided for by national legislation transposing Directive 2003/71 / EC (so-called "Prospectus Directive").[1]

The Court of Justice came to the same conclusion as Advocate General Jean Richard De La Tour in his opinion delivered on 2 December 2021,[2] although without recalling some of the most controversial arguments.[3]

The preliminary ruling originates from the resolution of Banco Popular, which took place through the sale of business tool in favour of Banco Santander, according to Articles 22 and 24 of SRMR, as decided in June 2017 by the Single Resolution Board. A few months after the adoption of the resolution scheme, some investors who in June 2016 had subscribed shares issued by Banco Popular in the context of a capital increase brought an action against the issuer and Banco Santander. They sought a declaration of invalidity of the share purchase contract alleging an error invalidating their consent, resulting from the incomplete or inaccurate prospectus published before the share issue.

In the context of the appeal lodged by Banco Santander, the national judge questioned through the preliminary reference if, after the issuer's resolution, the shareholders could bring such an action and the subsequent claim for damages under Article 6 of Prospectus Directive against the issuer or its universal successor.

Since similar issues had also arisen in the Italian legal system following the resolution of the so-called "four banks",[4] the Italian Government, upon the Bank of Italy's request, intervened in the preliminary ruling proceedings and argued in favor of the same interpretation later adopted by the Court of Justice.

---

[1] See also Regulation (EU) 2017/1129 of the European Parliament and of the Council, of 14 June 2017, relating to the prospectus to be published when securities are offered to the public or admitted to trading (so-called "Prospectus Directive") and repealing Directive 2003/71 /EC of the European Parliament and of the Council of 4 November 2003. As for the liability related to the violation of the transparency rules on the prospectus, the Regulation does not innovate the regime previously resulting from the Prospectus Directive, so the conclusions of the Court of Justice can also be considered valid in the new regulatory context.

[2] The Opinion of the Advocate General Jean Richard De La Tour, presented on 2 December 2021, was announced in No 14 of Nomos Basileus.

[3] For a critical comment on the Opinion of the Advocate General, see J.L. Colino Mediavilla, *Más del Banco Popular: ¿pueden los titulares de acciones amortizadas en la resolución ejercitar acciones de resarcimiento o de nulidad de la adquisición basadas en la difusión de información defectuosa en el mercado de valores? (TJUE, asunto C-410/20)*, II Congreso Nacional de Derecho Bancario, ICAM, 28 and 29 April 2022, Madrid, available on https://eprints.ucm.es/id/eprint/71965/.

[4] Banca Marche, Banca Popolare dell'Etruria and Lazio, Cassa di Risparmio di Ferrara and CariChieti. Following the resolution, in some proceedings started by the former shareholders, the Bank of Italy intervened in support of the bridge entity and its acquirer.

Firstly, the ECJ considered that under Article 34(1)(a) and (b), BRRD, the shareholders of the institution under resolution must bear first losses.

Pursuant to Article 53(3) BRRD, where a resolution authority reduces to zero the principal amount of a liability, obligations and claims arising in relation to it that are not accrued at the time when the power is exercised must be considered as "*discharged for all purposes*". Therefore, as provided for in Article 60 (2), BRRD, following to the exercise of the write-down power, "*no liability to the holder of the relevant capital instrument shall remain under or in connection with that amount of the instrument, which has been written down, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write-down power*".

In the Court's view, the resolution procedure is a special insolvency regime derogating from the ordinary one, whose implementation must be motivated on the grounds of the public interest. In this sense, the significant impact on individuals resulting from the resolution is justified considering that such a procedure has to be applied to address situations of extreme urgency, only to credit institutions and investment firms that are failing or likely to fail, and only when necessary to pursue the objective of financial stability in the public interest. In particular, the resolution procedure should only apply where the credit institution or investment firm cannot be wound up under the ordinary insolvency proceedings without destabilising the financial system.[5]

According to the Court, taking into account the derogating nature of the resolution procedure, its regime prevails over other EU rules whose application could hinder the effective fulfillment of the resolution's objectives.

To this end, the BRRD provides for appropriate derogations from the rules for the protection of shareholders and creditors contained in company law directives.[6] In the Court's view, the Prospectus Directive also falls within the scope of such derogations, to the extent that its application could conflict with the resolution's objectives. Indeed, the lack of an express derogation from the Prospectus Directive in the BRRD is not relevant, as the exceptions to the ordinarily applicable regime resulting from the special nature of resolution constitute an open list, whose perimeter has to be determined in consideration of the resolution's effectiveness.

Following the Court's reasoning, the liability action based on the infringement of prospectus rules falls into the category of obligations and credits that, if not accrued at the time of resolution, must be considered as discharged for all purposes after the exercise of the write-down power. Consequently, such an action cannot be brought against the issuer or its universal successor after the resolution. Similar conclusions also apply to the action for the declaration of

---

[5] Cf. also point 46.

[6] See Recital n. 120 BRRD.

invalidity of the share purchase contract, taking into account that its upholding can lead the applicant to obtain compensation. Indeed, according to the Court, such actions would call into question the entire assessment behind the resolution decision, which also includes the consideration of capital composition.

In the light of its established case law, the Court also recalls that neither the right to property nor the right to judicial protection, ensured by Articles 17 and 47 of CDFUE, are absolute. On the contrary, their exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union.[7]

As already argued by the Advocate General, in the context of the resolution procedure, the protection of shareholders and creditors lies on the no creditor worse off principle, according to Article 75 BRRD. To this end, the Court clarifies that it is necessary to compare the treatment reserved to shareholders and creditors with the treatment they would have received within the normal insolvency proceedings and that this evaluation can be autonomously contested even when the resolution decision has not been challenged.

In this regard, it is not clear whether the Court, recalling the no creditor worse off principle, also shares the Advocate General's opinion, according to which, in the context of the assessment provided for by Article 75 BRRD, the resolution authority should consider whether, under a normal winding-up procedure, a decision resulting from an action for damages or a declaration of nullity could actually be enforced in favour of the injured shareholder. In this case, according to the no creditor worse off principle, the shareholder could be compensated for the difference from the loss incurred under the resolution procedure.[8]

3. References to "notes de doctrine"

Pier Mario Lupinu, *Banco Popular affected investors' claims rejected by the Court of Justice in favour of Santander (C-410/20)*, "EU Law Live", 19th may 2022.

J.L. Colino Mediavilla, *Más del Banco Popular: ¿pueden los titulares de acciones amortizadas en la resolución ejercitar acciones de resarcimiento o de nulidad de la adquisición basadas en la difusión de información defectuosa en el mercado de valores? (TJUE, asunto C-410/20)*, II Congreso Nacional de Derecho Bancario, ICAM, 28 and 29 April 2022, Madrid, available on https://eprints.ucm.es/id/eprint/71965/.

---

[7] In relation to the right to property, see Court of Justice, Judgment of 13 June 2017, C-258/14, Eugenia Florescu and Others v Casa Judeţeană de Pensii Sibiu and Others, point 51. As for the right to effective judicial protection, see Court of Justice, Judgment of 19 December 2019, C-752/18, Deutsche Umwelthilfe eV v Freistaat Bayern, point 44.

[8] See the Opinion recalled in note 2, points 104-110.

BPC Lux 2 Sàrl and Others v Banco de Portugal and Others

1. Keywords and summary

BPC Lux 2 Sàrl and Others v Banco de Portugal and Others

Court of Justice – Case C-83/20 – Judgement of 5 May 2022 – ECLI:EU:C:2022:346

Request of preliminary ruling on the Banco de Portugal's decision to place Banco Espirito Santo SA in resolution, based on national law, before the entry into force of the Directive 2014/59/EU

RESOLUTION BASED ON NATIONAL LAW – Inapplicability of Directive 2014/59/EU

The Directive 2014/59/EU is not applicable to the resolution procedure carried out on the basis of national law after the adoption of such Directive but before the expiration of the deadline for its transposition by Member States.

EFFECTS OF RESOLUTION – Bridge institution – Shareholders and creditors – Right to property – Restrictions – Public interest – Principle of proportionality – Resolution based on national law

The loss in value of the shares or liabilities of a credit institution, which have been transferred to a bridge institution pursuant to a resolution action based on national law before the entry into force of Directive 2014/59/EU, does not constitute an actual expropriation of such shares or liabilities under Article 17(1), second sentence, of the Charter of Fundamental Rights of the EU, when such a loss in value stems not from the resolution action, but from the condition of insolvency or of likeliness of insolvency of the concerned institution.

The same resolution action constitutes a regulation of use of property under Articles 17(1), third sentence, and 52(1) of the Charter. Such regulation of use is admissible when the resolution action is provided for by law, is aimed at objectives of general interest recognised by the Union (such as the stability of the banking sector), and is proportionate (i.e. it preserves sufficiently the rights of shareholders and creditors).

The national law that, before the entry into force of Directive 2014/59/EU, provides for the resolution action of the transferral of shares or liabilities of a credit institution to a bridge institution complies with Article 17(1), third sentence, of the Charter if it guarantees, in principle, the economic neutrality of the resolution action, even if it does not expressly provide for an ex ante fair, prudent and realistic valuation of the assets and liabilities of the institution in resolution nor for the strict application of the no-creditor-worse-off principle.

2. Portuguese national resolution legislation: partial implementation of Directive 2014/59/EU (BRRD) and protection of shareholders of the institution under resolution

by Francesca Chiarelli (*)

In its judgment dated May 5, 2022, the Court of Justice issued a ruling (Case C-83/20) on the preliminary questions submitted by the Portuguese administrative court (*Supremo Tribunal Administrativo*), where there is a pending dispute introduced by some former shareholders and subordinated bond holders of Banco Espírito Santo (hereafter BES) who challenged the decision on the resolution of BES.

The resolution action in relation to BES, which was one of the major credit institutions in the Portuguese banking system, was taken by Banco de Portugal on August 3, 2014, due to the serious and grave risk of default on obligations by the bank. Without emergency action by the Resolution Authority, the outcome would have been the suspension of payments and the revocation of BES' authorization to operate as a credit institution, resulting in the bank being placed in a state of liquidation. The resolution action involved the creation of a bridge institution (Novo Banco S.A.), to which certain assets and liabilities of BES were transferred. BES remained in existence, until the withdrawal of its licence by the ECB in July 2016, as a "bad bank", which kept the assets and liabilities not transferred to Novo Banco.

The resolution decision was adopted by the Banco de Portugal based on Decree-Law No 31-A/2012 of February 10, 2012, which introduced into Portuguese law and, specifically, into the *Regime Geral das Instituições de Crédito e Sociedades Financeiras* (hereinafter RGICSF) the legislation on the resolution of credit institutions. This legislation – which preceded the BRRD – was adopted to implement and fulfil Portugal's commitments in the May 17, 2011 Memorandum of Understanding on Economic Policy Conditions between the Portuguese state and the Commission, the European Central Bank and the International Monetary Fund.[1]

Moreover, a few days before the resolution of BES, Portugal's national resolution legislation was amended by Decree-Law No 114-A/2014 of August 1, 2014, which partially transposed the BRRD directive.

The plaintiffs challenged the resolution action before the national courts, arguing, in particular, that it was adopted in violation of EU law.

According to the plaintiffs' arguments, which were also submitted by the referring court, the national legislation applied to the resolution of the BES

(*) The author gratefully acknowledges suggestions from Luís Barroso, Head of Unit of Legal Services Department, Banco de Portugal.

[1] See "Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding" with the IMF, available at https://www.imf.org/external/np/loi/2012/prt/121912.pdf

did not provide shareholders with the same guarantees as those recognized by the BRRD. This is because said national legislation does not include: (i) a fair, prudent, and realistic valuation of the assets and liabilities of the institution before the adoption of its resolution; (ii) the payment of any consideration to the institution under resolution or the shareholders, depending on that valuation (iii) the "no creditor worse off" principle for the shareholders of the institution subject to the resolution action; and (iv) an assessment to determine whether shareholders and creditors would have received more favourable treatment if the institution under resolution had entered into ordinary insolvency proceedings.

According to the plaintiffs, such requirements laid down in the BRRD[2] are aimed at balancing resolution measures with shareholders' property rights.

The Supremo Tribunal Administrativo therefore turned to the Court of Justice of the European Union, under Article 267 TFEU, and posed two questions.

With the first one, the referring court questioned the compatibility of the national legislation, on which the BES resolution decision was based, with the BRRD and, in particular, with Articles 36, 73 and 74 and Article 17 of the Charter of Fundamental Rights of the Union, due to the failure to transpose certain requirements set forth in the directive itself.

With the second question, the Portuguese court asked the Court of Justice whether a partial transposition of the BRRD could seriously undermine the result prescribed by the directive, in light of the European case law on the obligations of Member States during the period prior to the deadline for transposition of a directive.[3]

In the Judgment under review, the CJEU found that the invoked provisions of the BRRD Directive do not apply to the resolution of the BES. According to the CJEU, at the time of the adoption of the BES resolution measure, the applicable legal regime was the national legislation on the reorganization and resolution of credit institutions, which was introduced in the RGICSF by Decree-Law No 31-A/2012. The latter was approved prior to the submission by the Commission of the BRRD legislative proposal, and, therefore, said national legislation could certainly not constitute transposition of that directive.

With reference to Decree-Law No 114-A/2014, which amended the Portuguese regime regarding the reorganization and resolution of credit institutions in 2012 a few days before the BES resolution action, the Court noted that the Portuguese state had transposed specific aspects of the BRRD

---

2 See Article 36(9) and (10) and Articles 73 and 74 of Directive 2014/59.

3 The referring court mentioned the Court of Justice's December 18, 1997, Inter-Environnement Wallonie judgment (C-129/96), which lays down the principle that, while pending the deadline for the transposition of a directive, Member States to which a directive is addressed must refrain from adopting provisions that might seriously jeopardize the attainment of the result prescribed by the directive (see para. 45). In the same terms, the Court of Justice has also ruled in its May 26, 2011, judgment, Stichting Natuur en Milieu and Others (C-165/09 - C-167/09) and February 11, 2021, judgment, M.V. and Others (C-760/18).

directive before the transposition deadline, although not transposing the entirety of its provisions.[4] However, taking into account that Member States cannot be challenged for their failure to transpose directives into their domestic legal system before the expiration of the transposition deadline and that a directive can only produce direct effects after that deadline, the Court concluded that the provisions of the BRRD cannot be invoked before the national court.[5]

Regarding the applicability of Article 17 of the Charter, the Court noted that, according to Article 51(1) of the Charter, the provisions of the Charter apply to Member States only during the implementation of Union law.[6]

In the Court's view, the provisions of the Charter are applicable to the main proceedings for two reasons. First, Decree-Law No 114-A/2014 constitutes a measure of implementation of Union law (albeit partial and prior to the expiration of the transposition deadline). Moreover, while the resolution legislation introduced by the 2012 Decree-Law does not constitute an implementing measure of Union law, nevertheless it was adopted for the purpose of fulfilling commitments made under a Memorandum of Understanding that is part of the Union law.[7]

That being said, as to the applicability of the provisions invoked by the referring court, the Court of Justice has confirmed that shares and bonds negotiable on capital markets fall under the scope of Article 17 of the Charter.[8]

---

[4] The preamble of Decree-Law No 114-A/2014 explicitly specifies that it aims to transpose into Portuguese law the "*no creditor worse off*" principle of the BRRD.

[5] Under Article 130 of the BRRD, the deadline for transposition of the Directive was December 31, 2014.

[6] Article 17(1) of the Charter "Right to Property" states: "*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest*".

[7] The Court, departing from previous rulings on the applicability of the Charter to proceedings concerning national measures adopted on the basis of Memoranda of understanding, notes how the "*Memorandum of understanding finds its legal basis in Article 3(5) of Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism (OJ 2010, L 118, p. 1). Since that Regulation is based on Article 122(2) TFEU, that Memorandum of Understanding is part of Union law*" (para. 29). It is interesting to note that in the Conclusions presented on October 14, 2021, the Advocate General Giovanni Pitruzzella justified the applicability of the Charter's provisions in the main proceedings also in light of the commonality of objectives between the BRRD and the national legislation: "45. *In this regard, however, I note, on the one hand, that the Portuguese government itself made it clear that the 2012 legislation pursued the same fundamental objective as Directive 2014/59, albeit in partly different ways. That legislation in fact – for the adoption of which, moreover, the Portuguese legislature had been inspired by the preparatory work of that directive – had been adopted to anticipate, pending the approval of Directive 2014/59, the introduction in Portuguese law of regulatory measures relating to the reorganization and resolution of credit institutions, in order to avoid the recurrence of situations of serious public and private harm resulting from the financial crisis*".

[8] Both the Court of Justice of the European Union and the European Court of Human Rights have had occasion to clarify that the protection conferred by Article 1 of Protocol No 1 to the ECHR, which enshrines the protection of the right to property as the minimum threshold of protection, relates to rights having patrimonial value (see, Court of Justice, May 21, 2019, *Commission v Hungary* (C-235/17); and EDU Court judgment of Sept. 20, 2011, *Shesti Mai Engineering OOD and Others v Bulgaria* (No 17854/04).

It is, after all, a long-established fact of EU and ECHR jurisprudence that the protection of the right to property safeguards a broad spectrum of subjective legal situations, including assets endowed with value due to the expectation of future cash flows, such as shares.

The judgment then went on to examine whether or not the BES resolution action constitutes a deprivation of property that Article 17 makes subject to the occurrence of specific conditions (existence of public interest; reservation of law; payment of just compensation).[9]

Adhering to the reconstruction espoused by the Advocate General, the Court finds that the resolution action taken by Banco de Portugal does not constitute a deprivation of property.

According to the Court, the loss in value of the shares is not caused by the resolution action taken by Banco de Portugal, but results from the state of insolvency or the risk of insolvency in which the bank found itself. Therefore, the Court concluded, "*a resolution action taken pursuant to national legislation such as that at issue in the main proceedings does not constitute a deprivation of property within the meaning of the second sentence of Article 17(1) of the Charter*" (para. 49).

Nonetheless, the Court noted that the adoption of a resolution action constitutes a regulation of the use of property within the meaning of Article 17 and Article 52(1) of the Charter, according to which, if necessary, the law may impose restrictions on the exercise of rights under the Charter, when there are purposes of general interest recognized by the Union (such as the stability of the financial system) and provided that the restriction complies with the principle of proportionality.

In this regard, the Court, in light of its well-established case law, found that the Portuguese resolution legislation does indeed meet the purposes of general interest recognized by the Union, such as the objective of ensuring the stability of the banking and financial system.

The Court's response is not innovative, following in the wake of established case law, both European and ECHR.[10]

---

[9] On the shareholder's right to property and its limits, see: Court of Justice, judgment of November 8, 2016, *Dowling v Irish Department of Finance* (C-41/15); judgment of September 20, 2016, *Ledra Adv. and Others v ECB and Commission* (Joined Cases C-8/15 and C-10/15 and C-105/15 to C-109/15); Judgment of July 19, 2016, *Kotnik and Others v Državni zbor Republike Slovenije* (C-526/14); Judgment of March 12, 1996, *Pafitis/Trapeza* (C-441/93); Judgment of May 30, 1991, *Karella and Karellas* (Joined Cases C-19/90 and C-20). See also EDU Court, judgment of July 10, 2012 (*Grainger and Others v United Kingdom*); judgment of November 24, 2005 (*Capital Bank AD v Bulgaria*); judgment of October 21, 2003 (*Credit and Industrial Bank v Czech Republic*).

[10] See Court of Justice, Sept. 20, 2016, *Ledra Advertising and Others v Commission and ECB* (C-8/15 P to C-10/15); July 19, 2016, *Kotnik and Others* (C-526/14). See also EDU Court, Nov. 7, 2002, *Olczak v Poland* and July 10, 2012, *Grainger and Others v United Kingdom*.

As for compliance with the principle of proportionality, the Court found that, regardless of the absence of an explicit provision of the "*no creditor worse off*" principle in favour of shareholders, the Portuguese legislation contains provisions that sufficiently take into account the position of shareholders in the context of resolution.

Finally, the Court addressed the second question and examined whether the national legislation, due to the failure to transpose certain specific requirements laid down in Directive 2014/59, could seriously jeopardize the achievement of the result prescribed by that directive.

The Court gave a negative answer also to this question. The European Court recalled that it had already clarified how "*Member States are entitled to adopt interim provisions or to implement a directive in several stages. In such cases, the divergence of transitional provisions of national law from that directive or the failure to transpose some of its provisions would not necessarily undermine the result prescribed by it*" (para. 70).

When the adoption of a measure by a Member State is intended to transpose an EU directive, even if partially, and such transposition is correct, the transposing measure cannot be considered likely to produce an undermining effect, since it partially contributes to bringing national law into line with that directive.

3. References to "notes de doctrine"

Martinho Lucas Pires, *Unforgivable late admissions: the Court of Justice decides on bank resolution in BPC Lux 2 Sàrl (C-83/20)*, "EU Law Live", 12th may 2022.

Finanziaria d'investimento Fininvest SpA (Fininvest) and Silvio Berlusconi v ECB

1. Keywords and summary

Finanziaria d'investimento Fininvest SpA (Fininvest) and Silvio Berlusconi v ECB

General Court – Case T-913/16 – Judgement of 11 May 2022 – ECLI:EU:T:2022:279

ECB's decision not to authorise the acquisition of a qualifying holding in a credit institution

CONCEPT OF ACQUISITION OF A QUALIFYING HOLDING – Broad interpretation

The concept of "acquisition of a qualifying holding" must be regarded as an autonomous concept of Union law, to be interpreted in a uniform manner in all Member States. In the absence of a definition of such concept in Union law but inferring from Articles 22 of Directive 2013/36/EU and 15 of Regulation (EU) No 1024/2013, it must be interpreted taking into account, first, the general context of its use and its usual meaning in everyday language and, second, the objectives pursued by the provisions of Union law governing the procedure for authorising acquisitions of qualifying holdings as well as the effectiveness of those provisions.

In light of this, the concept of "acquisition of a qualifying holding" cannot be interpreted restrictively and it must include all kinds of transactions that allow both direct and indirect acquisitions.

CONCEPT OF ACQUISITION OF A QUALIFYING HOLDING – Change in the quality of the holding – Acquisition of a qualifying holding – Merger

Where an indirect qualifying holding becomes direct or where the degree of indirect control of that qualifying holding changes, a fundamental element of the legal structure of the ownership is modified, with the result that such a transaction must be regarded as the acquisition of a qualifying holding.

Based on the foregoing, the concept of "acquisition of a qualifying holding" must be intended as including share exchange transactions (like those resulting from a merger) and, in general, all the situations that alter the legal structure of the holding.

CONCEPT OF ACQUISITION OF A QUALIFYING HOLDING – Likely influence of the proposed acquirer

The applicability of the procedure for the authorisation of the acquisition of a qualifying holding is not subject to a change in the likely influence that the proposed acquirer may have on the credit institution. Such a factor is to be taken into account at a later stage, for the sole purpose of assessing the suitability of that acquirer and the financial soundness of the proposed acquisition.

PROCEDURE FOR ASSESSING ACQUISITIONS OF QUALIFYING HOLDINGS – Likely influence of the proposed acquirer

Pursuant to Article 23(1) of Directive 2013/36/EU, when the competent authority assesses the suitability of the proposed acquirer of a qualifying holding in a credit institution, it must have regard to the likely influence of the proposed acquirer on the credit institution concerned.

Nonetheless, the assessment of the reputation of the proposed acquirer, as part of the suitability assessment, does not depend on the extent of that acquirer's likely influence on the credit institution concerned. Therefore, when assessing the reputation of the proposed acquirer, the competent authority is not required to take in consideration the acquirer's likely influence on the credit institution concerned.

GOOD REPUTE – Principle of proportionality – Lack of discretion

The automatism between the conviction for a particularly serious offence and the loss of the good repute foreseen by the decree of the Italian Ministry of Economy and Finance No 144/1988 is consistent with the object and the purpose of Directive 2013/36/EU and does not violate the principle of proportionality.

In the assessment of the good repute of the proposed acquirer, the ECB must apply the national rules transposing Directive 2013/36/EU. Therefore, given the automatism foreseen by the aforementioned decree No 144/1988, the ECB has no margin of discretion when the proposed acquirer has been convicted for one of the serious offences foreseen therein.

RIGHT TO BE HEARD – Time limit of the procedure

The time limit of three working days within which the concerned party can provide comments on the draft supervisory decision addressed to such party pursuant to Article 31(3) of Regulation (EU) No 468/2014 is not unlawful, because in the context of the procedure for the assessment of the acquisition of a qualifying holding several procedural arrangements enable the party concerned to be heard.

Such party may put forward all the relevant information in the application for the authorisation of the acquisition of a qualifying holding and has the opportunity to make its views on the ECB's draft decision effectively known.

ACQUISITION OF A QUALIFYING HOLDING – Authorisation – ECB's exclusive competence – *Res judicata*

In light of the ECB's exclusive competence to decide on the authorisation of a proposed acquisition of a qualifying holding on a credit institution, a national definitive judgement cannot be relied on to obstruct the exercise of that exclusive competence.

2. Judgment 11 May 2022 of the General Court of the European Union (T-913/16). Dismissal of the appeal against the ECB's decision opposing the acquisition of a qualifying holding in Banca Mediolanum

by Olina Capolino and Michele Cossa

The background of the case can be summed up as follows. Since the 1990s, Mr Silvio Berlusconi held, through Fininvest, an approximately 30% of the Mediolanum S.p.A., a mixed financial holding company (MFHC) that was controlling, *inter alia*, the Italian bank Banca Mediolanum.

In March 2014, on the occasion of the transposition of the second Directive on financial conglomerates (2011/89/EU) into the Italian law, the legislator introduced new suitability requirements for qualifying shareholders in MFHCs, who had to prove they met such requirements at the moment of the MFHC's registration as a holding in the Banking Groups' Register. In 2013, Mr Berlusconi had a final conviction for tax fraud: on the ground that he did not meet the reputation requirement, in October 2014, the Bank of Italy and the Italian supervisory authority for the insurance sector (IVASS) rejected Fininvest and Mr Berlusconi's application for authorisation. The rejection implied the suspension of voting rights and the obligation to divest their shares in the MFHC Mediolanum exceeding the limit of 9.999%.

Mr Berlusconi challenged the decision before the Italian administrative courts. In 2015, the Mediolanum Group announced a reverse merger of the MFHC Mediolanum S.p.A. into Banca Mediolanum, which became effective on 30 December 2015. In the light of the Authorities' decision of October 2014, upheld in the meantime by ruling of the TAR of Lazio, III Chamber (decision No 7966 on 5 June 2015), the merger was authorised on the condition that Fininvest sold the shares acquired, as a result of the merger, in exchange for its shares in the MFHC Mediolanum S.p.A.

With judgement No 882/2016, the Consiglio di Stato upheld Mr Berlusconi's appeal and overruled the Authorities' decision, enhancing a transitional rule included in the secondary legislation on the requirements for qualifying shareholders, which the Authorities and the TAR did not consider as still applicable.

As a combined result of the judgment and the merger, Fininvest (directly and without prior authorization) became the owner of a qualifying holding of 30.1% in a bank's capital, with the power to exercise the related property and administrative rights.

Thus, the Bank of Italy and the ECB (which in the meantime had undertaken the tasks and powers under the SSM Regulation) decided to carry out a new assessment of the qualifying holding. Despite a request by the supervision authority, Fininvest did not apply. As a consequence, the Bank of Italy (in agreement with the ECB) started the assessment procedure on its own initiative (*ex officio*) and, in September 2016, forwarded to the ECB a proposal for a decision under Article 15 of the SSM Regulation. In October 2016, the ECB – agreeing on the Bank of Italy's proposal – adopted a final decision opposing the acquisition by Mr Berlusconi and Fininvest of the qualifying holding in Banca Mediolanum on the ground that the acquirers did not meet the reputation requirement.

Mr Berlusconi and Fininvest challenged the ECB's decision before the General Court of the European Union (case T-913/16). In the meantime, they brought different proceedings before the national administrative courts seeking the annulment or declaration of nullity of the Bank of Italy's acts preparatory to the ECB's decision. In particular, they argued that the Bank of Italy's acts had violated, among other things, the finality of the judgement of Consiglio di Stato of March 2016.

In the frame of the *giudizio di ottemperanza* (*enforcement proceedings*) before the Consiglio di Stato, a reference for a preliminary ruling led to the Court of Justice's well-known decision of 19 December 2018 (C-219/17). The ECJ stated therein the principle that the jurisdiction over (preparatory and not binding) acts adopted by a national authority in the context of a common authorization procedure for the acquisition of a qualifying holding (Articles 4(1) (c) and 15, SSM Regulation) exclusively pertains to the judge of the authority exercising decision-making powers, *i.e.* the European judge.

While the national judgments ended with a declaratory of lack of jurisdiction, Fininvest and Mr Berlusconi enriched the appeal to the European judge with new claims submitted during the proceeding, consisting in the transposition of the pleas relating to the violation of Italian law concerning the internal acts of the common procedure.

The Tribunal's decision can be summarised as follows.

With the initial pleads, the claimants disputed that the reverse merger between the holding and the Banca Mediolanum could be qualified as an acquisition of a qualifying holding according to the banking legislation and therefore be subject

to authorization. The General Court denied this assumption referring to an autonomous concept, under the European law, of "acquisition of a qualifying holding".[1] This concept could be inferred from Articles 15 SSMR and 22 CRD and should be specified "*taking into account the general context of its use and its usual meaning in everyday language*" (point 50). In light of these parameters, the General Court framed this concept, intending to include share exchange transactions (like those resulting from a merger) and, in general, all the situations that alter the "*legal structure of the holding.*" Such an interpretation can be shared and is correct also in light of the national law transposing the CRD Directive.

Nor, according to the General Court, is the need for authorization contingent on the likely influence of the proposed acquirer of the credit institution. Instead, such a factor becomes relevant at a later stage, namely when assessing the acquirer's suitability and the acquisition project's financial soundness.

After clarifying the applicability of the authorization procedure in the case at stake, the General Court rejected the other grounds of appeal, including those relating to Mr Berlusconi's reputation assessment. In this respect, the European Court deemed it relevant the claimant's final conviction for tax fraud, jointly considered with the provisions of the Ministerial Decree No 144/1998, as they were applicable *ratione temporis*, which included this type of conviction among those automatically "dishonouring" and therefore forbidding the acquisition of a qualifying holding. According to the General Court, this automatism is proportionate and adequate to pursue the CRD's objectives, of which the Ministerial Decree No 144 can be considered a proper transposition, at least *in parte qua*.

These considerations allowed the General Court to deem it unnecessary to scrutinise the other situations regarding Mr Berlusconi (pending judicial and administrative proceedings and preliminary sanctions), which the Authorities had also considered as detrimental to his reputation, as well as the applicability of the Joint EBA-ESMA-EIOPA Guidelines on the assessment the acquirers' suitability requirements.

Likewise, according to the Court, the obligation deriving from the application of the Ministerial Decree No 144 was depriving the ECB of discretion. As a consequence, the ECB could not violate the principle of proportionality, also taking into account that, in the view of the Court, no provision of either EU or national law would have allowed, in place of the contrary decision, a favourable conditional decision, as requested by the claimants (point 170 and following).

Furthermore, the General Court rejected the grounds relating to alleged violations of the right of defence, recognising the entire legitimacy of the Bank of Italy's and the ECB's conducts. It also underlined that any breach of the right of defence is irrelevant where the proceeding could not have a different outcome, as in the present case (points 181-236, 204 and following).

---

[1] According to the decision, if instead "*the applicability of the assessment of qualifying holding would depend on the interpretation of this concept in the national legal systems, the mandatory nature of this assessment would be called into question*" (point 48 of the reasoning).

Finally, the General Court did not scrutinise the additional allegations presented during the trial, following the Court of Justice's decision of 19 December 2018[2] and concerning the alleged unlawfulness of the national acts of the authorization procedure. In the view of the European judges, these claims were overdue, as they should have been presented from the beginning. Accordingly, the Court's decision mentioned above did not affect in any way the outcome, as it only gave an interpretation of the applicable legislative framework that already existed.[3]

Therefore, purely procedural grounds prevented the European Judge from scrutinising compliance – other than with the EU law – also with national law, a task deriving from the distribution of powers within the SSM, as recognised by the Court of Justice's case law (in the decision of 19 December 2018 mentioned above).

The interested parties have already publicly announced their intention to appeal the judgement. An appeal before the administrative court (TAR Lazio) is currently pending against the Bank of Italy's decision that, after the ECB's opposition, ordered Fininvest to sell (within 18 months) its shares in Mediolanum exceeding the limit of 9.999%, under Article 24 TUB. This trial was suspended by order of 17 April 2018 No 2286, until the judgment that will settle the dispute on the annulment of the ECB's decision becomes final.

3. References to "notes de doctrine"

Vittorio Santoro, *Acquisto di partecipazioni qualificate nel capitale delle banche: questioni di giurisdizione*, "Banca Borsa Titoli di Credito", 2/2022.

Filippo Annunziata, *Qualifying shareholders and the fit and proper assessment. A new chapter in Fininvest-B. v. ECB (case T-913/16 – Decision of the General Court)*, "Le Società", 7/2022.

Marco Saverio Spolidoro, *"Mediolani mira omnia". Fusioni e acquisizioni di partecipazioni rilevanti in enti creditizi*, "Le Società", 7/2022.

---

[2] The decision (in C-219/17) stated that only EU judges are competent to incidentally assess the legitimacy of NCAs' acts that are part of the common procedures.

[3] In short, Articles 84, para 1, of the Rules of Procedure of the General Court prohibits the introduction of new pleas unless they are based on matters of law or on facts that come to light during the procedure. Despite the Court's decision of 19 December 2018 intervened during the proceeding, the General Court held that the "transfer" before the European judge of the grounds initially introduced by the claimants before the TAR and the Consiglio di Stato was not admissible. That is because said Court's decision, being merely interpretative, cannot be considered as a new matter of law, under Article 84 above. For that reason, Fininvest and Mr Berlusconi should have introduced before the General Court the grounds concerning the alleged illegitimacy of the Bank of Italy's acts from the beginning. Therefore, the General Court declared the inadmissibility of all these complaints before examining them on their merit.

Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v SRB, Antonio Del Valle Ruíz and Others v Commission and SRB, Eleveté Invest Group, SL and Others v Commission and SRB, Algebris (UK) Ltd. and Anchorage Capital Group LLC v Commission, Aeris Invest Sàrl v Commission and SRB

1. Keywords and summary

Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v SRB

General Court – Case T-481/17 – Judgement of 1 June 2022 – ECLI:EU:T:2022:311

Antonio Del Valle Ruíz and Others v Commission and SRB

General Court – Case T-510/17 – Judgement of 1 June 2022 – ECLI:EU:T:2022:312

Eleveté Invest Group, SL and Others v Commission and SRB

General Court – Case T-523/17 – Judgement of 1 June 2022 – ECLI:EU:T:2022:313

Algebris (UK) Ltd. and Anchorage Capital Group LLC v Commission

General Court – Case T-570/17 – Judgement of 1 June 2022 – ECLI:EU:T:2022:314

Aeris Invest Sàrl v Commission and SRB

General Court – Case T-628/17 – Judgement of 1 June 2022 – ECLI:EU:T:2022:315

Single Resolution Board's and Commission's decision to place Banco Popular Español SA in resolution

Decision to place a credit institution in resolution – Action for annulment – Action brought only against the SRB's decision – Resolution procedure – Compatibility with the "Meroni doctrine"

In the context of the complex administrative procedure for the adoption of a resolution scheme, the decision of the SRB taken under Article 18 of Regulation (EU) No 806/2014 does not constitute a merely preparatory act. Therefore, having regard to Articles 86(1) and 20(15) of said Regulation, an action for annulment brought only against that decision and not also against the Commission's endorsement under Article 18(7) of the same Regulation must be considered admissible.

Such an arrangement is consistent with the so-called "Meroni doctrine", since the endorsement mechanism, provided for by the law with the aim of preventing

an "actual transfer of responsibility" to a European agency, does not imply that the subsequent Commission's act absorbs the decision of the SRB.

DECISION TO PLACE A CREDIT INSTITUTION UNDER RESOLUTION – Technically complex cases – Discretion – Action for annulment – Scope of the assessment of the Court – Burden of proof

In the judicial review of technically complex cases such as those concerning the legitimacy of resolution decisions, the Court may not go beyond the ascertainment of the compliance with procedural rules, the adequacy of the reasoning, the accuracy of the facts underlying the decision, the absence of a manifest error of assessment and misuse of powers. Under no circumstances may the Court substitute its technical or economic assessment for that of the competent authorities.

Nonetheless, the margin of appreciation granted to the SRB and the Commission in the resolution procedure must not keep the Court from reviewing the interpretation of the economic data on which the decision of the competent authorities is grounded, in order to verify not only the accuracy and reliability of the facts, but also the adequacy of such data in supporting the conclusion drawn by the authorities and the absence of other relevant data. In any case, the burden of demonstrating the implausibility of the assessment carried out by the authorities lies with the applicants.

DECISION TO PLACE A CREDIT INSTITUTION UNDER RESOLUTION – European Commission's decision to endorse a resolution scheme – Duty to state reasons – Need of weighing up

Pursuant to Article 18(7) of Regulation (EU) No 806/2014, the Commission must either "endorse" the resolution scheme proposed to it by the SRB or object to its discretionary aspects. Since such provision does not require the Commission to repeat in its decision the SRB's analysis, when the Commission endorses the resolution scheme, the statement of reasons for its decision is limited to indicating that it agrees with the reasons expressed in the scheme.

Furthermore, the settled case-law of the Court of Justice requires to weigh the degree of precision of the statement of the reasons for a measure against (among other things) the time and technical facilities available for taking the measure. Thus, when assessing the compliance by the Commission with its duty to state reason under Article 296 TFEU, it must be considered the very short period from the transmission of the resolution scheme by the SRB available to the Commission to adopt its decision, pursuant to Article 18(7) of Regulation (EU) No 806/2014.

DECISION TO PLACE A CREDIT INSTITUTION UNDER RESOLUTION – Duty to state reasons – Duty to protect confidentiality and professional secrecy – Shareholders and creditors – Right to obtain a full disclosure of the resolution scheme – Denial

The duty to state reasons that falls on the SRB when it decides to place a credit institution under resolution is not breached if the resolution scheme explains every element that the SRB was required to take into consideration and did take into consideration, even if some parts of the scheme are not made public. In particular, under Article 88 of Regulation (EU) No 806/2014, the shareholders and creditors of the entity under resolution have no right to obtain the full disclosure of the resolution scheme and of the related documents, in light of the obligation of confidentiality imposed on the SRB.

RESOLUTION PROCEDURE – Shareholders and creditors – Right to access – Denial – Duty to protect confidentiality and professional secrecy

The right of access to the file can only be exercised during the administrative proceedings in which the file is prepared for the purpose of taking a decision. Only the entity placed under resolution, but not its shareholders and creditors, is subject to the resolution decision, therefore such shareholders and creditors do not have the right to access to the file of the resolution procedure.

In any case, the right of access to the file, when applicable, does not cover confidential information, because the SRB has an obligation to ensure that the entities can trust that the information they provide to the authority is treated as confidential. Lack of trust on their side would compromise the public interest in the normal functioning of the markets in financial instruments of the European Union.

RESOLUTION PROCEDURE – Write down and conversion power – Shareholders and creditors – Right to be heard – Restrictions – Public interest – Financial stability – Principle of proportionality

Resolution procedures pursuant to Article 18 of Regulation (EU) No 806/2014 represent individual procedures with respect to the entity under resolution, but not also in relation to its shareholders and creditors. At the same time, the interests of the latter could be adversely affected by the resolution action, in particular if the power to write down and convert their instruments is exercised by the resolution authority. In light of this, their right to be heard cannot be ruled out; rather, its exercise can be restricted, pursuant to Article 52(1) of the Charter of Fundamental Rights of the EU.

The restrictions to the right to be heard of shareholders and creditors of the entity in resolution pursue objectives of general interest (the stability of the financial

markets and the effectiveness of the resolution decision), are not disproportionate to the aforesaid objectives, and do not constitute an intolerable interference which infringes upon the very substance of the aforementioned right to be heard. On the contrary, hearing the shareholders and creditors before the adoption of the resolution decision would undermine the objectives above, considering the urgency constraints and the need for a surprise and immediate effect.

DUTY TO PROTECT CONFIDENTIALITY AND PROFESSIONAL SECRECY – Public general remarks of the Chair of the SRB – No breach – Leak of information by an anonymous source – Burden of proof

The fact that the Chair of the SRB makes general remarks on a credit institution during a public interview, without mentioning the possibility that such credit institution could be subject to resolution, does not constitute a breach of the duty of confidentiality and professional secrecy under Article 339 TFEU and Article 88 of Regulation (EU) No 806/2014.

Furthermore, when an anonymous source reveals to a journalist information regarding the (possible) resolution of a credit institution, it cannot be presumed that such leak is to be ascribed to the SRB or the Commission and, consequently, there is no burden on them to prove not to be the source.

DUTY TO PROTECT CONFIDENTIALITY AND PROFESSIONAL SECRECY – Disclosure of confidential information – Irrelevance – Conditions for resolution

The disclosure to the press of confidential information on a credit institution before its resolution by the SRB or the Commission can lead to the annulment of the resolution decision only if it is established that the content of that decision would have been different if that irregularity had not occurred. Such circumstance does not occur when the conditions for the resolution of the credit institution laid down in Article 18(1) of Regulation (EU) No 806/2014 are satisfied regardless of such irregularity.

CONDITIONS FOR RESOLUTION – Failing or likely to fail

As clearly inferable from the resolution framework (as in Recital 57 of Regulation (EU) No 806/2014), not only full insolvency, but also illiquidity of a credit institution can be sufficient to declare such entity as failing or likely to fail under Article 18(1)(a) of Regulation (EU) No 806/2014.

In particular, in accordance with Article 18(4)(c) of Regulation (EU) No 806/2014, inability or potential inability in the near future to pay debts and liabilities as they fall due can trigger the declaration of failing or likely to fail, which not necessarily presupposes balance-sheet insolvency (which is provided for under lett. (b) of Article 18(4) as a different and self-sufficient condition).

CONDITIONS FOR RESOLUTION – Lack of alternative supervisory or private sector measures

The reasons why supervisory or private sector measures suitable to avoid the resolution are not available are irrelevant in the assessment of the condition provided for by Article 18(1)(b) of Regulation (EU) No 806/2014.

VALUATION FOR THE PURPOSES OF RESOLUTION – Valuation 2

Pursuant to the relevant provisions of the resolution framework (Article 20 SRMR and the EBA draft RTS, successively adopted with Commission Delegated Regulations No 2018/344 and No 2018/345) the decision on the choice of the resolution tool is taken by the resolution authority and not by the independent valuer; the latter is required to carry out a fair, prudent and realistic valuation of the assets and liabilities of the entity to be placed under resolution with a view to the application of a given resolution tool. This allocation of responsibilities does not affect the independence of the valuer, to the extent it is instrumental to the resolution objectives.

Article 20(10) SRMR expressly contemplates the situation where, in consideration of the urgency, it is not possible to comply with the ordinary requirements for Valuation 2 and recognises the existence of uncertainties inherent in any provisional valuation by providing that it includes a buffer for additional losses. Some uncertainties and approximations are inherent in any provisional valuation and do not entail (for this reason alone) that it was not "fair, prudent and realistic" within the meaning of Article 20(1) SRMR.

EFFECTS OF RESOLUTION – Write down and conversion power – Shareholders and creditors – Right to property – Restrictions – Public interest – Principle of proportionality

The right to property is not absolute and may be subject to restrictions under Article 52(1) of the Charter of Fundamental Rights of the EU. In particular, restrictions must be: a) provided for in applicable legal provisions (legality requirement); b) necessary to pursue objectives of general interest of the Union (purpose requirement); c) proportionate to the said objectives (proportionality requirement). In light of this, the restrictions introduced by a resolution action: a) are provided for by the Regulation (EU) No 806/2014, b) purport to ensure the stability of the financial markets (due to contagion concerns) and achieve the resolution objectives under Article 14 of the same Regulation, c) are not disproportionate to such objectives.

In this latter respect, given that the interest in protecting investors (albeit relevant) does not always prevail over the public interest in ensuring the stability

of the financial system, proportionality is guaranteed by the rules concerning compensation, as they preserve the essence of the right to property.

DECISION TO PLACE A CREDIT INSTITUTION UNDER RESOLUTION – Liability of the SRB and the European Commission

The non-contractual liability of the SRB and the Commission in relation to a resolution decision subsists if the three fundamental conditions of the non-contractual liability of the Union under Article 340(2) TFEU are met, namely (i) the unlawfulness of the conduct alleged against the Union institution, (ii) the fact of damage, and (iii) the existence of a causal link between the conduct and the damage.

2. The admissibility of the action for annulment brought only against the SRB decision and compatibility of the resolution procedure with the "Meroni doctrine"

by Francescopaolo Chirico

In ruling on the legality of the resolution scheme adopted in respect of BPE, the General Court focused on the role of the Commission in the complex administrative procedure provided for by Article 18 SRMR. This issue affects, on the one hand, the detection of the challengeable act in the context of the administrative procedure and, on the other hand, the compatibility of the said procedure with the principles on the delegation of powers resulting from the case law of the Court of Justice (so-called "Meroni doctrine").[1]

Admissibility of an action for annulment brought only against the SRB and not against the Commission

In one of the five pilot cases decided by the General Court,[2] the Commission, intervening in support of the SRB, argued that the action brought by the applicant only against the SRB decision (and not against the Commission's endorsement under Article 18(7) SRMR) was inadmissible on the ground that the resolution scheme adopted by the Board was a merely preparatory act, in itself incapable of producing binding legal effects until followed by the Commission's endorsement.

---

[1] See CJ 13 June 1958, *Meroni v Alta Autoridad*, 9/56; CJ 22 January 2014, *United Kingdom v Parliament and Council*.

[2] See GC 1 June 2022, *Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v SRB*, T-481/17, p. 107 – 150. In the same judgment, a similar objection was also raised by the Parliament and the Council in their interventions. According to the case law of the Court of Justice, although the interveners are generally not entitled to raise an objection of inadmissibility, where the objection involves public policy considerations, the Court should examine it of its own motion (See CJ 24 March 1993, *CIRFS v Commission*, C-313/90).

According to the case law of the CJEU, any act adopted by the institutions of the European Union, whatever its form, which is intended to produce binding legal effects, must be regarded as a challengeable act within the meaning of Article 263 TFEU. In order to determine whether an act produces such effects, it is necessary to examine the substance of that act and to assess those effects in the light of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the relevant institution.

In this regard, the Court points out that the SRMR expressly confers decision-making powers on the SRB, including the determination of "*the details of the resolution tools to be applied to the institution under resolution*" (see Articles 16(1) and 23(1) SRMR). In the Court's view, it is also relevant that the decision adopted by the SRB expressly provided for a date for its entry into force[3] and that it required the FROB, in its capacity as national resolution authority, to take all necessary measures to implement the scheme under Article 18(9) SRMR.

Following the principles already affirmed by the Court of Justice in the ABLV Bank case,[4] the General Court points out that Article 86 SRMR provides for that SRB's decisions may be challenged before the Court of Justice where there is no right of appeal to the Appeal Panel,[5] as in the case of the resolution scheme. Significantly, there is no reference in that provision to the decisions taken by the other institutions involved in the adoption of the resolution scheme.

Article 20(15) SRMR also points in the same direction, insofar as it provides for that the valuation referred to therein shall be an integral part of the decision taken by the Board and may not be challenged separately but only together with that decision.

That leads the General Court to hold that, in the context of the complex procedure for adopting the resolution scheme, in which several authorities are called upon to intervene, the decision adopted by the SRB, through which it exercises the powers expressly conferred by the SRMR, constitutes an act that may be autonomously challenged.

A contrary solution would conflict with the principle of legal certainty, which requires, *inter alia*, that rules of law have to be clear, precise, and predictable in their effect, especially where they may have negative consequences for individuals and undertakings. Requiring the applicants to challenge the decision of the SRB together with the Commission's endorsement would make the judicial review subject to an admissibility requirement not expressly laid down.

In the view of the Court, that conclusion is not contradicted by the involvement of the Commission in the procedure. Although the endorsement is necessary for the

---

[3] See Article 12 of the decision SRB/EES/2017/08 of 7 June 2017.

[4] See CJ 6 May 2021, *ABLV Bank v ECB*, C-551/19 P and, *supra*, "SRB's non resolution decision: lack of standing of the sharholders of the credit institution to bring an action for its annulment".

[5] See Article 85(3) SRMR.

entry into force of the scheme, its legal effects remain independently attributable, after the endorsement, to the decision taken by the SRB. Any annulment of the latter decision would deprive the Commission's endorsement of its object and, in that sense, would entail its automatic annulment even if it had not been the subject of a specific appeal.

Compatibility of the resolution procedure with the "Meroni doctrine"

In the Court's view, the structure of the resolution procedure does not conflict with the principles on the delegation of powers resulting from the Court of Justice case law, which does not imply that only the decision adopted by the Commission can produce legal effects. The endorsement mechanism, provided for by the law with the aim of preventing an "actual transfer of responsibility"[6] in the meaning of the Meroni doctrine, does not imply that the subsequent Commission's act absorbs the decision of the SRB and, in this sense, does not prevent the resolution scheme from being challenged separately from the endorsement.

Consistently with the case law of the Court of Justice, the SRMR entrusts the Commission only with the evaluation of the discretionary aspects of the resolution scheme, granting it the power to object. In this sense, the Commission's competences must be kept distinct from those of the SRB, as they do not extend to the non-discretionary technical aspects of the Board's decision nor imply the power to autonomously modify the resolution scheme or its legal effects. For that reason, unlike the ECB's FOLTF assessment,[7] in the Court's view, the decision taken by the SRB may not be regarded as a merely preparatory act.

This does not imply that the Commission's endorsement has to be considered a merely formal step consisting of a passive transposition of the Board's decision.

In the pilot cases where the applicants specifically pleaded that the arrangement resulting from the SRMR conflicts with the principles on the delegation of powers,[8] the General Court clarified that the endorsement mechanism reflects the objective of attributing to a Union institution the legal and political responsibility for determining the Union's action on the resolution.[9] The period of only 24 hours that the Union legislator has assigned to the Commission to carry out its assessment does not contradict this conclusion, taking into account that the Commission's involvement is ensured already

---

[6] See CJ 13 June 1958, *Meroni v Alta Autoridad*, 9/56.

[7] See CJ 6 May 2021, *ABLV Bank v ECB*, C-551/19 P.

[8] See GC 1 June 2022, *Aeris Invest Sàrl v Commission and SRB*, T-628/17, p. 121 – 149; GC 1 June 2022, *Antonio Del Valle Ruíz and Others v Commission and SRB*, T-628/17, p. 204 – 242; GC 1 June 2022, *Algebris (UK) Ltd. and Anchorage Capital Group LLC v Commission*, T-570/17, p. 110 – 157.

[9] See GC 1 June 2022, *Aeris Invest Sàrl v Commission and SRB*, T-628/17, p. 133.

before the moment of the formal endorsement, inter alia through the presence of a permanent observer at the meetings of the SRB.[10]

Moreover, the General Court holds that, under Article 18(7) SRMR, the Union law conferred on the Commission and the Council (and not on the SRB) the final assessment as to the existence of the public interest in the resolution.[11] As part of this evaluation, it is also up to the Commission to verify whether the resolution tool chosen by the SRB is appropriate and proportionate to the resolution objectives, having regard also to the factual circumstances of the crisis.

On that basis, the General Court goes so far as to deny that, as for the powers provided for in Articles 21 and 24 SRMR, an actual delegation of powers to the SRB takes place. Consequently, the requirements the Court of Justice laid down for the legality of the delegation of powers, as set out in its judgment of 22 January 2014, C-270/12, *United Kingdom v Parliament and Council*, do not come into question.[12]

3. The scope of the Court's assessment and the Commission and the SRB's duty to state the reasons

by Michele Cossa and Giuseppe Pala

The Court's remarks on the scope of the assessment and on the duty to state reasons can be illustrated together, since they cut across the object of the actions.

Scope of the assessment

The Court spent some preliminary remarks on the scope of its assessment. Some of the applicants argued that the EU judge should be allowed, when examining resolution decisions, to evade the traditional limits of the judicial review in technically complex cases. In the appellants' view, the Court should examine the substantive accuracy, reliability and consistency of the economic and financial information relied upon by the SRB and ensure that the resolution package has a sufficiently sound factual basis.

In dealing with these claims, the Court resorted to its consolidated case-law, according to which, in the case of complex technical issues, the judge may not go beyond the ascertainment of the compliance with procedural rules, the adequacy of the reasoning, the accuracy of the facts underlying the decision, the absence of a manifest error of assessment and misuse of powers. Under no circumstances may the Court substitute its technical or economic assessment for that of the competent authorities.

---

10 GC 1 June 2022, *Antonio Del Valle Ruíz and Others v Commission and SRB*, T-628/17, p. 230 – 232; GC 1 June 2022, *Algebris (UK) Ltd. and Anchorage Capital Group LLC v European Commission and SRB*, T-570/17, p. 138 – 140.

11 See GC 1 June 2022, *Aeris Invest Sàrl v Commission and SRB*, T-628/17, p. 138.

12 See GC 1 June 2022, *Aeris Invest Sàrl v Commission and SRB*, T-628/17, p. 148.

However, the approach adopted by the General Court, while respectful of the prerogatives of the EU institutions, cannot be regarded as merely deferential. The decisions state that the margin of appreciation granted to the SRB and the Commission must not keep the Court from reviewing the interpretation of the economic data on which the decision is grounded, in order to verify not only the accuracy and reliability of the facts, but also the adequacy in supporting the conclusion drawn by the authorities and the absence of other relevant data. In any case, the burden of demonstrating the implausibility of the assessment carried out by the authorities lies with the applicants.

These principles were especially applied by the Court in the assessment of the correctness of Valuation 1 and 2.

On the duty to state reasons

In case T-570/17 (p. 145-157) and in case T-523/17 (p. 529-586), the applicants alleged the breach of the obligation to state reasons by the Commission, submitting that the latter merely endorsed the SRB's proposal but did not adequately identify its own reasons to support the resolution scheme.

The General Court considered that the Commission, in its decision, agreed with the reasons stated by the SRB, according to which (i) the conditions for adopting the resolution scheme were met also as regards the public interest criterion, and (ii) the sale of business tool should be applied. In doing so, in the General Court's view, the Commission complied with its obligation to state reasons under Article 296 TFEU. Indeed, pursuant to Article 18(7) SRMR, the Commission must either "endorse" the resolution scheme or object to its discretionary aspects. Since such provision does not require the Commission to repeat the SRB's analysis in its decision, when the Commission endorses the resolution scheme, the statement of reasons for its decision is limited to indicating that it agrees with the reasons expressed in the scheme. Furthermore, the settled case-law of the Court of Justice requires to weigh the degree of precision of the statement of the reasons for a measure against (among other things) the time and technical facilities available for taking the measure. Thus, the General Court also considered the very short period available to the Commission under Article 18(7) SRMR to adopt its decision from the transmission of the resolution scheme by the SRB.

In case T-523/17, the General Court also dismissed the applicants' claim according to which the SRB's resolution scheme failed to state reasons on a number of topics, concerning inter alia (i) the procedure for the sale of BPE's business (that was actually carried out by the FROB), (ii) the existence of the conditions for the resolution, (iii) the fact that the BPE's resolution plan of 2016 was not followed, etc. The General Court considered that the SRB's resolution scheme explained in detail every element that it was required to take into consideration and that such statement of reasons is fully comprehensible even if some parts of the scheme were not made public. In this respect, the General Court stated that, under Article 88 SRMR, the applicants' have no right to obtain the full disclosure of the resolution scheme and of the related documents, in light of the obligation of confidentiality imposed on the SRB.

In case T-628/17 (p. 330-353), the applicant submitted that the statement of reasons provided by the SRB in its resolution scheme was insufficient and contradictory, particularly with regard to the choice for the sale of business tool, which according to the applicant was ineffective in solving the BPE's liquidity crisis. The General Court dismissed the claim, considering that the SRB had clearly and specifically stated why each of the other resolution tools were not apt to pursue the resolution objectives as well as the sale of business in light of BPE's conditions.

4. The right to be heard and the right of access to the resolution file

*by Cristiano Martinez**

A group of pleas[13] made by the applicants concerns the "right to good administration" and in particular two of its components: the right to be heard and the right of access to the resolution file.[14]

The General Court rejected both allegations and substantiated its findings by a broad reference to settled case-law.

Right to be heard

The claim on the right to be heard was raised both generally against Article 18 SRMR[15] – as such provision does not expressly contemplate such

---

(*) The views and opinions expressed in this article are personal and are those of the author. They do not necessarily reflect the position of the organisation – the Single Resolution Board – where he currently works. The article does not represent an official statement of that organisation and that organisation cannot be held liable for its contents.

[13] See GC 1 June 2022, *Antonio Del Valle Ruíz and Others v Commission and SRB*, T-510/17, p. 113 – 186, 412 – 439, 456 – 484. GC 1 June 2022, *Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v SRB,* T-481/17, p. 190 – 264, 321 – 336. GC 1 June 2022, *Algebris (UK) Ltd. and Anchorage Capital Group LLC v Commission*, T-570/17, p. 321 – 388, 417. GC 1 June 2022, *Eleveté Invest Group, SL and Others v Commission and SRB*, T-523/17, p. 426 – 528. GC 1 June 2022, *Aeris Invest Sàrl v Commission and SRB,* T-628/17, p. 220 – 272, 354 – 402, 493 – 518.

[14] See Article 41 of the EU Charter of fundamental rights, in particular paragraphs 1 and 2: "*1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions*".
As to the right of access to the file, see also Article 90(4) SRMR: "*Persons who are the subject of the [SRB's] decisions shall be entitled to have access to the [SRB's] file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or internal preparatory documents of the [SRB]*".

[15] The acts of general application that constitute the basis of individual decisions (or that have a direct legal connection with such decisions) may legitimately form the subject matter of a plea of illegality in actions for annulment brought against those decisions.

a right – and specifically against BPE's resolution scheme applying such provision.

The right to be heard falls within the prism of the "right of defence", a "*fundamental general principle of EU law*" that applies "*in all proceedings which are liable to culminate in a measure adversely affecting a person*", regardless of whether an express rule exists to that effect in subordinate legislation or not (as it is the case of the SRMR).

The right to be heard allows, from an objective standpoint, to examine the case and establish the facts precisely, correctly and, from a subjective standpoint, to protect a person who is adversely affected by a decision, so that he/she can submit his/her views before the decision is adopted.

As regards resolution decisions, such person is only the entity subject to resolution. In fact, resolution procedures pursuant to Article 18 SRMR represent individual procedures with respect to the entity, but not also in relation to its shareholders and creditors. At the same time the General Court adds that the interests of the latter could be adversely affected by the resolution action, in particular considering the exercise of the power to write down and convert their instruments.

Given the above, their right to be heard cannot be ruled out; rather its exercise could be restricted. In that respect, Article 52(1) of the EU Charter of fundamental rights prescribes that any such limitation "*must be provided for by law and respect the essence of those rights and freedoms*" and that "*subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*".[16]

In the case at hand:

a) the restrictions pursue(d) objectives of general interest, *i.e.* the stability of the financial markets[17] and the effectiveness of the resolution decision;[18]

b) the restrictions are/were not disproportionate to the aforesaid objectives and cannot/could not be considered as an intolerable interference

16 Precedents can be found in the sectors of environmental liability and agriculture as well as fund-freezing measures.

17 The stability of financial markets is deemed to be an overriding public interest. Indeed a bank's failure can rapidly spill over into other banks (also across Member States) and into other sectors of the economy. Furthermore, the continuity of the bank's critical functions also contributes to such objective. The resolution is intended to preserve or restore the financial situation of a credit institution, as an alternative to its liquidation.

18 Timing in resolution is crucial, as the speed in taking a decision is a condition for its effectiveness. The General Court acknowledged a paramount need to act expeditiously and without advance notice in order to avoid irreparable harm to the bank, its depositors and other creditors, or the banking and financial system as a whole. Furthermore, in the case of BPE the resolution occurred during a weekday, not even during a weekend, as typically happens.

> which infringes/d upon the very substance of the rights guaranteed. On the contrary, hearing the shareholders and creditors before the resolution decision would undermine the objectives above.

In general terms, such restrictions are justified by urgency constraints and by the need for a surprise and immediate effect. In this connection, it is also worth noting that the disclosure of the relevant information before the decision is taken must be presumed to have effects on the public and private interests concerned (see recital 116 SRMR).[19]

In any case, importantly the applicants are not deprived of a "*reasonable opportunity of putting* [their] *case to the competent authorities*".

Right of access to the file

The applicants challenged the fact that the SRB (and the Commission endorsing the resolution scheme) did not share the documents on which they relied for their decisions before their adoption, thus infringing the right of access to the file.

The General Court disregarded such claim by stating that the right of access to the file can only be exercised during the administrative proceedings in which the file is prepared for the purpose of taking a decision.[20]

As said, the only person considered to be subject to the resolution decision is the entity placed in resolution. Its shareholders and creditors cannot be deemed as such and do not have a right to be heard in the procedure which led to the adoption of the resolution scheme.

On a separate note, the General Court however added that the access to the file, when applicable, does not cover confidential information as prescribed by the applicable provisions. The rationale for that limitation is that the SRB has an obligation to ensure that the entities can trust that the information they provide to the authority is treated as confidential. Lack of trust on their side would compromise the public interest in the normal functioning of the markets in financial instruments of the European Union.

---

[19] It follows that where urgency needs or risks to financial stability do not come into play, the restrictions do not apply. Indeed, the applicants could exercise their right to be heard in respect of the valuation 3 before the relevant SRB decision was taken. Valuation 3 was adopted after the resolution scheme was carried out and implemented.

[20] In competition cases, access to the file is afforded to persons or undertakings subject to proceedings opened or decisions taken against them. Subsequent access, once the decision is taken (e.g. for the purpose of bringing an action for annulment against such decision), would not qualify as access to the file, but rather access to the documents on which the SRB has based the adoption of the resolution scheme. The access to documents has a different legal basis from the access to the file (see Article 90(1) SRMR and law provisions referred to therein).

5. Confidentiality and professional secrecy

by Giuseppe Pala

In cases T-523/17,[21] T-570/17[22] and T-610/17,[23] the applicants (all shareholders or creditors of BPE) submitted that the SRB and the European Commission illegitimately disclosed to the public confidential information on BPE's critical conditions on 23 May 2017, when the Chair of the SRB gave an interview to Bloomberg and on 31 May 2017, when a Reuters article appeared online citing as the source an anonymous EU official that, in the applicants' view, should be traced back to the SRB or the Commission.

According to the applicants, such alleged breach of confidentiality and professional secrecy not only constituted a violation of Article 339 TFEU and Article 88 SRMR, but also caused BPE's liquidity crisis by generating panic among the depositors, thus determining the subsequent failure of the Spanish bank. On the basis also of this allegation, the applicants asked the General Court to annul the resolution decision and, in case T-523/17, to ascertain the non-contractual liability of the SRB and the European Commission for the damage supposedly caused to the applicants.[24]

First, the General Court held that the claim of breach of confidentiality was unfounded.

In the interview given to Bloomberg on 23 May 2017, the Chair of the SRB made only general remarks and, in any case, did not mention the possibility that BPE could be subject to resolution. In fact, the applicants did not identify specifically which confidential information the Chair supposedly revealed during the interview. Therefore, no breach of Article 339 TFEU and Article 88 SRMR[25] occurred in that instance.[26]

Furthermore, the applicants provided no proof that the anonymous EU official who was cited as the source in the Reuters article of 31 May 2017 was a member of the SRB or the Commission; nor can it be presumed that any leak of information regarding the (possible) resolution of a bank is to be ascribed to the SRB or the

---

21 See GC 1 June 2022, *Eleveté Invest Group, SL and Others v Commission and SRB*, T-523/17, p. 600 – 646.

22 See GC 1 June 2022, *Algebris (UK) Ltd. and Anchorage Capital Group LLC v Commission*, T-570/17, p. 158 – 214.

23 See GC 1 June 2022, *Aeris Invest Sàrl v Commission and SRB*, T-628/17, p. 410 – 461.

24 See, *infra*, the article *8. Damages*.

25 As interpreted in light of Recital 116 SRMR, according to which "*as information obtained by the Board, the national resolution authorities and their professional advisers during the resolution process is likely to be sensitive, before the resolution decision is made public, that information should be subject to the requirements of professional secrecy. The fact that information on the contents and details of resolution plans and the result of any assessment of those plans may have far-reaching effects, in particular on the undertakings concerned, must be taken into account. Any information provided in respect of a decision before it is taken, be it on whether the conditions for resolution are satisfied, on the use of a specific tool or of any action during the proceedings, must be presumed to have effects on the public and private interests concerned by the action*".

26 See GC 1 June 2022, case T-523/17, p. 611 – 618; GC 1 June 2022, case T-628/17, p. 431 – 438.

Commission, consequently there was no burden on them to prove not to be the source. In any case, the information on BPE supposedly provided to Reuters by the anonymous EU official was not confidential, also in light of the fact that news of BPE's risk of failure were public at least from half of May 2017.[27]

Second, the General Court stated that even if the applicants had established that the SRB or the Commission disclosed confidential information to the press, this circumstance would not have been sufficient to cause the annulment of the resolution decision, nor to justify the award of damages to the applicants.

On the one hand, the supposed violation of confidentiality could have led to the annulment of the resolution decision only if it was established that the content of that decision would have been different if the irregularity had not occurred. On the contrary, the applicants did not dispute that the conditions laid down in Article 18, para. 1, SRMR were satisfied when the SRB adopted the resolution scheme and the Commission endorsed it. In this respect, the circumstances that led BPE to fulfill the failing or likely to fail condition were irrelevant, even if such circumstances could be traced back to the interview of the Chair of the SRB on 23 May 2017 or to the Reuters article of 31 May 2017.[28]

On the other hand, the General Court established that the applicants' allegation that the abovementioned interview and article caused BPE's liquidity crisis by generating panic among depositors was "*based on a partial and erroneous presentation of the facts*". Indeed, the failure of BPE originated from multiple concurring factors dating back at least to 2016, which were recollected in detail by the ECB in both its assessments of the BPE's request for emergency liquidity assistance and of the failing or likely to fail condition, by the SRB in the resolution scheme, and even by the BPE's own governance body on 6 June 2017, when it declared the bank to be failing. Therefore, even if the breach of confidentiality by the SRB or the Commission had occurred (and in the General Court's view, it did not), such irregularity would not have been the cause of BPE's failure.[29]

6. Substantive aspects of the resolution action

by Michele Cossa

Many of the grounds for the appeals in the BPE cases concerned the lawfulness of the EU institutions' action with regard to the compliance with the substantive conditions for initiating the resolution action.

---

[27] See GC 1 June 2022, case T-523/17, p. 619 – 646; GC 1 June 2022, case T-570/17, p. 188 – 213; GC 1 June 2022, case T-628/17, p. 439 – 461.

[28] See GC 1 June 2022, case T-523/17, p. 163 – 166; GC 1 June 2022, case T-570/17, p. 163 – 166; GC 1 June 2022, case T-628/17, p. 411 – 416.

[29] See GC 1 June 2022, case T-523/17, p. 653 – 675; GC 1 June 2022, case T-570/17, p. 167 – 176; GC 1 June 2022, case T-628/17, p. 417 – 429.

Conditions for resolution

One of the pleas supporting the actions brought by the holders of BPE's equity and debt instruments was related to the alleged absence of the conditions which, pursuant to Articles 32 BRRD and 18 SRMR, must be fulfilled in order for a resolution action to be triggered. The Court refuted the appellants' submissions, finding that the SRB and the Commission had correctly applied the legislation in question.

In particular, with regards to the condition under Article 18(1)(a) SRMR (*i.e.* the entity was failing or likely to fail), it has to be remembered that Banco Popular was initially assessed as FOLTF by the ECB, after consulting the SRB, by reason of a serious crisis of liquidity due to excessive deposit outflows, the speed of such outflows and the inability of the bank to generate further liquidity. On the other hand, at the time of the assessment, the ECB could not conclude that BPE was failing or likely to fail on the basis of its capital position. In the resolution scheme, the SRB endorsed the ECB's conclusions.

Contrary to what was argued by the appellants, the Court maintained that not only full insolvency but even illiquidity could lead to a FOLTF declaration. Such conclusion is clearly inferable from the framework, as in Recital 57 SRMR. The conclusion drawn by the SRB, in following the ECB assessment that BPE was failing or likely to fail, was then correctly grounded on Article 18(4)(c) SRMR (inability or potential inability in the near future to pay debts and liability as they fall due) which not necessarily presupposes balance-sheet insolvency (which is provided for under lett. (b) of Article 18(4) as a different and self-sufficient condition for FOLTF). Moreover, the Court pointed out that EBA Guidelines on circumstances when an institution shall be considered as FOLTF (EBA/GL/2015/07), confirm that infringement of regulatory liquidity requirements may trigger FOLTF declaration and enumerate various factors to be taken into account in the assessment (such as adverse developments of liquidity position, of current and future obligations and of the institution's reputation).

Against this background, the Court found that the facts taken into consideration by the ECB and SRB, so as to conclude that BPE did not have options to restore its liquidity position, were correctly collected and assessed. The SRB listed the events that led to the deterioration of BPE liquidity position and noted that, in May 2017, BPE coverage requirement had fallen below the minimum threshold provided for by Article 460(2)(c) CRR while BPE did not manage to restore compliance with the requirement on the date of the resolution scheme. The Court agreed with the SRB in concluding that BPE's liquidity problem could not be considered as temporary.

In the view of the decisions at stake, even the SRB's assessment on the second condition for resolution, *i.e.* the lack of alternative supervisory or private sector measures (Article 18(1)(b) SRMR), was correct and founded. In the resolution scheme, the SRB (taking into account the ECB's assessment) concluded that there was no alternative measure that could prevent the failure of Banco Popular.

The liquidity position of the bank was so deteriorated that it would not allow sufficient time to implement a corporate transaction, while a private sale process already in place had not brought any results up to that point. The BPE's board itself acknowledged that the bank was failing. Moreover, the SRB found it unlikely that the bank would be able to mobilise sufficient additional liquidity through market transactions or central bank operations or through the measures foreseen in its contingency funding and recovery plans within the necessary time frames. As for emergency liquidity assistance, it would have been insufficient in view of the speed of the deterioration in the liquidity position.

All these facts were deemed as sufficient to ground the resolution decision, while the appellants' claims were considered unsubstantiated. The applicants argued that the private sale did not come to fruition because of the SRB (in particular due to a public statement of its chairman which allegedly caused deposit outflows). The argument was deemed unfounded as well as ineffective, since the reasons why private solutions are not conceivable are irrelevant in the assessment under Article 18(1)(b).

Furthermore, according to the Court, the applicants did not provide any evidence to support their assertion that both supervisory actions and private measures (suitable to avoid resolution) were available at the time of the decision.

As to the former, more than other early intervention measures, it seems however that the applicants mainly referred to ELA. On this point, the Court noted that BPE had already received an initial liquidity assistance, but its liquidity situation was rapidly crumbling and further emergency liquidity assistance would have been insufficient to cope with the situation, as assessed by the SRB. In addition, the SRB is not entrusted with the power of granting ELA, which falls within the remit of the national central banks. Thus, the SRB had only to consider that the ECB, in its FOLTF assessment, stated that the emergency liquidity assistance, which it approved, did not solve BPE's liquidity crisis and that the Bank of Spain did not grant further emergency liquidity assistance to BPE.

On the private sector alternatives, the Court found that the circumstances put forward by the claimants were merely speculative, if not ineffective. A possible capital increase, floated by the appellants, was to be considered, at most, at a very early stage; and besides, BPE's liquidity shortage was not to be imputed to the undercapitalization, but rather to rapid deposit outflows. The alleged will to sell non-strategic assets was not founded on evidence and it was not demonstrated that the disposal of assets was actually feasible within a short period of time.

Furthermore, the private sale procedure initiated in April 2017 had not brought any buyer and, at the time of the adoption of the resolution scheme, there was no concrete prospect that it would be concluded positively in a timeframe that would allow BPE to pay its debts.

For the same reason, it is of no relevance, in the Court's view, that Banco Santander – *i.e.* the purchaser in the resolution procedure by way of sale of

business tool – subsequently succeeded in selling certain assets. What matters according to the Court, for the purposes of verifying the fulfilment of the second condition for resolution, is the factual situation at the time of the assessment.

All this considered, the Court found no flaws in the SRB's conclusion about the absence of any private or supervisory alternative to BPE resolution.

Finally, on the third condition, concerning the public interest (Article 18(1)(c) SRMR), the applicants did not complain that the resolution scheme did not meet the objectives of Article 14(2) SRMR but rather that the same objectives could have been reached through a less burdensome ordinary insolvency procedure. The Court held that the SRB and the Commission did not fall into a manifest error of assessment in considering that the public interest condition was met. The resolution procedure helped minimising the destruction of value by taking into account that liquidation would result in greater losses for creditors and that the losses incurred by shareholders and subordinated creditors would be outweighed by the benefits of maintaining essential functions and limiting negative effects on financial stability.

On Valuations 1 and 2

The pleas concerning valuations in BPE resolution can be analysed separately by topics, depending on whether they concern Valuation 1, provisional Valuation 2 or ex-post valuation.

Valuation 1, dated 5 June 2017, was prepared by the SRB under Article 20(5)(a) SRMR and had the objective of informing the determination of whether the conditions for resolution, as defined in Article 18(1) SRMR, were met.

The applicants claimed that Valuation 1 was not carried out by an independent person as required by Article 20(1) SRMR and that the condition under which, according to Article 20(3) SRMR, the valuation may be carried out by the SRB (*i.e.* an independent valuation is not possible) was not met, as demonstrated by the circumstances that Deloitte was able to carry out Valuation 2.

The Court rejected such argument by confirming the urgency that allowed the SRB to carry out a provisional valuation under Article 20(3) SRMR, and by considering the Valuation 1 at hand as obsolete, following the assessment carried out by the ECB on 6 June 2017 that Banco Popular was failing or likely to fail. SRB's valuation stated that the reference date for its assessment was 31 March 2017, while the ECB relied on updated information, in particular on the significant withdrawals of deposits from Banco Popular from April and May 2017 and on its inability to generate further liquidity.

Several applicants also expressed various grievances against Valuation 2, based on the general assumption that it was not "fair, prudent and realistic".

Valuation 2, dated 6 June 2017, was drawn up by Deloitte as an independent expert, in accordance with Article 20(10) SRMR.

In its decisions, the General Courts refuted all the arguments of the applicants. The Court forthwith applies the principles (recalled in the same decisions) on the scope of its assessment, since while not substituting its own assessment for that of the independent expert, it does not refrain from verifying the correctness of the method used, in some cases even with a granular analysis (see in particular T-523/17, points 366 ff.). The Court found that the methodology adopted by Deloitte corresponds to the one provided for in the technical standards. This fully justified, among others, the breadth of the range of the valuations between the worst-case and the best-case scenario and the inconsistencies with audited annual accounts and financial reports from previous periods.

More in general, the Court stated that Valuation 2 meets the requirements laid down in Article 20 SRMR. The applicants argued that such valuation was flawed for having the SRB already chosen the appropriate resolution action and therefore instructed Deloitte not to consider any resolution action other than the sale of business tool. However, the Court observed that the decision on the choice of the resolution tool is taken by the resolution authority and not by the independent valuer. The applicable provisions (Article 20 SRMR and the EBA draft RTS, successively adopted with Commission Delegated Regulations 2018/344 and 2018/345) presuppose a situation where a valuation is carried out with a view to the application of a given resolution tool. Nor this allocation of responsibilities is able to affect, in the Court's view, the independence of the valuer, to the extent it is instrumental to the resolution objectives.

Moreover, the Court addressed the applicants' criticism on the reliability of Valuation 2, based on the facts that it contains numerous caveats concerning time and information available. In this regard, the Court acknowledged that, given Banco Popular's precipitating liquidity position, Deloitte has been asked to carry out its valuation within an extremely short period (12 days). While Deloitte stated that there were a number of gaps and inconsistencies in the available information and mentioned that the valuation had to be regarded as highly uncertain and provisional, Article 20(10) SRMR expressly contemplates the situation where, in consideration of the urgency, it is not possible to comply with the ordinary requirements for Valuation 2 and recognises the existence of uncertainties inherent in any provisional valuation by providing that it includes a buffer for additional losses.

Thus, in view of the urgency of the situation, the SRB could rely on Valuation 2, carried out under Article 20(10) SRMR, in order to adopt the resolution scheme. According to the Court, some uncertainties and approximations are inherent in any provisional valuation and do not entail (for this reason alone) that it was not "fair, prudent and realistic" within the meaning of Article 20(1) SRMR.

Lastly, the applicants complained that the SRB did not carry out an ex post definitive valuation "as soon as practicable", in alleged breach of Article 20(11) SRMR.

In 2018 the SRB took the view that an ex post definitive valuation would serve no practical purpose, nor it would lead to a compensatory decision provided for

in Article 20(12) SRMR, since carrying out such valuation could have no impact on the already completed sale of BPE to Banco Santander, which determined the market price of BPE in an open, fair and transparent process.

Such decision was already declared compliant to the legal framework by the General Court and the Court of Justice in the *Aeris* and *Algebris* cases (T-599/18 and T-2/19; C-874/19 P and *Algebris* C-934/19 P), as Article 20(12) SRMR does not mention the sale of business tool (*i.e.* the tool used in this case) which implies a lawfully conducted tender procedure. According to these decisions, the right price corresponds to the actual market price, so that, de facto, every debate on the potential economic value of the assets of the transferred institution is settled.

In the five decisions at hand, the General Court did not mention this previous jurisprudence but, in view of the nature of the appeals aimed at obtaining the annulment of the resolution decision, could simply recall Article 20(13) SRMR. According to such provision, a provisional valuation is a valid basis for adopting the resolution scheme. Ex post valuation is, by definition, subsequent to the adoption of the resolution scheme. However, according to settled case-law, the legality of an EU measure is assessed on the basis of the facts and law at the time when the measure was adopted. The issue whether or not an *ex post* definitive valuation was carried out, thus, cannot affect the validity of the resolution decisions.

On the sale process

The Court dismissed the applicants' complaints on the sale process of Banco Popular, stating that the SRB and the FROB correctly implemented the sale and did not commit any irregularities.

In particular, the Court held that the SRB had correctly struck the balance between the sale requirements and the need to achieve the resolution objectives, so that any deviation from the former was justified by the urgency of the circumstances and by the need to avoid a real danger to the financial stability.

In the same line, the Court noted that the SRB and the FROB were prudent in accepting Banco Santander's terms, even though the offer was submitted after the deadline set by the procedural letter. The sale to Banco Santander, indeed, avoided an uncontrolled insolvency of BPE which could have undermined its essential functions and would not have made it possible to achieve the objectives of Article 14 SRMR.

It is relevant to add that in dealing with these pleas, the General Court made clear that all the sale decisions have to be regarded as intermediate act. According to established case-law, such acts may not be the subject to an action for annulment, but their unlawfulness may be relied on in support of an action brought against the final decision of which these measures constitute an act of elaboration.

7. Right to property

*by Cristiano Martinez**

The BPE judgments[30] clarify the interaction between the resolution and the right to property of the owners of affected capital instruments pursuant to Article 17(1) of the EU Charter of fundamental rights.[31]

The applicants claimed, in particular, that the exercise by the SRB of the power to write-down and convert some capital instruments issued by BPE deprived their holders of all the economic value, hence such exercise was devoid of justification and disproportionate.

The General Court elaborated on settled case-law and rejected the plea entirely.

The right to property is not an "absolute" right, hence it may be subject to restrictions under Article 52(1) of the EU Charter of fundamental rights.[32] In particular, restrictions must be: a) provided for in applicable legal provisions(legality requirement); b) necessary to pursue EU objectives of general interest (purpose requirement); c) proportionate to the said objectives (proportionality requirement). If such conditions are met, the restrictions at stake do not represent a disproportionate and intolerable interference that impairs the very substance of the right to property.

In that respect, the General Court found that restrictions introduced by a resolution action: a) are provided for by the SRMR, b) purport to ensure the stability of the financial markets (due to contagion concerns) and achieve the resolution objectives under Article 14 SRMR, c) are not disproportionate to such objectives.

(*) The views and opinions expressed in this article are personal and are those of the author. They do not necessarily reflect the position of the organisation – the Single Resolution Board – where he currently works. The article does not represent an official statement of that organisation and that organisation cannot be held liable for its contents.

30 See GC 1 June 2022, *Antonio Del Valle Ruíz and Others v Commission and SRB*, T-510/17, p. 485 – 541. GC 1 June 2022, *Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v SRB,* T-481/17, p. 258 – 273, 478 – 535. GC 1 June 2022, *Algebris (UK) Ltd. and Anchorage Capital Group LLC v Commission*, T-570/17, p. 389 – 432. GC 1 June 2022, *Aeris Invest Sàrl v Commission and SRB,* T-628/17, p. 150 – 219, 462 – 492.

31 "*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest*."

32 "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*."

In this latter respect, given that the interest in protecting investors (albeit relevant) does not always prevail over the public interest in ensuring the stability of the financial system, proportionality is guaranteed by the rules concerning compensation, as they preserve the essence of the right to property.

First, the legal framework sets out a mechanism to fairly compensate affected shareholders and creditors by reference to the counterfactual scenario, *i.e.* "*for the value of their shares or credits that they would have been entitled to under normal liquidation*" (this was the only alternative to the resolution of BPE). The fair compensation is based on true market value at the time of the resolution,[33] considering that investors bear the risk of their investment.

Second, it is for an independent valuer to determine and compare the treatment of shareholders and creditors in resolution and in the hypothetical counterfactual scenario of national insolvency proceedings (Valuation 3).[34]

On a separate note, the General Court also dismissed, as unsubstantiated, the applicants' claim that the restrictions to their right to be heard before the adoption of the resolution scheme[35] infringed on their right to property.

8. Damages

by Giuseppe Pala

In case T-523/17, a group of shareholders and creditors of BPE claimed damages from the European Commission and the SRB based on two parallel arguments.[36]

On the one hand, the applicants argued that the resolution scheme violated the provisions of the SRMR and caused them damage, by writing down the value of BPE's shares and liabilities. Having already found that the resolution scheme was legitimate,[37] the General Court rejected such claim.[38]

---

33 Furthermore, the compensation must be paid in good time, since it does not stem from Article 17(1) of the EU Charter of fundamental rights that the payment is to be made at the same time as the restriction of the right to property (*i.e.* on the date of the resolution scheme).

34 Furthermore, the General Court added that, if a provisional Valuation 2 is carried out in the circumstances under Article 20(10)-(12) SRMR, the shareholders and creditors are entitled to compensation if the ex post definitive Valuation 2, where applicable (e.g. bail-in tool), shows that the actual value of the business is higher than the one considered in the provisional one. Also see ECJ 21 December 2021, *Algebris (UK) Ltd. and Anchorage Capital Group LLC v Commission,* C-934/19 P, p. 92.

35 See, *supra*, 4. *The right to be heard and the right of access to the resolution file*.

36 See GC 1 June 2022, *Eleveté Invest Group, SL and Others v Commission and SRB*, T-523/17, p. 587 – 699.

37 See, *supra*, 3. *The scope of the Court's assessment and the Commission's and the SRB's duty to state the reasons*.

38 See p. 588 – 591.

On the other hand, the applicants maintained that, regardless of the legitimacy of the resolution scheme, BPE would not have been subject to resolution (or, at least, not at the same conditions) if not for the Commission's and the SRB's actions, namely: the disclosure to the public of confidential information on 23 May 2017 (during an interview of the Chair of the SRB) and on 31 May 2017 (in a Reuters article that cited, as source, an anonymous EU official);[39] the inertia of the SRB and the Commission in spite of the financial difficulties of BPE (in particular, the lack of early intervention measures); the violation of the principle of good administration (especially because no less impactful measures were taken into consideration). Therefore, in the applicants' view, the Commission and the SRB should be considered responsible for the damage they suffered, *i.e.* the loss of value of BPE's shares and liabilities.

The General Court recalled the three fundamental requisites of the non-contractual liability of the Union under the Article 340, para. 2, TFEU, specifically (*i*) the unlawfulness of the conduct alleged against the Union institution, (*ii*) the fact of damage, and (*iii*) the existence of a causal link between the conduct and the damage. Then, in light of the applicants' allegations, it denied the existence of such requisites in the case at hand.

First, the General Court considered unsubstantiated the applicants' assertions about the unlawfulness of the conduct of the Commission and the SRB.

In the General Court's view, the applicants did not specify the confidential information that was supposedly divulgated on 23 and 31 May; on the contrary, no breach of confidentiality by the SRB and the Commission stands out in the analysis of the interview of the Chair of the SRB and of the Reuters article.[40]

Furthermore, according to the General Court, the applicants did not identify the actions that the SRB and the Commission allegedly omitted, nor did they identify the specific provisions they violated with their supposed inertia. In particular, the applicants did not explain which early intervention measures would have been apt to prevent the failure of BPE and, in any case, they did not consider that such measures fall outside the competence of the SRB and under the competence of the ECB and of national competent authorities.[41]

Finally, when they alleged that the SRB and the Commission did not take less impactful measures into consideration outside the resolution ones, thus violating the principle of good administration, the applicants were actually referring to measures that the SRB and the Commission have no competence to take, nor to ask other authorities to take (such as the liquidity assistance that could have been provided to BPE only by *Banco de España*).[42]

---

39 See, *supra*, 5. *Confidentiality and professional secrecy*.

40 See p. 600 − 646.

41 See p. 647 − 652, 173 − 176.

42 See p. 178 − 231.

Second, having recalled that the alleged damage must be a sufficiently direct consequence of the conduct complained of, which must be the decisive cause of the damage, the General Court ascertained that the applicants failed to establish such a causal link between the conduct of the SRB and the Commission and the alleged damage they suffered.

The applicants assumed that the abovementioned public statements of the Chair of the SRB on 23 May 2017 and the Reuters article of 31 May 2017 caused BPE's liquidity crisis by generating panic among depositors. The General Court instead found this allegation to be baseless, since the origin of the failure of BPE preceded the interview of the Chair of the SRB and the Reuters article, as was clearly stated by the ECB, the SRB and even by the BPE's own governance body. Therefore, the failure of BPE could not be linked directly to the SRB's or the Commission's conduct.[43]

In light of these reasons, the General Court dismissed the applicants' claim for damages.

9. References to "notes de doctrine"

Christy Ann Petit, *Financial stability objective and delegation of powers in resolution – a consolidation of EU case-law. The "Banco Popular" cases before the General Court*, "EU Law Live", 16th june 2022.

43 See p. 653 – 675.

Anglo Austrian AAB AG, anciennement Anglo Austrian AAB Bank AG and Belegging-Maatschappij "Far-East" BV v ECB

1. Keywords and summary

Anglo Austrian AAB AG, anciennement Anglo Austrian AAB Bank AG and Belegging-Maatschappij "Far-East" BV v ECB

General Court – Case T-797/19 – Judgement of 22 June 2022 – ECLI:EU:T:2022:389

European Central Bank's decision to withdraw a credit institution's authorisation

DECISION TO WITHDRAW A CREDIT INSTITUTION'S AUTHORISATION – Action brought by shareholders – Lack of direct concern – Inadmissibility

Shareholders of a credit institution the authorisation of which has been withdrawn are not directly concerned by the withdrawal and, therefore, are not entitled to challenge the ECB's relevant decision.

DECISION TO WITHDRAW A CREDIT INSTITUTION'S AUTHORISATION – Criteria for the withdrawal – Serious breach of national law on anti-money laundering and countering the financing of terrorism

Pursuant to Articles 18(1)(f) and 67(1)(o) of Directive 2013/36/EU, the withdrawal by the ECB of the authorisation of a credit institution is sufficiently justified by the fact that it was found liable for a serious breach of the national provisions adopted pursuant to Directive 2005/60/EC (now Directive 2015/849/EU). To this end, it is not necessary that the existence of the serious breach is established by the judicial authority, as it is sufficient that the competent authority ascertained it.

Pursuant to Article 14(5) of Regulation (EU) No 1024/2013 and Article 67(1)(o) of Directive 2013/36/EU, for the purpose of withdrawing the authorisation of a credit institution, the ECB must rely on the NCA's decisions that established the breach of AML/CFT rules by such credit institution.

The fact that the credit institution's conduct in breach of AML/CFT rules occurred in the past or that corrective measures have been implemented by the credit institution after the breach was discovered has no impact on the legitimacy of the withdrawal of the authorisation. Indeed, for the purpose of the withdrawal of the authorisation, the relevant national law as well as Articles 18(1)(f) and 67(1)(o) of Directive 2013/36/EU do not set a time limit to the possibility to consider the serious breach, nor they require that the serious breach is still ongoing when the withdrawal decision is adopted.

DECISION TO WITHDRAW A CREDIT INSTITUTION’S AUTHORISATION – Wrong legal basis not affecting the substantive assessment – Invalid plea in law

The plea in law alleging that the ECB’s decision to withdraw a credit institution’s authorisation is based on the wrong national legal basis is purely formal in purport and cannot affect the legitimacy of the decision.

DECISION TO WITHDRAW A CREDIT INSTITUTION’S AUTHORISATION – Request of suspension – Denial – Right to a complete and effective judicial protection – No impact

The decision by the ECB not to suspend the application of the decision to withdraw the credit institution’s authorisation despite the request made by such credit institution does not constitute a violation of its right to a complete and effective judicial protection. Indeed, even if, as a consequence of the withdrawal of the authorisation, the credit institution is subject to the liquidation procedure, it can still apply to the Court of Justice for the suspension of the operation of the ECB’s decision of withdrawal, it can challenge such decision and, if the decision is found unlawful, it can claim damages.

DECISION TO WITHDRAW A CREDIT INSTITUTION’S AUTHORISATION – Proposal by the National Competent Authority – Right to be heard

When the ECB receives from the national competent authority a proposal for a decision to withdraw a credit institution’s authorisation, it is not required to transmit such proposal to the concerned credit institution.

The fact that the credit institution was not heard by the national competent authority prior to the latter’s proposal to the ECB has no impact on the lawfulness of the ECB’s autonomous decision to withdraw the authorisation, even when, according to national law, the credit institution had a right to be heard by the national competent authority.

2. The withdrawal of AAB Bank’s authorisation as a credit institution by the ECB upheld by the General Court

by Paola Battistini

The facts of the case can be summarised as follows. After having adopted a large number of injunctions and sanctions against Anglo Austrian AAB

(AAB Bank), a less significant credit institution established in Austria, the Österreichische Finanzmarktbehörde (Austrian financial markets supervisory authority; “the FMA”) submitted to the European Central Bank (ECB) a draft decision to withdraw AAB Bank’s authorisation to access the activities of a credit institution.

By its decision of the 14 November 2019, the ECB withdrew that authorisation. In essence, it considered that, on the basis of the FMA’s findings, AAB Bank was not capable of ensuring sound risk management. The ECB concluded that the criteria for withdrawal of the authorisation, as laid down in Article 18(f) in relation with Article 67(1)(d) and (o) of Directive 2013/36/UE (CRD IV) as transposed in Austrian law, were fulfilled, and that the withdrawal was proportionate. According to these provisions, the withdrawal of the authorisation is possible where a credit institution fails to have in place appropriate and robust governance arrangements, including properly functioning internal audit, accounting, documentation and concentration risk management mechanisms and reliable information processes or when a credit institution is found liable for a serious breach of the national provisions adopted pursuant to Directive 2005/60/EC (now Directive 2015/849/EU – AMLD).

The ECB’s decision was immediately effective, but on 20 November 2019 it was temporarily suspended by the Order of the President of the General Court, as a result of the request for interim relief brought by the bank and its main shareholder, Belegging-Maatschappij “Far-East”. Following that, on 7 February 2020, the President of the General Court set aside the earlier order and dismissed the application for interim measures.

In the judgment at stake, the General Court dismissed in its entirety the action seeking annulment of that decision of the ECB, ruling for the first time on a withdrawal of authorisation for a credit institution based on serious breaches of the rules on anti-money laundering and countering the financing of terrorism (AML/CFT) and on governance.

The case is an example of the so-called composite procedures,[1] in which the decision-making process involves, vertically, both national and Union administrations, i.e. the FMA and the ECB. AAB Bank was a less significant credit institution and thus under the direct supervision of the FMA. The SSMR,[2] however, allocates the final responsibility to the ECB for authorising and withdrawing an authorisation.

Firstly, paraphrasing the text of Article 4(3) SSMR, the Court pointed out that the ECB is obliged to apply, inter alia, the national law provisions

---

[1] See C. Eckes and R. D’Ambrosio, *Composite administrative procedures in the European Union*, in ECB Legal Working Paper Series No 20, November 2020.

[2] See Article 14 of Council Regulation (EU) No 1024/2013 of 15 October 2013 (the “SSM Regulation” or “SSMR”).

transposing directives falling within its sphere of competence.[3] In this respect, the General Court concluded that the criteria justifying the withdrawal of authorisation provided for in CRD IV and national law transposing that directive were accomplished. The Court held that the ECB committed no manifest error of assessment when concluding that AAB Bank was found liable for serious, repeated or systematic breaches of the national provisions on AML/CFT adopted pursuant to Directive 2005/60.

With reference to the involvement of national law, AAB Bank argued that the sanctions for when a credit institution is found liable for a serious breach of the national provisions adopted pursuant to the AML Directive can only be imposed under administrative criminal law or criminal law, and must be determined in court proceedings by a final judgment. AAB Bank brought forward this argument based on its reading of a specific provision of the Austrian law, namely Article 34(2) FM-GwG (Bundesgesetz zur Verhinderung der Geldwäsche und Terrorismusfinanzierung im Finanzmarkt), transposing Directive 2005/60.

The General Court rejected AAB Bank's plea and stated that the notion of "serious breach" referred to in the relevant national provision, read together with the current Article 58(2) AMLD, can encompass both criminal and administrative sanctions. The type of sanction (criminal or administrative) is thus not decisive for the qualification of the infringement as "serious".

Furthermore, contrary to what AAB Bank claimed, the General Court maintained that the FMA decision at issue is a final one. The General Court referred to previous judgments of the CJEU[4] to clarify that a credit institution can be found guilty of serious AML/CFT infringements within the meaning of the relevant national provisions on the basis of administrative decisions, taking into account the importance of prudential rules aimed at combating money laundering and terrorist financing, but also the particular responsibility of credit institutions in this regard and the need to draw the consequences as soon as possible from the commission of violations of such rules. Arguing, as the AAB Bank asserted, that the serious AML/CFT violations can be ascertained only by a judicial decision having res judicata authority would

---

[3] This is not the first time that the Court of Justice of the European Union dealt with decisions of the ECB interpreting national law pursuant to Article 4(3) SSMR. See, in particular, ECJ, 2 October 2019, *Crédit mutuel Arkéa v ECB* (Joined Cases C-152/18 P and C-153/18 P), and GC, 24 April 2018, *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* (Joined Cases T-133/16 to T-136/16). In these cases, the General Court states that the scope of national laws must be assessed in the light of the interpretation given to them by national courts. In another case, it even added that, in the absence of decisions by the national competent courts, it is for the General Court to rule on the scope of such national provisions (see GC, 13 December 2017, Crédit mutuel Arkéa, T-712/15, § 132, and T-52/16, § 131). On the application of national law by the ECB, see R. D'Ambrosio, *Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)*, in *Quaderni di ricerca giuridica della Consulenza Legale*, n. 88, 2020, p. 131 ff.

[4] See §§ 45-46: GC, 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse/Commissione* (T-474/04), § 37 and 76; GC, 8 May 2019, *Lucchini/Commissione* (T-185/18), § 38.

have meant to make the application of the Austrian law depending on the choice of the bank to appeal (or not) the administrative decision.[5]

The Court emphasised that the AAB Bank's arguments, relating to the fact that the violations ascertained were old or had been corrected, do not call that conclusion into question. The alleged requirement of on-going breaches at the time of the adoption of the decision to withdraw the authorisation does not follow from the law, neither from Article 18(f) or Article 67(1)(o) CRD IV nor from the relevant Austrian law. Indeed, there is not a time limit to be observed for taking into account earlier decisions establishing liability. The Court observed that, especially in this case, the breaches found three or five years prior to the adoption of the contested decision cannot be considered to date back over time. On the AAB Bank's position that the breaches which had been corrected could no longer justify the withdrawal of authorisation, the Court noted that such an approach would undermine the objective of safeguarding the European banking system, since it would permit credit institutions that have committed serious breaches to continue their activities as long as the competent authorities do not demonstrate again that they have committed new breaches. This reasoning applies not only to the AML breaches but also to general governance ones. With regard to the latter, the Court reiterated that the interpretation according to which past breaches or breaches which have been mitigated cannot justify a withdrawal of authorisation is apparent neither from CRD IV nor from the relevant national law.

The Court also dismissed the reasoning of AAB aimed at disputing the seriousness of the breaches found. In that regard, it took into account that, prior to the FMA's proposal of withdrawal, the AAB Bank had been found liable for serious AML breaches in a number of court and administrative decisions which had become final. Therefore, the seriousness of those breaches cannot be challenged at the stage of the administrative procedure before the ECB.

Regarding the composite aspects of the case, the General Court attentively considered whether or not the ECB itself ensured AAB Bank's right to complete and effective judicial protection and rights of the defence.

As regards the first point, it found that the ECB, by refusing to suspend the application of the contested decision, did not infringe the right to effective legal protection since this did not prevent AAB Bank from bringing an action for annulment and making an application for interim measures.

Subsequently, the Court affirmed that the ECB decision was adopted in due observance of the rights of the defence of AAB Bank. In particular, it stated that AAB Bank was properly heard during the adoption of the contested decision since it was given the opportunity to submit its observations on the ECB draft decision. By contrast, there is no separate right to be heard on the FMA's draft decision, therefore the ECB was not obliged to send to AAB the FMA's

[5] See § 44.

draft decision and thus allow the former to respond to the latter. Moreover, the General Court rejected AAB Bank's submission that the ECB infringed the principle of good administration by failing to carefully and impartially identify, verify and examine all the factual elements relevant to the withdrawal of the authorisation. The Court considered the ECB did not just merely reproduce the FMA's findings, but made its own assessment of the facts and evidence available to it.

Lastly, the Court discarded AAB Bank's plea according to which the contested decision destroyed the economic value of the shares that its shareholder held in its capital and undermined the essence of that shareholder's right to property. As AAB Bank is not the holder of that property right, it cannot rely on it in support of its action for annulment.

3. References to "notes de doctrine"

Enrico Gagliardi, Laura Wissink, *So far so good: the review of national law in EU judicial proceedings (Case Anglo Austrian AAB and Belegging-Maatschappij "Far-East", T-797/19)*, "EU Law Live", 8th july 2022.

Francesca Corneli v ECB

1. Keywords and summary

Francesca Corneli v ECB

General Court – Case T-501/19 – Judgement of 29 June 2022 – ECLI:EU:T:2022:402

European Central Bank's decision refusing access to its decision to place Banca Carige S.p.A. under special administration

RIGHT TO ACCESS – Duty to protect confidentiality and professional secrecy – Institution under special administration

Article 4(1)(c) of the ECB Decision No 2004/258 on public access to documents – in accordance with which the ECB must refuse access to a document where its disclosure would undermine the protection of the confidentiality of information that is protected as such under Union law – cannot be the legal basis of a general presumption of confidentiality for all the information included in a decision that places a credit institution under special administration.

RIGHT TO ACCESS – Duty to protect confidentiality and professional secrecy – Criteria for assessing the request – Case-by-case analysis – Duty to state reasons

When the ECB deems necessary to refuse access to a document due to the confidentiality of the information contained therein, it must assess whether the two following criteria are met for each concerned information, namely that: i) the information held is not public; ii) its disclosure is likely to affect adversely the interests of the natural or legal person who provided it, or of third parties, or of the proper functioning of the system of prudential supervision (see also the judgement of the Court of Justice of 19 June 2018, Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister, C-15/16, EU:C:2018:464, paragraph 35). Consequently, a case-by-case analysis is necessary.

When the ECB refuses access to a document on the basis of Article 4(1)(c) of the ECB Decision No 2004/258, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the protected interest. The risk of such undermining must be reasonably foreseeable and not purely hypothetical. The statement of reasons, in particular, must be characterized by a specific indication of the elements taken into consideration and must be linked with the object of the request, so as to enable the addressee

and the Court to understand and verify in which way the requested document represents an exception to the right of access.

DUTY TO STATE REASONS – Notification to the person concerned – Failure to state reasons

The statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting him and a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court.

The case law of the EU administrative review bodies

Case 2/2021, Decision of 27 January 2022, Case 3/2021, Decision of 8 June 2022

1. Keywords and summary

[.], Appellant, v the Single Resolution Board

Case 2/2021 – Final decision of 27 January 2022

[.], Appellant, v the Single Resolution Board

Case 3/2021 – Final decision of 8 June 2022

Single Resolution Board's decision to deny a waiver from the internal minimum requirement and eligible liabilities ("iMREL") for a subsidiary of a resolution entity

WAIVER FROM THE iMREL – Conditions for the waiver – Discretion

Taking into account that Article 12h(1) of Regulation (EU) No 806/2014 expressly provides for that the SRB *may* waive the application of the iMREL where the conditions set out in the same Article are met, and in line with the case-law of the General Court, once the SRB has ascertained that all conditions are met, it still has a margin of discretion in granting or not granting the waiver.

Article 12h of Regulation (EU) No 806/2014 requires a two-pronged test from the resolution authority in order to finally determine the response to the request for a waiver: in the first place, an assessment that the conditions set out in Article 12h are met; if so, in the second place, a more discretionary assessment that, according to the informed judgment of the authority and taking into consideration all factual elements of the case, such a waiver may and in the end will be granted.

As regards the requirement of Article 12h(1)(c), the relevant assessment is not automatic, but it implies a complex, factual and legal evaluation on whether or not "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary". Therefore, the assessment of the occurrence of condition (c) entails for the SRB a certain margin of appreciation, which is, however, more constrained and limited than the one granted in the second stage of the assessment, where the SRB is literally given the discretionary power not to grant the waiver, even if all conditions are met.

WAIVER FROM THE iMREL – Conditions for the waiver – Suitable guarantee of the parent undertaking – Assessment by the SRB – Duty to state reasons

Both the original text of Article 12(10) of Regulation (EU) No 806/2014 and the new Article 12h of the same Regulation, as introduced by Regulation (EU) No 877/2019, as well as the original text of Article 45(12) of Directive 2014/59/EU and the new Article 45f of the same Directive, as introduced by Directive (EU) 2019/879, set out, as a condition for the waiver from the iMREL for a subsidiary of a resolution entity, the negative requirement that there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities to the concerned subsidiary by its parent undertaking, in particular when the latter is placed under resolution. In contrast, only the Directive 2014/59/EU explicitly provides for the additional positive requirement that the parent undertaking guarantees the commitments entered into by its subsidiary, in line with Article 7(b) of Regulation (EU) No 575/2013 in the matter of prudential requirements. It follows that, pursuant to Regulation (EU) No 806/2014, the fulfillment of the condition of a suitable guarantee of the parent undertaking is not statutorily required to obtain the waiver.

The objective of the condition set out by Article 12h(c) of Regulation (EU) No 806/2014 (that there is no current or foreseen impediment to the prompt transfer of own funds or repayment of liabilities to the concerned subsidiary by its parent undertaking) is to ensure that the choice to waive the iMREL requirement is neutral as to the resolvability of the group, because other arrangements are in place, within the group, which can act as functional substitutes of the iMREL with equivalent effects as the conversion or write down of iMREL at the level of the subsidiary. Therefore, in order to meet such condition, also a guarantee of the parent company may serve and may be one of the arrangements available as an alternative to the prepositioning of iMREL, having equivalent effects.

Having regard to the objectives of Article 12h(c), the textual difference between Article 45f of Directive 2014/59/EU and Article 12h(c) of Regulation (EU) No 806/2014 cannot be construed as precluding the SRB from requiring the parent company to guarantee the commitments entered into by its subsidiary under the latter provision. As a result, the SRB may, in the exercise of its discretion and without being required to do so, request such a guarantee from the resolution entity in order to be satisfied that there are no impediments to the prompt transfer of own funds. However, the SRB cannot, by way of internal policy documents such as the MREL Booklet, turn an exercise of discretion into a fully-fledge de facto requirement to be met irrespective of the individual circumstances of the case. Where a guarantee is deemed necessary, the margin of appreciation that the SRB enjoys extends to the assessment of the content of such guarantee, which must be to the satisfaction of the SRB functionally equivalent to the prepositioned iMREL in a gone concern scenario.

The outcome of the assessment of the existence of the condition under Article 12h(c) of Regulation (EU) No 806/2014 must be exhaustively motivated by the SRB in its decision.

2. Appeal Panel of the Single Resolution Board rules on the waiver of iMREL

by Guido Crapanzano

The facts of the case can be summarised as follows.

In May 2019, a credit institution submitted a request for a waiver of the iMREL related to a subsidiary, under Article 45(12) BRRD and Article 12(10) SRMR; however, when the Board adopted its decision on the waiver, those Articles had been substituted by new Articles 45f(3) and (4) BRRD and Articles 12h(1) and (2) SRMR respectively.

During the assessment of the request, the Board was provided with a legal opinion concluding «that there was no obstacle in the […] [applicable law] to transfer funds between the parent entity and the subsidiary, even in the case of resolution action […]. However, the SRB noted that a similar issue is also present in the context of the waiver from capital requirements and that the SRB did not know to what extent the ECB supported the bank's analysis on the absence of obstacles to the transfer of funds. […] The SRB further pointed out that, although such a capital waiver is not a condition for the granting of an iMREL waiver, the absence of it would reduce the level of comfort for the SRB to waive MREL for the same entity».

The parent entity then issued a hard letter of comfort similar to those accepted by the ECB in the context of capital waivers under Article 7(1) CRR. Nevertheless, on «17 December 2020 the SRB adopted a draft decision proposing the rejection of the application for the waiver because "the letter of comfort does not provide sufficient assurance to the Board that the resources necessary for loss absorption and/or recapitalisation (…) will be available when needed". The Board considered that the guarantee could be unilaterally revoked at any time and that it did not appear to confer an actionable right to the subsidiary». Thus, the draft decision was adopted on 12 May 2021, rejecting the request for the waiver on the ground that material impediments to the transfer of funds may exist, given the lack of a suitable guarantee.

The Appellant submitted three pleas to the Appeal Panel, concluding for the remittal of the case to the Board. With its first plea, the Appellant claimed that the SRB erred in law and exceeded its powers by disregarding the objectives pursued by the provisions it sought to apply and depriving them of any practical legal effect by making the waiver virtually impossible to obtain. According to the Appellant, when considering insufficient the letter of comfort provided by the institution's parent, the Board imposed additional conditions to those set out in the SRMR (in both its original and amended languages). In the opinion of the Appellant, «Article 12h SRMR requires that there must not be current or foreseen practical or legal impediments to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary for which the waiver is sought». At the same time, the SRB introduced a new condition, requiring credit

institutions to provide «evidence that the resolution entity or parent undertaking has guaranteed the obligations of the subsidiary in an amount that is equal to, at least, the amount of a hypothetical MREL requirement which would have been set if the subsidiary were not waived». With its second and third pleas, the Appellant claimed a violation of the principle of legal certainty, because of the Board's lack of clarity on the conditions for the waiver and also a breach of the principle of good administration, as the assessment of the Board «does not accurately reflect the assessment of facts and policy developments».

The ruling allows collecting some views about the Panel's interpretation of the functioning of iMREL and the standards of review[1] () in the assessment of the decisions of the Board.

It is important to remark that, in both the original language of Article 12 SRMR and the new text of Article 12h SRMR as amended by the Banking Package 2019 (i.e., Regulation EU 877/2019 amending the SRMR), the set of conditions for the waiver of iMREL is substantially smaller than in the old Article 45(12) or new Article 45f BRRD, respectively. Both languages of the SRMR and the BRRD provide, as a condition for the waiver, the negative requirement that «there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by its parent undertaking» (compare the original language of Article 12(10), and the amended text of Article 12h(1)(c) and 12h(2)(c) SRMR, to the original language of Article 45(12)(d), and the amended text of Article 45f(3)(c) and 45f(4)(c) BRRD). In contrast, only the BRRD explicitly requires the additional positive requirement that a suitable guarantee is in place (see the original language of Article 45(12)(e) and the amended text of Articles 45f(3)(d) and 45f(4)(d) BRRD).

Given the difference in the language between the SRMR and BRRD, the Appeal Panel was called to settle, in the first place, whether the negative condition that no material impediment to the transfer of funds exists nonetheless implies the positive condition about the existence of a sufficient guarantee. This is a point of pure law, involving the appraisal of the meaning (and the rationale) of the provisions of a legal act; therefore, it is traditionally subject to a full (or comprehensive) review.

The answer of the Panel is negative. Although the Panel considers it «unfortunate that the requirements for the waiver set out in [the BRRD and the SRMR] are not aligned» it concludes that the language of Article 12h SRMR does not impose the provision of a special guarantee. Still, it gives the Board a margin of appreciation to assess the circumstances and get persuaded whether an explicit guarantee is necessary or not. Therefore, the Panel seems to suggest that Article 12h SRMR gives the Board a wider margin of manoeuvre

---

[1] See, generally, Alexander H. Türk, *Oversight of administrative rulemaking: Judicial Review*, 19 EL Rev. 2013, 126-142; Andriani Kalintiri, *What's in a Name? The Marginal Standard of Review of Complex Economic Assessments in EU Competition Enforcement*, 53 CMLR 2016, 1282-1316, available at SSRN: https://ssrn.com/abstract=4035276

compared to that provided under Article 45f(3) and (4) BRRD, as other Resolution Authorities could not waive iMREL unless a suitable guarantee by either the parent or the resolution entity has been provided according to Article 45f BRRD. This interpretation may be justified by the special attributes of the entities subject to the SRMR and is based on the letter of Article 12h SRMR, which provides that the Board may grant the waiver of iMREL where some conditions are met. According to settled case-law (see, for instance, General Court, judgement of 13 July 2018, *La Banque Postale v European Central Bank*, T-733/16, ECLI:EU:T:2018:477), this implies that, once it is verified «that all conditions are met, the Board has still a margin of discretion in granting or not granting the waiver».

In the opinion of the Panel, the assessment of the Authority has to be led by the principle that «the choice to waive the iMREL requirement [has to be] neutral as to the resolvability of the group, because other arrangements are in place, within the group, which can act as functional substitutes of the iMREL with equivalent effects as the conversion or write-down of iMREL at the level of the subsidiary».

This appraisal, which likely requires a complex factual and legal assessment of the overall financial structure of the (resolution) group, according to the Panel, is subject to a marginal (or limited) review – usually restricted to the manifest error of appreciation – that is even narrower than the review applicable to the assessment that conditions for the waiver are met (and, in particular, that no material impediment to the transfer of funds exists). The difference seems to originate from the fact that, in the case of the assessment of the conditions, the appraisal is about a set of complex factual and legal elements whose relevance has already been established by the legislator; in contrast, in the case of the assessment of the need for an appropriate guarantee, the appraisal relates to both the complex legal and factual elements that characterise the financial structure of the group, and also the opportunity to impose an additional requirement, as a means to realise the objective of the resolution.

Despite the narrow margin of review, the Panel ruled for the remittal of the case to the Board, because the latter missed to sufficiently detail why the letter of comfort provided by the institution was deemed inadequate.

Update: after the adoption of the ruling of the AP, the EBA issued the Question ID: 2020_5581 and Question ID: 2020_5644 on the waiver of iMREL.

Case 1/2022, Decision on admissibility of 29 June 2022

1. Keywords and summary

[.] v the Single Resolution Board

Case 1/2022 – Decision on admissibility of 29 June 2022

Whether the joint decision on the determination of the MREL taken by the resolution college can be challenged before the Appeal Panel

implementation of srb's mrel decision – National resolution authority's act implementing the SRB MREL decision – Appealability

According to the principle affirmed by the Court of Justice in the *Iccrea Banca* case (judgment of the Court of Justice of 3 December 2019, Case C-414/18, Iccrea Banca v Banca d'Italia, ECLI:EU:C:2019:1036), like the national resolution authority's acts that communicate to credit institutions the *ex-ante* contributions due to the Single Resolution Fund, also the national resolution authority's acts implementing the SRB MREL decision cannot be challenged before a national court for errors pertaining to the SRB's act.

resolution colleges – Nature of the joint decision taken by the resolution college

According to Recital n. 98 of BRRD, the resolution college should not be considered as a decision-making body but a platform facilitating decision-making by national authorities. However, the fact that resolution colleges seek to facilitate consensus (without having independent decision-making as a college) does not mean that the process results in no decision.

The essence of the joint decision adopted in the framework of a resolution college is that of a bundle of individual decisions, adopted together and in parallel by each resolution authority being part of the college, unless one or more of them disagree, in which case the decisions will be adopted in parallel, but separately. Formally, the joint decision may result in a single document prepared by the resolution authority of the parent resolution entity, to which it is also attached the individual consent of the other national resolution authorities. In the light of the above, in a context where the SRB is part of a resolution college, the joint decision adopted by the latter must be regarded as also containing an SRB's decision.

RESOLUTION COLLEGES – Nature of the joint decision on MREL – Nature of the SRB's decision instructing the National Resolution Authority on MREL

The act adopted by the resolution college under Article 45h of BRRD must be regarded as a decision that marks the end of the process at the college level. The joint decision is not a preliminary or intermediate act but a final decision binding on the resolution authorities concerned, unless they have disagreed, also producing legal effects on the relevant credit institution. In the light of the above, within the SRM, from the perspective of the relevant credit institution, the subsequent SRB's decision is a merely confirmatory act of the decision taken by the resolution college to the effect of having the binding MREL determination duly implemented at the national level within the Banking Union. While the relevant NRA may appeal this last decision before the Appeal Panel, the same appeal is precluded to the group parent company, considering the confirmatory nature of the act.

REPEAL OF THE MREL DECISION – Consequences for pending proceedings

The MREL determination process has a cyclical nature. Since justice cannot be rendered instantly, the MREL determination of any cycle, where appealed before the Appeal Panel or the Court of Justice, will inevitably be reviewed or updated by one or more determination(s) of the subsequent cycle(s) before the appeal of the original MREL determination is finally settled by a judgment with the effects of *res judicata*. In this context, if the original appeal were considered moot, the yearly reconsideration of MREL determinations may de facto prevent their legal review, in contrast with Article 47 of the Charter. Therefore, as for the MREL cyclical determination, it must be followed the consistent body of CJEU's case law considering that, where a decision is replaced during the proceedings by another decision with the same subject matter, this is not a factor that in itself renders the existing appeal moot, but rather a new factor allowing the appellant to continue its appeal and to adapt its claims and pleas in law also to challenge, in the same proceedings, the new MREL decision.

2. The joint decision on MREL taken by the resolution college can be challenged before the Appeal Panel

by Francescopaolo Chirico

In its decision of 29 June 2022, in Case 1/2022, the Appeal Panel addressed the issue of judicial protection of the resolution entity following the joint decision on MREL adopted by the resolution college pursuant to Articles 45h and 88 of Directive 2014/59/EU (BRRD).

The Panel starts by considering that the identification of the remedies available to the credit institution stems from the interpretation of a complex legal framework, composed of Regulation No 806/2014 (SRMR) and the BRRD provisions on resolution colleges, as complemented by Commission Delegated Regulation 2016/1075.[1]

Although in the current state of case law there is yet no specific guidance as to which acts could be challenged under Article 85 SRMR, the Appeal Panel considers that the distinction between "preparatory" and "final" acts, as developed in the CJEU's case law, shall apply.

By recalling the principle affirmed by the Court in the recent case law related to administrative procedures consisting of several stages before different authorities (and in particular the *Iccrea Banca* case),[2] the Panel firstly notes that that, like the NRA's acts adopted to communicate to credit institutions the *ex-ante* contributions due to the Single Resolution Fund, also the NRA's act implementing the SRB's decision on MREL cannot be challenged before a national court for errors pertaining to the SRB's act.[3]

As for the decision on MREL adopted by the resolution college, the Panel recalls that, according to Recital n. 98 of BRRD, the resolution college should not be considered a decision-making body but a platform facilitating decision-making by national authorities.

However, according to the Panel, the fact that resolution colleges seek to facilitate consensus (without having independent decision-making as a college) does not mean that the process results in no decision. Indeed, the essence of the joint decision adopted in the framework of a resolution college is that of a bundle of individual decisions, taken together and in parallel by each resolution authority being part of the college, unless one or more of them disagree, in which case the decisions will be adopted in parallel, but separately. Formally, the joint decision may result in a single document prepared by the resolution authority of

---

[1] Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges.

[2] See Court of Justice, judgment 3 December 2019, Case C-414/18, *Iccrea Banca v Banca d'Italia*. See also judgment of 6 May 2021, joined cases C-551/19 P and C-552/19 P, *ABLV v ECB*, and judgment of 19 December 2018, case C-219/17, *Silvio Berlusconi and Fininvest v Banca d'Italia*.

[3] According to the Panel, the same conclusion applies to the NRA's act "*which implement and communicate to a credit institution a resolution plan prepared by the SRB and endorsed by the European Commission*". As for the admissibility of the action for annulment proposed only against the SRB's resolution decision, without challenging the Commission's endorsement jointly, the Appeal Panel recalls the judgment of the General Court of 1 June 2022, Case T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno v SRB*, already commented *supra*.

the parent resolution entity, to which it is also attached the individual consent of the other national resolution authorities.

In light of the above, the text of Articles 88 and 45h BRRD, duly read in their overall normative context, implies that the joint decision is not a preliminary but a final decision binding on the resolution authorities concerned, unless they have disagreed. Therefore, in a context where the SRB is part of a resolution college, the joint decision adopted by the latter must be regarded as also containing an SRB's decision. Such an act is binding to the SRB itself, according to Article 45h(7) BRRD, and *vis-à-vis* the relevant credit institution, as also implied by the duty to communicate the determination adopted by the college to the resolution entity.

Following this line of reasoning, the SRB's decision, adopted after the issuance of the resolution college's decision, has the sole purpose of instructing the NRA to implement the MREL determination according to the SRM framework, which entrusts national authorities with the execution of the Board's acts. In other words, the resolution college's decision is the final MREL determination adopted by the SRB and the other national resolution authorities involved, while the subsequent SRB's act only contains the specific instruction addressed to the NRA under the SRM Regulation to the effect of having the binding MREL determination duly implemented at the national level within the Banking Union.

Therefore, from the viewpoint of the credit institution, the resolution college's decision finally determines the MREL requirement, whereas the following SRB's decision is only confirmatory of such determination, since the SRB's decision does not introduce any new substantive factor *vis-à-vis* the credit institution. On the contrary, from the viewpoint of the national resolution authority, the SRB's act is not merely confirmatory, because it is the first act containing specific instructions to the NRA. On this premise, in previous decisions of the Panel, the appeal brought by a national resolution authority against the SRB's decisions instructing the same NRA within the Banking Union to implement a joint decision adopted by the college was considered admissible.

Back to the point of view of the credit institution concerned, it is true that Article 12 SRMR entrusts the SRB with the task of setting the MREL levels for entities and groups. However, such provision has to be read in conjunction with Recital 91 and Article 5 SRMR, according to which the SRB has to follow the procedures laid down by the BRRD under Articles 88 and 89 on resolution colleges. Thus, in a context where the SRB is part of a resolution college, the Board must act in compliance with BRRD provisions, making its determination within the framework of the joint decision by the college. It follows that the Board exercises its power and competence in such a collegial context, as required by BRRD, and that the joint decision adopted by the Board and other resolution authorities is a binding legal act (not a preparatory act).

Consequently, according to the Panel, the relevant entity can bring an action under Article 85 SRMR against the decision taken by the college, while it should not be able to appeal the subsequent Board's decision, as this latter act would not bring a distinct change of the applicant's legal position.

In the Panel's view, the admissibility of the appeal against the joint decision is not affected by the adoption of a new joint determination on MREL pending the Panel decision. Indeed, the MREL determination process has a cyclical nature. Since justice cannot be rendered instantly, the MREL determination of any cycle, if appealed before the Appeal Panel or the Court of Justice, will inevitably be reviewed or updated by one or more determination(s) of the subsequent cycle(s) before the appeal of the original MREL determination is finally settled by a judgment with the effects of *res judicata*. In this context, if the original appeal were considered moot, the yearly reconsideration of MREL determinations may de facto prevent their legal review, in contrast with Article 47 of the Charter. Therefore, as for the MREL cyclical determination, it must be followed the CJEU's case law considering that, where a decision is replaced during the proceedings by another decision with the same subject matter, this is not a factor that in itself renders the existing appeal moot, but rather a new factor allowing the appellant to continue its appeal and to adapt its claims and pleas in law also to challenge, in the same proceedings, the new MREL decision.[4]

---

[4] See Orders of the General Court of 24 May 2011, case T-176/09, *Gibraltar v Commission*, paragraph 47; and of 18 November 2005, case T-299/04, *Abdelgani Selmani v Council and Commission*, paragraph 68, and case law cited therein.

The judgments of the national apical Courts

[.] v Banca d’Italia

1. Keywords and summary

[.] v Banca d’Italia

Corte di Cassazione, sez. II, Judgement of 8 February 2022, No 4006

Bank of Italy’s administrative pecuniary sanctions against the general manager of a credit institution

administrative sanctions – Right to access – Facts out of the control of the National Competent Authority – Request to reopen the sanctioning proceeding – Denial

The fact that the applicant could not access the documents because of an inefficiency of the post office, cannot justify a request to reopen the sanctioning proceeding. Nor can the sanction be considered unlawful on the basis of facts that were not under the control of the Authority, which became aware of the inefficiency of the post office after the conclusion of the proceedings and the adoption of the sanction.

administrative sanctions – Objective and subjective elements – Burden of proof

With regard to offences under Article 144 of Legislative Decree No 385 of 1993 (TUB), the culpability judgment is to be carried out taking into account objective normative elements and does not depend on psychological elements. Therefore, while the Authority must ascertain and prove the objective element of the violation, it is the offender that has to prove the absence of negligence, due to the presumption of guilt laid down in Article 3 of Law No 689/1981.

administrative sanctions – *Ne bis in idem – Idem factum*

In the event of repetition of the same illegal conduct in different periods, the adoption of a new sanction is not precluded by the *ne bis in indem* principle. In fact, the repetition of the same conduct at a later point in time amounts to a different “historical fact”. The *idem factum* exists only when there is a naturalistic correspondence in the configuration of the offence, considered in all its elements (conduct, event, causal link) and with regard to the circumstances of time, place and person.

[.] v Banca d'Italia

1. Keywords and summary

[.] v Banca d'Italia

Corte di Cassazione, sez. II, Judgement of 15 February 2022, No 4923

Bank of Italy's administrative pecuniary sanctions against members of the management body of a credit institution

ADMINISTRATIVE SANCTIONS – No criminal nature - Article 6 ECHR – Inapplicability – Right to complete and effective judicial protection

The safeguards enshrined in Article 6 ECHR and Article 47 CFR (*i.e.* the right to be heard before the decision-making body and the principle of separation between the investigative and decision-making phases) apply to administrative sanctions having a *coloration pénale*. Therefore, such safeguards are not applicable to administrative sanctions adopted by the Bank of Italy pursuant to Article 144 (in the version prior to the amendments provided for in Legislative Decree No 72 of 2015, transposing CRD IV) of the Italian consolidated law on banking (TUB), given that said sanctions are not criminal in nature.

There is no doubt that the remedy available under Italian law (Article 145 TUB) ensures an effective judicial protection of the sanctioned person, having the Court of Appeal the power to examine the whole matter. Indeed, the judge can review both the formal legality and the substance of the sanction, including the determination of its amount.

NON-EXECUTIVE MEMBERS OF THE MANAGEMENT BODY – Duty to act in an informed manner

The duty of directors to act in an informed manner, even if they are non-executive, provided for under Article 2381 of the Italian civil code, entails, on the one hand, a duty to be proactive, by exercising all the powers connected with the office in order to prevent or mitigate critical situations of which they are, or should be, aware; on the other hand, a duty to seek information, within the powers connected with the office, with the diligence required by the nature of the office and their specific competences, so that both the choice to act and not to act are based on the knowledge of the situation of the institution.

These duties apply in a stricter manner to members of the management body of credit institutions, since, in such cases, not only the contractual liability to the company's shareholders may come into play, but also that, of a public nature, to the supervisory authority.

As already held by the Court, when it comes to non-executive directors of credit institutions, all of them, who are appointed because of their specific expertise also in the interest of savers, must perform the duties with particular diligence and, therefore, also non-executive directors are required to assess the adequacy of the organisational and accounting structure, as well as the business performance, and are obliged, in the event they are or should be aware of any irregularity, to take all appropriate initiative to ensure that the institution operates in a diligent, correct and transparent manner.

[.] and others v Banca d'Italia

1. Keywords and summary

[.] and others v Banca d'Italia

Corte di Cassazione, sez. II, Judgement of 9 April 2022, No 12435

Bank of Italy's administrative pecuniary sanctions against members of the management body and the general manager of a credit institution

administrative sanctions – Time reasonably necessary to ascertain the violation – Boundaries of the Corte di Cassazione's review

With regard to administrative sanctions, the activity of ascertaining the offence incumbent on the public authority does not end with the mere knowledge of the fact in its materiality. On the contrary, verification activities also include the time necessary to assess the objective and subjective elements of the violation that are necessary for the correct formulation of the findings. The determination of the time reasonably necessary for the public authority to conduct such an assessment falls within the remit of the Court of merit, taking into account the greater or lesser complexity of the individual case. This assessment may be reviewed by the Corte di Cassazione only if it is vitiated by the failure to examine a decisive and controversial fact, pursuant to Article 360 of the Code of Civil Procedure.

administrative sanctions – Notification to the person concerned – Time limit of the procedure – Approval of the Head of Directorate General for Financial Supervision and Regulation

As regards administrative sanctions imposed by the Bank of Italy, the time limit of 90 days provided for in Article 14 of Law No 689/1981 for the notification of the verification of a violation begins to run on the date of the approval of the inspection report by the Head of Directorate General for Financial Supervision and Regulation, who certifies the conclusion of the assessment of all the elements of the violation.

administrative sanctions – Rules entered into force during the proceedings – Principle of *favor rei* – Inapplicability

In the absence of an explicit legal provision, the criminal law principle of *favor rei* does not extend to the field of administrative sanctions, which responds to the different principle of *tempus regit actum*, except in the case of sanctions

having *coloration pénale* according to the criteria developed by the European Court of Human Rights

ADMINISTRATIVE SANCTIONS – No criminal nature – Article 6 ECHR – Inapplicability

The administrative sanctions imposed by the Bank of Italy pursuant to Article 144 et seq. of Legislative Decree No 385 of 1993 (in the version prior to the amendments provided for in Legislative Decree No 72 of 2015, transposing CRD IV) on persons performing management, administration, or control functions in credit institutions cannot be deemed to be of criminal nature, given their limited economic effect and impact on the fundamental rights and freedoms of the offenders. Therefore, with regard to such sanctions, a question of their compatibility with the guarantees deriving from Article 6 of the European Convention on Human Rights does not arise.

[.] v Banca d'Italia

1. Keywords and summary

[.] v Banca d'Italia

Corte di Cassazione, sez. II, Judgement of 9 April 2022, No 12436

Bank of Italy's administrative pecuniary sanctions against members of the management body of a credit institution

administrative sanctions – Time reasonably necessary to ascertain the violation – Full knowledge of the violation – Notification to the person concerned – Time limit of the procedure – Approval of the Head of Directorate General for Financial Supervision and Regulation

The verification of a violation does not coincide with the moment when the "fact" is ascertained in its materiality, but must be understood as including the time necessary for the evaluation of the data acquired concerning the elements (objective and subjective) of the offense, and therefore the time necessary for the deliberation, in light of the complexity of the investigation. The Court of Appeal shall determine the time reasonably needed for the Authority to come to such full knowledge, identifying the "dies a quo" of the time limit, taking into account the greater or lesser difficulty of the case and the fact that the inspections, despite the absence of specific deadline, need to be carried out within a reasonable time limit.

Regarding administrative sanctions adopted by the Bank of Italy, the time limit of 90 days provided for in Article 14 of Law No 689/1981 for the notification of the verification of a violation begins to run on the date of signature of the inspection report by the Head of Directorate General for Financial Supervision and Regulation.

non-executive members of the management body – Duty to act in an informed manner

The duty to act in an informed manner of non-executive directors of credit institutions, laid down in Articles 2381 (3) and (6) and 2392 of the Italian civil code, is not confined, in its concrete operation, to the reports received from the managing directors, since also the former must have adequate knowledge of the business and contribute to ensure effective risk governance of all areas of the bank, so as to supervise the choices made by the executive bodies.

The duty of non-executive directors to be proactive and gather information is not dependent on the failure of the managing directors to provide information.

ADMINISTRATIVE SANCTIONS – Objective and subjective elements – Burden of proof

In order to adopt sanctions against persons performing administrative, managerial or control functions, the Bank of Italy needs to ascertain and prove the objective element of the violation. Differently, in light of the presumption of guilt laid down in Article 3 of Law No 689/1981, it is the offender that has to prove its absence of negligence.

[.] v Banca d'Italia

1. Keywords and summary

[.] v Banca d'Italia

Corte di Cassazione, sez. II, Judgement of 31 May 2022, No 17567

Administrative pecuniary sanctions against the member of the administrative boby of a credit institution

ADMINISTRATIVE SANCTIONS – Breach of the principle of correlation – Boundaries of the Corte di Cassazione's review

As regards administrative sanctions, a breach of the principle of correlation between the contested fact and the fact on which the sanction is based, as provided for by Article 14 of Law No 689 of 1981, occurs when the sanction is imposed for a case, identified in its essential elements and in the relevant circumstances outlined by the relevant rules, different from that attributed to the offender at the time of the notification of the findings, given that in such cases the offender's right of defence is infringed. The relevant review falls within the remit of the court of merit, the conclusions of which, if adequately reasoned, are unquestionable by the Corte di Cassazione.

REMUNERATION POLICIES AND PRACTICES – Agreement on consensual termination of employment with the general manager – Additional benefits – Clause aimed at indemnifying the director from his liability

With regard to the agreement on consensual termination of employment with the general director of a credit institution, any additional benefits beyond those provided for in the relevant national collective labour agreement must comply with the provisions adopted by the Bank of Italy on remuneration policies and practices pursuant to Article 53(1)(d) of Legislative Decree No 385/1993. Therefore, the agreed remuneration must be correlated to the performance achieved and the risks taken; the clause in the agreement whereby the credit institution undertakes to indemnify the general director against actions for damages, including those of third parties, in relation to the performance of its duties is unlawful.

Appendix

Text of the judgments of the national apical Courts

Corte di Cassazione, [.] v Banca d'Italia, 08/02/2022, n. 4006

Svolgimento del processo – Motivi della decisione

1. Il sig. D.B.L., già direttore generale della [banca]…, ha proposto ricorso, sulla scorta di tre motivi, per la cassazione del decreto con cui la Corte d'appello di Roma ha rigettato l'opposizione ex art. 145 TUB (D.Lgs. n. 385 del 1993) da lui proposta avverso il provvedimento sanzionatorio adottato nei suoi confronti dalla Banca d'Italia con la Delib. n. 374 del 2014 del 15 luglio 2014.

2. Con la suddetta delibera la Banca d'Italia aveva inflitto al D.B., in relazione all'attività da lui svolta come direttore generale della [banca]…, la sanzione pecuniaria di Euro 25.000 per carenze nell'organizzazione e nei controlli interni, con particolare riferimento al processo del credito, in base all'art. 53, comma 1, lett. b) e d) e art. 67, comma 1, lett. b) e d) TUB.

3. La corte capitolina ha preliminarmente rigettato la doglianza con cui l'opponente si era lamentato – deducendo la violazione del proprio diritto di difesa - di non aver ricevuto risposta alla propria domanda di accesso agli atti del procedimento. Tale doglianza, secondo la corte territoriale, era infondata sotto un duplice profilo. In primo luogo, perchè la Banca d'Italia aveva accolto la suddetta istanza di accesso agli atti e aveva comunicato all'interessato tale accoglimento mediante lettera raccomandata, il cui mancato ricevimento non poteva esserle addebitato. In secondo luogo, perchè, in ogni caso, le irregolarità riscontrate nel corso degli accertamenti ispettivi erano state integralmente descritte nelle note contestative, sì da consentire al ricorrente di esercitare compiutamente le proprie difese, né sussistevano "ulteriori documenti, atti o comunicazioni diverse del rapporto ispettivo"; cosicché il D.B. "ben avrebbe potuto esercitare compiutamente le proprie difese, che non erano inderogabilmente condizionate all'accesso agli atti" (pag. 3, secondo capoverso, del decreto).

4. Nel merito, la Corte d'appello di Roma ha rigettato il motivo di opposizione concernente la dedotta mancanza dell'elemento soggettivo dell'illecito, disattendendo le argomentazioni dell'opponente centrate sul rilievo che le violazioni accertate dall'Organo di vigilanza si riferivano non alla società capogruppo, presso la quale il D.B. rivestiva la qualità di direttore generale, bensì alla società operativa del gruppo, la [banca]…

5. Da ultimo, la corte territoriale ha escluso che il fatto che il D.B. fosse stato già precedentemente sanzionato dalla Banca d'Italia, con provvedimento del 31.8.2010, per la medesime condotte omissive oggetto del provvedimento sanzionatorio impugnato in questo giudizio integrasse violazione del principio del *ne bis in idem*, osservando che la seconda sanzione trovava causa nella persistenza della condotta omissiva, ossia nella

mancata adozione delle misure necessarie a porre rimedio alle carenze già precedentemente rilevate e sanzionate, valendo ciò a integrare un nuovo illecito.

6. Al ricorso del D.B. la Banca d'Italia ha resistito depositando controricorso.

7. La causa è stata discussa e decisa nella camera di consiglio del 21 luglio 2021 per la quale entrambe le parti hanno depositato memorie illustrative.

8. Con il primo motivo di ricorso, riferito all'art. 360 c.p.c., nn. 3 e 5 il sig. D.B. deduce la violazione e la falsa applicazione dell'art. 145 TUB e dei principi in materia di contraddittorio nel procedimento sanzionatorio della Banca d'Italia, nonché dei principi in materia di diritto di accesso agli atti del procedimento di cui alla L. n. 241 del 1990. Il motivo attinge la statuizione di rigetto del motivo di opposizione relativo alla violazione del diritto del ricorrente all'acceso agli atti e censura entrambe le rationes decidendi su cui tale statuizione si fonda, riassunte nel precedente paragrafo 4.

9. Quanto alla ratio decidendi consistente nel rilievo che la Banca d'Italia aveva risposto positivamente alla richiesta di accesso agli atti, con raccomandata pervenuta regolarmente al domicilio del D.B. e rimasta in giacenza presso l'ufficio postale, il ricorrente, nella narrativa dei fatti di causa, espone che "da indagini effettuate dal rag. D.B. presso Poste Italiane S.p.A. è emerso che durante il mese di (OMISSIS) si sono verificati diversi episodi di ritardo nelle spedizioni, oltre a disguidi di varia natura e che, per vero, dalla consultazione del sito di Poste Italiane è emerso che la comunicazione di riscontro di cui sopra non è mai stata consegnata al destinatario in quanto alla data del 25 agosto 2014 (dopo la notifica del provvedimento sanzionatorio) era ancora in lavorazione (dal 28.11.2013) presso i '(OMISSIS)'" (pag. 4, terzultimo capoverso ricorso). Sulla scorta di tale premessa di fatto, il ricorrente, nello svolgimento del motivo in esame, lamenta che la corte d'appello abbia omesso di esaminare la circostanza che egli, per causa a lui non imputabile, era giunto a conoscenza dell'accoglimento della sua istanza di accesso agli atti soltanto dopo la ricezione del provvedimento sanzionatorio a lui destinato e che la riproposizione di tale istanza, da lui conseguentemente effettuata, non aveva ottenuto alcuna risposta.

9.1. La censura è infondata. Va preliminarmente evidenziato che la corte d'appello ha esaminato la circostanza del mancato ritiro, da parte del D.B., della raccomandata contenente l'accoglimento della sua richiesta di accesso; alle pag. 2-3 del decreto impugnato si legge, infatti: "dall'esame degli atti risulta che la raccomandata con la quale si consentiva il diritto di accesso agli atti nei termini proposti era stata inviata all'effettivo domicilio del D.B. (OMISSIS) e restituita per compiuta giacenza. Dalla stessa narrazione del ricorrente non emerge alcun addebito da muoversi alla BdI circa l'asserito non ricevimento della predetta raccomandata". Ciò posto, risulta agevole rilevare che la doglianza del ricorrente si risolve, in sostanza, nell'assunto che - poichè egli non aveva mai ricevuto la raccomandata contenente l'accoglimento della sua istanza di accesso agli atti a causa di un disguido del servizio postale – la corte capitolina avrebbe errato nel non "valutare il comportamento della Banca d'Italia (che avrebbe dovuto riaprire il procedimento una volta avuta conferma dell'omessa ricezione degli atti da parte del D.B. senza sua colpa)" (pag. 9, rigo 10, del ricorso). Si tratta doglianza che non può trovare accoglimento per una duplice ragione.

9.2. In primo luogo, detta doglianza muove da un presupposto di fatto – che la raccomandata contenente l'accoglimento della istanza di accesso agli atti del D.B. fosse ancora in lavorazione presso Poste Italiane alla data del 25 agosto 2014 - il quale non risulta coerente con la ricostruzione dei fatti di causa operata dalla corte territoriale. Nell'impugnato decreto si afferma, infatti, che la suddetta raccomandata era stata "restituita per compiuta

giacenza” (pag. 3, rigo 1, del decreto), vale a dire che la procedura di lavorazione della raccomandata era stata completata; infatti, ai sensi degli artt. 20 e segg. delle Condizioni generali di servizio per l’espletamento del servizio universale postale di Poste Italiane (Tabella A allegata alla Delib. dell’Autorità per le Garanzie nelle Comunicazioni n. 385/13/cons del 20 giugno 2013), gli invii a firma (tra cui gli invii raccomandati) che non sia stato possibile recapitare all’indirizzo indicato vengono lasciati in deposito per trenta giorni presso l’ufficio postale, dandosi avviso al destinatario, prima di essere restituiti al mittente. Secondo l’accertamento di fatto della corte capitolina, non specificamente censurato nel ricorso del D.B., la lavorazione della raccomandata era dunque terminata; cosicché la censura in esame risulta inammissibile, in quanto basata su una ricostruzione dei fatti di causa alternativa a quella che emerge dalla pronuncia di merito.

9.3. In ogni caso, l’argomentazione giuridica sviluppata nella censura in esame va giudicata di per sé stessa priva di fondamento. Nel decreto della corte capitolina si sottolinea come, in sede di merito, il D.B. non abbia mosso alcun addebito alla Banca d’Italia in ordine alla regolarità delle modalità di invio della raccomandata contenente l’accoglimento della istanza di accesso agli atti da lui proposta. Nemmeno in questa sede di legittimità il D.B. imputa alla Banca d’Italia la violazione delle regole procedimentali che la stessa deve seguire nel rispondere ad una richiesta di accesso agli atti. Egli lamenta, invece, che la Banca d’Italia non abbia riaperto il procedimento dopo aver saputo che il sanzionato non aveva ricevuto, per fatto non a lui imputabile, la comunicazione di accoglimento della domanda di accesso agli atti da lui avanzata. In sostanza, secondo il ricorrente, la corte territoriale avrebbe dovuto annullare l’impugnato provvedimento sanzionatorio non per unii vizio di legittimità del procedimento amministrativo da cui esso è scaturito, ma a causa di un comportamento della Banca d’Italia posteriore alla emanazione del provvedimento impugnato; ciò di cui il ricorrente si lamenta, in ultima analisi, è la mancata adozione di un provvedimento di auto-annullamento della sanzione, in via di autotutela, con conseguente riapertura del procedimento sanzionatorio. Tale doglianza non può trovare accoglimento, giacché un provvedimento emesso all’esito di un procedimento in relazione al cui svolgimento non si deduca la violazione di alcuna prescrizione normativa non può ritenersi illegittimo a causa di fatti estranei alla sfera dell’amministrazione procedente (i disservizi postali), alla stessa resi noti dopo la chiusura del procedimento e l’emanazione del provvedimento conclusivo del medesimo.

9.4. Né, sotto altro aspetto, il ricorrente poteva fondatamente pretendere la riapertura del procedimento sanzionatorio per la dedotta violazione del proprio diritto di accesso agli atti, posto che tale diritto era autonomamente tutelabile attraverso l’impugnativa giurisdizionale del silenzio-diniego, ai sensi della L. n. 241 del 1990, art. 25, comma 4. Tale disposizione – alla cui stregua “Decorsi inutilmente trenta giorni dalla richiesta, questa si intende respinta. In caso di diniego dell’accesso, espresso o tacito, o di differimento dello stesso ai sensi dell’art. 24, comma 4, il richiedente può presentare ricorso al tribunale amministrativo regionale ai sensi del comma 5...” – trova infatti applicazione anche nel procedimento sanzionatorio della Banca d’Italia, giacché le Disposizioni di Vigilanza in materia di sanzioni e procedura sanzionatoria amministrativa (Provvedimento del 18 dicembre 2012), dispongono, nella Sezione II, p. 2, primo capoverso: “I soggetti sottoposti al procedimento sanzionatorio possono accedere ai documenti del procedimento nella parte in cui li riguardano, in base alle disposizioni della L. 7 agosto 1990, n. 241”.

9.5. La censura rivolta alla prima ratio decidendi della statuizione di rigetto del motivo di opposizione relativo alla violazione del diritto del ricorrente all’acceso agli atti va quindi disattesa.

9.6. Quanto alla seconda ratio decidendi di tale statuizione, consistente nell'argomento che le irregolarità riscontrate nel corso degli accertamenti ispettivi erano state integralmente descritte nelle note contestative, il ricorrente ne lamenta l'intrinseca illogicità e sottolinea come detto argomento risulti smentito dal fatto stesso che l'istanza di accesso agli atti da lui presentata era stata accolta dalla Banca d'Italia. La censura risulta inammissibile per sopravvenuta carenza di interesse, giacché la statuizione di rigetto del motivo di opposizione concernente il mancato accesso agli atti del sig. D.B. si regge autonomamente sulla ratio decidendi fondata sul rilievo che la richiesta di accesso agli atti da costui proposta aveva trovato completo accoglimento. Deve quindi trovare applicazione il principio, più volte affermato da questa Corte, che qualora la decisione di merito si fondi su di una pluralità di ragioni, tra loro distinte e autonome, singolarmente idonee a sorreggerla sul piano logico e giuridico, la ritenuta infondatezza delle censure mosse ad una delle rationes decidendi rende inammissibili, per sopravvenuto difetto di interesse, le censure relative alle altre ragioni esplicitamente fatte oggetto di doglianza, in quanto queste ultime non potrebbero comunque condurre, stante l'intervenuta definitività delle altre, alla cassazione della decisione stessa (così, tra le tante Cass. 11493/2018).

9.7. Il primo mezzo di ricorso va quindi in definitiva rigettato, per l'infondatezza della prima delle due censure in cui si articola e per l'inammissibilità, per sopravvenuta carenza di interesse, della seconda.

10. Con il secondo motivo di ricorso, riferito all'art. 360 c.p.c., n. 3 il sig. D.B. deduce la violazione e la falsa applicazione della normativa di vigilanza e l'omesso esame del fatto che il ricorrente ricopriva il ruolo di direttore generale di una banca diversa da quella in cui si sono verificati gli illeciti contestati dalla Banca d'Italia. Secondo il ricorrente, nella contestazione mossa al D.B. dall'Organo di vigilanza difetterebbe tanto l'elemento oggettivo quanto l'elemento soggettivo dell'illecito amministrativo.

10.1. Nel mezzo di ricorso si argomenta che il D.B. era il direttore generale della banca capogruppo e non della banca in cui erano state riscontrate le anomalie e disfunzioni organizzative rilevate in sede ispettiva; addebitargli queste ultime, pertanto, postulerebbe una forma di responsabilità oggettiva, non prevista dall'ordinamento, per condotte omissive relative a situazioni estranee alla sfera di controllo dell'agente. D'altra parte, prosegue il ricorrente, la corte di appello avrebbe "del tutto omesso indicare, individuare e attribuire al rag. D.B. un titolo di responsabilità per i fatti oggetto di contestazione nel provvedimento sanzionatorio che fosse direttamente riconducibile ai doveri connessi alla propria qualifica di direttore generale della capogruppo" (pag. 11, secondo capoverso, della sentenza). Quanto all'elemento soggettivo dell'illecito, nel motivo si argomenta che, una volta escluso che al D.B. potesse effettivamente contestarsi una condotta omissiva in relazione a comportamenti che esulavano dalla sfera di controllo attribuita alla sua funzione, la Banca d'Italia non avrebbe potuto avvalersi della presunzione di colpa di cui la L. n. 689 del 1981, art. 3. In sintesi, il motivo di ricorso si risolve nell'assunto che il direttore generale della capogruppo "non aveva alcun dovere di controllo e vigilanza sulla [banca]… (né sulla società…) che possa dirsi essere stato reiteratamente omesso" (pag. 12, rigo 1 e segg., del ricorso).

10.2. Il motivo non può trovare accoglimento. In primo luogo va rilevato che esso prende le mosse da un presupposto fattuale che il D.B. "non era direttore generale della banca sottoposta ad ispezione ma di altra Banca (la capogruppo)" (cfr. pag. 10, terzo capoverso, del ricorso) che risulta smentito dalla narrativa dei fatti di causa offerta nello stesso ricorso, là dove si riferisce specificamente che la [banca]…, di cui l'odierno ricorrente era direttore generale, era stata sottoposta ad ispezione (cfr. pag. 2 del ricorso, penultimo capoverso: "a

seguito degli accertamenti ispettivi eseguiti presso la Capogruppo dal 26 Marzo 2013 al 7 agosto 2013”).

10.3. Anche a prescindere dal suddetto rilevo, va comunque evidenziato che l’impugnato decreto - dopo aver richiamato gli obblighi imposti dalla normativa di vigilanza ed aver affermato che “rispetto a queste ed ulteriori prescrizioni in materia di vigilanza prudenziale per le banche il D.B. è venuto meno a detti obblighi” (pag. 4, quarto capoverso, del decreto) – si è fatto espressamente carico dell’assunto del ricorrente alla cui stregua egli non avrebbe potuto essere chiamato a rispondere, quale direttore generale della società capogruppo, delle disfunzioni organizzative di una società controllata e tale assunto ha motivatamente disatteso, evidenziando come esso si fondasse su una “interpretazione riduttiva del suo ruolo da parte del D.B., senza tener conto delle specifiche responsabilità che la normativa primaria e secondaria pone a carico degli esponenti della capogruppo di un gruppo bancario” (pag. 5, primo capoverso, del decreto). Tale affermazione della corte territoriale fa riferimento proprio alla disciplina evocata nella lettera di contestazione dell’illecito; quest’ultima – come emerge dal relativo stralcio trascritto nella nota 1 della pag. 3 del ricorso – richiama, tra l’altro:

– l’art. 67, comma 1 TUB, che recita: “Al fine di esercitare la vigilanza consolidata, la Banca d’Italia impartisce alla capogruppo, con provvedimenti di carattere generale, disposizioni concernenti il gruppo bancario complessivamente considerato o suoi componenti, aventi ad oggetto:... b) il contenimento del rischio nelle sue diverse configurazioni;... d) il governo societario, l’organizzazione amministrativa e contabile, nonché i controlli interni e i sistemi di remunerazione e di incentivazionea....)”;

– le Istruzioni di vigilanza per le banche (Circ. 299/99), Titolo IV, Capitolo 11, la cui Sezione III (Sistema dei controlli interni del gruppo bancario) riguarda precisamente i compiti della capogruppo in materia di controlli interni al gruppo bancario;

– le Nuove disposizioni di vigilanza prudenziale per le banche (Circ. 263/06), Titolo I, Capitolo 1, Parte IV (La gestione e il controllo dei rischi. Ruolo degli organi aziendali), il cui Paragrafo 3 è rubricato “La gestione e il controllo dei rischi nel gruppo bancario”.

10.4. La responsabilità contestata al D.B. dalla Banca d’Italia, e ritenuta sussistente dalla corte territoriale, non è quindi, contrariamente a quanto sostiene il ricorrente, una responsabilità oggettiva per fatto altrui (ossia per fatto degli organi e dei dipendenti della banca controllata) ma una responsabilità per fatto proprio, ossia per infrazioni concernenti l’attività della capogruppo, distinte ed ulteriori rispetto alle infrazioni concernenti l’attività della banca controllata. A fronte della lineare motivazione del decreto impugnato, il mezzo di ricorso risulta del tutto aspecifico. La denuncia di violazione di legge si risolve in una generica protesta di violazione della normativa di vigilanza, senza alcuna identificazione delle disposizioni di cui si lamenta la violazione o la falsa applicazione e senza alcuna indicazione delle affermazioni in diritto contrastanti con tali regole esplicitamente o implicitamente contenute nell’impugnato decreto. Quanto alla denuncia di omesso esame di fatto decisivo (enunciata nella rubrica del mezzo, pur senza espresso richiamo all’art. 360 c.p.c., n. 5), pur essa va disattesa, perchè il “fatto decisivo” a cui tale denuncia si riferisce – ossia il fatto che il D.B. era direttore generale della banca capogruppo, e non della controllata – è stato esaminato dalla corte d’appello, come illustrato nel paragrafo precedente.

10.5. Per quanto riguarda, infine, il riferimento del motivo in esame al tema dell’elemento psicologico dell’illecito (pag. 11, terzultimo capoverso, del ricorso), è qui sufficiente richiamare il principio, enunciato in Cass. 6625/20, che, in relazione agli illeciti di cui al D.Lgs. n. 385 del 1993, art. 144 nei confronti di soggetti che svolgono funzioni di direzione, amministrazione o controllo di istituti bancari il legislatore individua una

serie di fattispecie, destinate a salvaguardare procedure e funzioni incentrate sulla mera condotta, secondo un criterio di agire o di omettere doveroso, ricollegando il giudizio di colpevolezza a parametri normativi estranei al dato puramente psicologico e limitando l'indagine sull'elemento oggettivo dell'illecito all'accertamento della condotta inosservante, sicché, integrata e provata dall'autorità amministrativa la fattispecie tipica dell'illecito, grava sul trasgressore, in virtù della presunzione di colpa posta dalla L. n. 689 del 1981, art. 3 l'onere di provare di aver agito in assenza di colpevolezza.

11. Con il terzo motivo di ricorso, riferito all'art. 360 c.p.c., nn. 3 e 5 il sig. D.B. contesta la violazione e la falsa applicazione dei principi costituzionali in materia di *ne bis in idem* e dell'art. 2697 c.c., nonché l'omesso esame dei documenti agli atti, reiterando la tesi, già dedotta in sede di merito, che per le irregolarità oggetto del provvedimento sanzionatorio impugnato in questo giudizio (comportamenti illegittimi riguardanti il processo dei crediti e il relativo rischio di credito) egli era già stato sanzionato dalla Banca d'Italia con il provvedimento sanzionatorio emesso il 31 agosto 2010. I rilievi della Banca d'Italia posti alla base del provvedimento sanzionatorio oggetto del presente giudizio si riferiscono, osserva il ricorrente, alla gestione del credito fino al 2010, ossia ad un periodo perfettamente coincidente con quello a cui si riferiscono le condotte sanzionate con il provvedimento emesso nel 2010 all'esito della precedente ispezione. Sotto altro aspetto, nel motivo si argomenta che la corte d'appello avrebbe altresì violato il disposto dell'art. 2697 c.c., addossando all'opponente onere della prova di essersi attivato per porre fine alla condotta omissiva contestatagli.

11.1. Il motivo è infondato. Quanto alla dedotta violazione del principio *ne bis in idem*, la censura muove da un presupposto di fatto - che il provvedimento sanzionatorio impugnato in questo giudizio abbia ad oggetto condotte omissive relative al medesimo periodo a cui si riferiscono le condotte omissive già sanzionate con il provvedimento nel 2010 - difforme dall'accertamento di fatto contenuto nell'impugnato decreto, alla cui stregua il provvedimento sanzionatorio oggetto del presente giudizio era stato emesso in relazione a "nuove violazioni rilevate all'esito dell'ispezione del 2013" (pag. 6, quarto capoverso, del decreto), ossia, più precisamente, in relazione alla protrazione, da parte del D.B., delle condotte omissive già sanzionata con il provvedimento del 2010.

11.2. In relazione alla condotta oggetto del provvedimento sanzionatorio impugnato in questo giudizio – così come individuata dal giudice di merito con accertamento di fatto che il ricorrente non ha adeguatamente cesurato – difetta, poi, il presupposto dell'idem factum. Se, infatti, le omissioni contestate al D.B. hanno ad oggetto i medesimi comportamenti doverosi, tali omissioni si sono, tuttavia, protratte attraverso periodi temporali diversi. La corte territoriale, là dove ha affermato che "il successivo accertamento della persistenza delle violazioni già accertate nel contesto di un precedente accertamento integra senz'altro una nuova fattispecie sanzionatoria" (pag. 6 terzultimo capoverso del decreto) si è dunque correttamente attenuta a principi consolidati nella giurisprudenza di legittimità e costituzionale; si veda, per tutte, C. Cost. n. 53/2018, p. 4, dove si legge: "la giurisprudenza di legittimità appare salda nel ritenere, in senso contrario, che, con riguardo al reato permanente, il divieto di un secondo giudizio riguarda soltanto la condotta posta in essere nel periodo indicato nell'imputazione e accertata con la sentenza irrevocabile, e non anche la prosecuzione o la ripresa della stessa condotta in epoca successiva, la quale integra un 'fatto storico' diverso, non coperto dal giudicato, per il quale non vi è alcun impedimento a procedere (tra le molte, Corte di cassazione, sezione sesta penale, sentenza 5 marzo-15 maggio 2015, n. 20315; sezione terza penale, sentenza 21 aprile-11 maggio 2015, n. 19354; sezione seconda penale, sentenza 12 luglio-13 settembre 2011, n. 33838). Ciò in quanto l'identità del fatto, rilevante ai fini dell'operatività del principio del *ne bis in idem*, sussiste – secondo un radicato principio giurisprudenziale – solo quando

vi sia corrispondenza storico-naturalistica nella configurazione del reato, considerato in tutti i suoi elementi costitutivi (condotta, evento, nesso causale) e con riguardo alle circostanze di tempo, di luogo e di persona (per tutte, Corte di cassazione, sezioni unite penali, sentenza 28 giugno-28 settembre 2005, n. 34655; nel senso che l'art. 649 c.p.p. 'viva' nei termini ora indicati si è, del resto, già espressa più volte questa Corte: sentenze n. 200 del 2016 e n. 129 del 2008)".

11.3. Per quanto poi concerne la dedotta violazione dell'art. 2967 c.c., è sufficiente rilevare che la corte d'appello non ha mai negato che l'onere della prova dell'illecito amministrativo gravasse sull'Organo di vigilanza, ma ha ritenuto che, in concreto, tale onere fosse stato adeguatamente soddisfatto dalla produzione delle risultanze ispettive. Tanto premesso, l'infondatezza della doglianza del ricorrente risulta agevolmente dal rilievo che – fermo restando che il concreto apprezzamento della attendibilità e concludenza di una risultanza istruttoria costituisce compito del giudice di merito – la corte capitolina, valorizzando le risultanze ispettive, si è correttamente conformata all'insegnamento di questa Suprema Corte alla cui stregua i verbali ispettivi, per tutti gli aspetti, anche relativi all'esame della documentazione, in relazione ai quali non hanno efficacia probatoria privilegiata, "costituiscono comunque elemento di prova, che il giudice deve in ogni caso valutare, in concorso con gli altri elementi, potendo essere disattesi solo in caso di motivata intrinseca inattendibilità o di contrasto con altri elementi acquisiti nel giudizio, attesa la certezza, fino a querela di falso, che quei documenti sono comunque stati esaminati dall'agente verificatore" (Cass. 11481/20, pag. 17-18).

12. Conclusivamente il ricorso va rigettato.

(OMISSIS)

Corte di Cassazione, [.] v Banca d’Italia, 15/02/2022, n. 4923

Svolgimento del processo – Motivi della decisione

1. I.G. propone ricorso, sulla scorta di quattro motivi, per la cassazione del decreto n. 8866/2016 della Corte d’appello di Roma che ha rigettato l’opposizione da lui proposta unitamente a B.L., F.E. e G.N. avverso il provvedimento del 23.09.14 con cui la Banca d’Italia gli aveva inflitto, ai sensi del D.Lgs. n. 385 del 1993, art. 144 (cd. Testo Unico Bancario, TUB), nella sua qualità di componente del Consiglio di Amministrazione della [banca]…, la sanzione pecuniaria di Euro 156.000,00. Le ragioni di tale sanzione erano state individuate: 1) nella violazione delle disposizioni sulla governance, 2) nelle carenze circa l’organizzazione e i controlli interni, 3) nelle carenze sulla gestione e sul controllo del credito, 4) nelle omesse e inesatte segnalazioni all’Organo di Vigilanza.

1.1. La corte d’appello ha in primo luogo disatteso il motivo di opposizione con cui i Dott. I. aveva dedotto l’illegittimità del procedimento sanzionatorio della Banca d’Italia. Nell’impugnato decreto si esclude che il mancato coinvolgimento dell’incolpato nella fase decisoria svoltasi davanti al Direttorio e la mancata distinzione tra funzioni istruttorie e decisorie all’interno della Banca d’Italia siano in contrasto con il principio del giusto processo di cui all’art. 6 CEDU e art. 47 CDFUE, essendo le garanzie del contraddittorio salvaguardate dalla possibilità del sanzionato di opporsi ai provvedimenti sanzionatori emessi da Banca d’Italia davanti ad un giudice munito di giurisdizione piena. La corte d’appello esclude altresì che l’ampliamento delle garanzie del contraddittorio introdotto nel procedimento sanzionatorio della Banca d’Italia con le modifiche allo stesso recate dal Provvedimento del 3.5.15 offra argomento per sostenere l’illegittimità del previgente modello procedimentale (applicabile nella specie ratione temporis), osservando come tale rafforzamento del contraddittorio si inserisca nel nuovo quadro normativo introdotto dal D.Lgs. n. 72 del 2015, caratterizzato, si legge nel decreto impugnato, da una “maggiore afflittività del sistema sanzionatorio” (pag. 6, primo capoverso).

1.2. Il collegio capitolino ha altresì disatteso la censura del Dott. I. circa la genericità delle contestazioni a lui rivolte dalla Banca d’Italia, affermando che “le condotte ascritte agli incolpati appaiono puntualmente ed analiticamente descritte, consentendo loro di individuare con precisione i fatti ed i precetti normativi disattesi (...). È del resto evidente, alla luce delle stesse controdeduzioni formulate dagli opponenti nel procedimento, come gli incolpati abbiano avuto specifica conoscenza di ogni accusa, apprestando analitiche difese nel merito” (pag. 7, secondo e terzo capoverso del decreto impugnato). La Cortte d’appello ha altresì rilevato come gli opponenti – tra cui figura l’odierno ricorrente – non avessero mosso alcuna analitica e precisa censura avverso le violazioni contestate da Banca d’Italia (riassunte a pag. 8 del decreto), limitandosi invece ad indicare “alcuni dati positivi dell’azione dell’organo gestorio” (cfr. pag. 8-9 decreto impugnato), del tutto inidonei a smentire il quadro emergente degli accertamenti dell’Organo di vigilanza, che avrebbe dovuto invece essere inficiato – ai fini della fondatezza dell’opposizione – da “argomentazioni tecniche particolarmente puntuali, non potendo limitarsi a critiche generiche ed apodittiche, che si limitino a contrapporre una propria rappresentazione dei fatti a quella emersa in seguito agli accertamenti ispettivi” (pag. 9, penultimo capoverso, secondo periodo, del decreto).

1.3. Infine, la Corte d’appello di Roma ha reputato infondato il motivo di opposizione concernente la mancata personalizzazione della misura sanzionatoria. Il collegio di merito ha ritenuto privo di rilevanza, ai fini della determinazione della misura della sanzione, il fatto che gli opponenti, tra cui l’odierno ricorrente, fossero stati componenti del c.d.a. privi di poteri esecutivi, richiamando l’insegnamento di questa Corte sul pari dovere in capo a ciascun consigliere d’amministrazione di essere costantemente informato circa

l'andamento della società al fine, da un lato, di controllare le scelte compiute dai consiglieri muniti di delega e, dall'altro, di attivarsi perchè il consiglio di amministrazione eserciti i poteri di direttiva o avocazione nei confronti di tali consiglieri.

2. Al ricorso del Dott. I. la Banca d'Italia ha resistito depositando controricorso.

3. La causa è stata chiamata nella Camera di consiglio del 21 luglio 2021, per la quale entrambe le parti hanno depositato memorie illustrative.

4. Col primo motivo di ricorso, articolato in tre distinte censure e riferito all'art. 360 c.p.c., comma 1, nn. 3) e 5), si denuncia la violazione e falsa applicazione dell'art. 47, comma 2 CDFUE. 4.1. Con la prima censura si sostiene che, contrariamente a quanto affermato nel decreto impugnato, la possibilità di ottenere una tutela giurisdizionale piena contro i provvedimenti sanzionatori della Banca d'Italia non sarebbe un rimedio sufficiente a sanare il vizio di imparzialità che inficia il procedimento amministrativo che ha condotto all'irrogazione della sanzione.

4.2. Con la seconda censura si argomenta che la corte d'appello avrebbe abdicato al proprio potere decisorio, con conseguente negazione della cd. full jurisdiction, essendosi limitata a richiamare le violazioni riportate nella cd. tavola sinottica della proposta sanzionatoria (pag. 8 decreto) e a rilevare che gli accertamenti di Banca d'Italia sono "di regola caratterizzata da un grado elevato di attendibilità conoscitiva" (pag. 9 decreto).

4.3. Con la terza censura si lamenta che la corte territoriale, appiattendosi sulla posizione della Banca d'Italia, avrebbe di fatto invertito il riparto dell'onere probatorio tra sanzionato e sanzionante.

5. Tutte le suddette censure sono infondate.

5.1. La prima censura è infondata per una duplice ragione. Per un verso, posto che i principi fissati dall'art. 6 CEDU e art. 47 CDFUE riguardano le sanzioni amministrative di carattere sostanzialmente penale, secondo i criteri fissati dalla sentenza della Corte EDU 8 giugno 1976 Engel e altri c. Paesi Bassi, risulta dirimente la considerazione che tali principi non possono essere invocati in relazione ai procedimenti relativi agli illeciti amministrativi previsti dal TUB, i quali, secondo la giurisprudenza assolutamente consolidata di questa Corte, non hanno carattere sostanzialmente penale (v. Cass. 17209/20, Cass. 16517/2020. Cass. 4/2019; Cass. pen. 12777/2018; Cass. 3656/2016; Cass. 24723/2018; Cass. 21553/2018; Cass. 16720/2018; Cass. 19219/2016; Cass. 3656/2016).

5.2. In secondo luogo, comunque, va ricordato che, come questa Corte ha già avuto modo di precisare (sent. n. 770/2017), anche in relazione alle sanzioni che, pur qualificate come amministrative, abbiano natura sostanzialmente penale, la garanzia del giusto processo, ex art. 6 della CEDU, può essere realizzata, alternativamente, nella fase amministrativa – nel qual caso, una successiva fase giurisdizionale non sarebbe necessaria – ovvero mediante l'assoggettamento del provvedimento sanzionatorio adottato in assenza di tali garanzie – ad un sindacato giurisdizionale pieno, di natura tendenzialmente sostitutiva ed attuato attraverso un procedimento conforme alle richiamate prescrizioni della Convenzione, il quale non ha l'effetto di sanare alcuna illegittimità originaria della fase amministrativa giacché la stessa, sebbene non connotata dalle garanzie di cui al citato art. 6, è comunque rispettosa delle relative prescrizioni, per essere destinata a concludersi con un provvedimento suscettibile di controllo giurisdizionale.

5.3. La seconda e la terza censura possono essere trattate congiuntamente, in ragione della loro stretta connessione, e vanno disattese. Non può affermarsi che la corte d'appello non abbia provveduto a prestare tutela giurisdizionale al ricorrente, né che essa abbia invertito

il riparto degli oneri probatori ex art. 2697 c.c. Al contrario, esercitando pienamente la propria potestas iudicandi, il collegio capitolino ha apprezzato il materiale istruttorio, concludendo nel senso che, da un lato, la Banca d'Italia aveva soddisfatto l'onere probatorio sulla stessa gravante; d'altro lato, gli opponenti – tra cui l'odierno ricorrente – non avevano espletato un'attività difensiva capace di smentire le risultanze probatorie.

5.4. Per quanto poi concerne l'affermazione della corte territoriale secondo cui gli accertamenti ispettivi sono "di regola caratterizzati da un grado elevato di attendibilità conoscitiva" (pag. 9, penultimo capoverso, del decreto), specificamente censurata dal ricorrente, essa non introduce alcuna inversione dell'onere probatorio ma - come fatto palese sia dall'uso dell'inciso "di regola", sia dalla precisazione espressa che detti accertamenti ispettivi non sono "assistiti da una presunzione di assoluta incontrovertibilità" (ivi) - si risolve nel tipico giudizio di apprezzamento del materiale istruttorio che il giudice di merito ha il potere di compiere secondo il suo prudente apprezzamento. L'assunto del ricorrente secondo cui nel caso di specie non ci sarebbe stato un "giudizio vero" (pag. 8 del ricorso, sub lett. "c") va poi giudicato del tutto assertivo e non veicolato attraverso alcuno dei mezzi di impugnazione per cassazione di cui all'art. 360 c.p.c. Sul piano astratto, infatti, è fuor di dubbio che il giudizio di opposizione ex art. 144 TUB garantisca la piena tutela giurisdizionale dei diritti, avendo il giudice il potere-dovere di esaminare l'intero rapporto, con cognizione non limitata alla verifica della legittimità formale del provvedimento, ma estesa – nell'ambito delle deduzioni delle parti – all'esame completo nel merito della fondatezza dell'ingiunzione, ivi compresa la determinazione dell'entità della sanzione (Cass. 6778/2015). Sul piano concreto, per contro, la Corte d'appello di Roma, pronunciando il decreto gravato, ha esercitato appieno i propri poteri decisori: ha valutato sufficientemente provati i fatti costitutivi della sanzione amministrativa inflitta dedotti dalla Banca d'Italia ed ha ritenuto l'attività difensiva spesa dagli opponenti, tra i quali l'attuale ricorrente, inidonea a sovvertire tale valutazione.

6. Col secondo motivo di ricorso, riferito all'art. 360 c.p.c., comma 1, nn. 3) e 5), si denuncia la violazione e falsa applicazione dell'art. 49, comma 1 CDFUE in cui la corte d'appello sarebbe incorsa non applicando alla fattispecie la disciplina introdotta con il D.Lgs. n. 72 del 2015, alla cui stregua "i soggetti che svolgono funzioni di gestione delle banche possono ricevere sanzioni amministrative soltanto in ipotesi eccezionali (...) pacificamente non ricorrenti nel caso in specie" (pag. 9 ricorso). Ad avviso del ricorrente, la sanzione prevista per l'illecito contestato al ricorrente avrebbe natura sostanzialmente penale alla stregua cd. "criteri Engel" e pertanto la disciplina sopravvenuta, risultando in concreto più favorevole per l'incolpato, sarebbe stata da applicare retroattivamente in base al principio del favor rei, disapplicando – per contrasto con l'art. 49, comma 1, CDFUE – D.Lgs. n. 72 del 2015, art. 2 comma 3, che espressamente esclude tale retroattività.

6.1. Il motivo è infondato, perchè si fonda su un presupposto – la natura sostanzialmente penale delle sanzioni. amministrativa applicata al ricorrente – che, come già illustrato nel precedente paragrafo 5.1., non trova riscontro nella giurisprudenza di questa Corte (Cass. 17209/20; Cass. 8046/19, pagg. 3 ss.; Cass. 16517/20, pag. 13 ss.), la quale – proprio in ragione della natura non penale (nemmeno sostanzialmente) delle sanzioni amministrative si cui agli artt. 144 e 144 ter TUB – ha ritenuto manifestamente infondata la questione di legittimità costituzionale del D.Lgs. n. 72 del 2015, art. 2, comma 3, per contrasto con gli artt. 3 e 117 Cost., nella parte in cui tale norma non prevede la retroattività del principio della lex mitior. (Cass. n. 17209/2020, cit.).

7. Col terzo motivo di ricorso, riferito all'art. 360 c.p.c., comma 1, n. 5), il decreto gravato viene censurato sotto tre distinti profili.

7.1. In primo luogo, il ricorrente lamenta che la corte di appello – a fronte del motivo di opposizione con cui egli aveva dedotto l'impossibilità di individuare le norme delle quali gli veniva addebitata la violazione – avrebbe omesso "qualsiasi verifica sull'effettiva possibilità di individuare le specifiche disposizioni" (pag. 11 ricorso). La censura è inammissibile, poichè non si confronta con la ratio decidendi del decreto, là dove si afferma (v. supra, p. 1.2) che i ricorrenti ben avevano avuto conoscenza delle specifiche norme violate, avendo ampiamente svolto attività difensiva all'interno del procedimento sanzionatorio.

7.2. In secondo luogo, il ricorrente deduce che la corte distrettuale si sarebbe limitata a rilevare la genericità e l'apodítticità delle argomentazioni da lui propugnate per censurare il provvedimento sanzionatorio, senza scendere nel merito delle stesse.

7.3. Infine, con la terza censura, si lamenta il silenzio della corte capitolina sul rilievo, anch'esso svolto in sede di opposizione, secondo cui il provvedimento sanzionatorio avrebbe formulato giudizi qualitativi sull'idoneità delle scelte imprenditoriali del consiglio di amministrazione, violando così il diritto alla libertà imprenditoriale ex art. 16 CDFUE, art. 41 Cost., comma 2 e art. 2380-bis c.c.

7.4. La seconda censura e la terza censura, che possono essere esaminate congiuntamente, sono anch'esse inammissibili, giacché in sostanza denunciano un vizio di insufficienza motivazionale dell'impugnato decreto. Va allora ribadito, per un verso, con riguardo all'art. 112 c.p.c., il risalente insegnamento di questa Corte alla cui stregua "il giudice, per adempiere all'obbligo della motivazione, non deve necessariamente confutare tutte le singole argomentazioni della parte, ma deve solo rendere conto del suo convincimento in modo logico e giuridicamente corretto. In tal caso le contrarie argomentazioni non esplicitamente confutate si intendono disattese per implicito" (così Cass. 2612/1971; nello stesso senso, in tempi successivi, Cass. 407/2006, Cass. 12652/2020). Per altro verso, con riguardo all'art. 360 c.p.c., n. 5, il principio che, in seguito alla riformulazione dell'art. 360 c.p.c., comma 1, n. 5, disposta dal D.L. n. 83 del 2012, art. 54, conv., con rnodif., dalla L. n. 134 del 2012, non sono più ammissibili nel ricorso per cassazione le censure di contraddittorietà e insufficienza della motivazione della sentenza di merito impugnata, in quanto il sindacato di legittimità sulla motivazione resta circoscritto alla sola verifica della violazione del "minimo costituzionale" richiesto dall'art. 111 Cost., comma 6, individuabile nelle ipotesi - che si convertono in violazione dell'art. 132 c.p.c., comma 2, n. 4, e danno luogo a nullità della sentenza di "mancanza della motivazione quale requisito essenziale del provvedimento giurisdizionale", di "motivazione apparente", di "manifesta ed irriducibile contraddittorietà" e di "motivazione perplessa od incomprensibile", al di fuori delle quali il vizio di motivazione può essere dedotto solo per omesso esame di un "fatto storico", che abbia formato oggetto di discussione e che appaia "decisivo" ai fini di una diversa soluzione della controversia (così Cass. n. 23940/17).

8. Col quarto motivo di ricorso, riferito all'art. 360 c.p.c., comma 1, nn. 3) e 5), si lamenta la violazione e falsa applicazione dell'art. 2381 c.c., commi 3 e 6 c.c., dell'art. 2392 c.c., comma 1, nonché l'omesso esame di un fatto decisivo per il giudizio. La corte territoriale, infatti:

a) avrebbe violato le norme sopra richiamate equiparando illegittimamente, quoad poenam, la posizione del ricorrente, amministratore senza deleghe, con quella degli amministratori delegati;

b) avrebbe inoltre omesso di considerare "le censure svolte dall'odierno ricorrente sull'effettivo assetto dei poteri... e sul concreto andamento dei flussi informativi" all'interno del consiglio di amministrazione (pag. 14, righi 2-3, del ricorso); con

conseguente violazione del principio di proporzionalità da parte della Banca d'Italia, erroneamente non rilevato dalla corte d'appello 8.1. Anche il quarto motivo deve essere disatteso. In via preliminare non è inopportuno ricordare l'insegnamento di questa Corte alla cui stregua "nel procedimento di opposizione avverso le sanzioni amministrative pecuniarie, il giudice, nel caso di contestazione della misure delle stesse, è autonomamente chiamato a controllarne la rispondenza alle previsioni di legge, senza essere soggetto a parametri fissi di proporzionalità correlati al numero ed alla consistenza degli addebiti, e può reputare congrua l'entità della sanzione inflitta in riferimento ad una molteplicità di incolpazioni anche qualora escluda l'esistenza di alcune di esse; egli, inoltre, non è chiamato a controllare la motivazione dell'ordinanza-ingiunzione, ma a determinare la sanzione entro i limiti edittali previsti, allo scopo di commisurarla all'effettiva gravità del fatto concreto, desumendola globalmente dai suoi elementi oggettivi e soggettivi, senza che sia tenuto a specificare i criteri seguiti, dovendosi escludere che la sua statuizione sia censurabile in sede di legittimità ove quei limiti siano stati rispettati e dalla motivazione emerga come, nella determinazione, si sia tenuto conto deii parametri previsti dalla L. n. 689 del 1981, art. 11" (così Cass. n. 11481/20).

8.2. Tanto premesso, in linea generale, sulla sindacabilità, in sede di legittimità, delle valutazioni operate dal giudice di merito in punto di entità delle sanzioni amministrative oggetto di opposizione, il Collegio osserva che la denuncia di violazione degli artt. 2381 e 2392 c.c., veicolata nella doglianza sopra riportata sub a) si palesa infondata alla luce della giurisprudenza di questa Corte secondo cui anche gli amministratori senza deleghe sono gravati di doveri particolarmente incisivi. In Cass. n. 19556/20 si è infatti chiarito che: "In tema di sanzioni amministrative previste dal D.Lgs. n. 385 del 1993, art. 144, l'obbligo imposto dall'art. 2381 c.c., u.c., agli amministratori delle società per azioni di 'agire in modo informato', pur quando non siano titolari di deleghe, si declina, da un lato, nel dovere di attivarsi, esercitando tutti i poteri connessi alla carica, per prevenire o eliminare ovvero attenuare le situazioni di criticità aziendale di cui siano, o debbano essere, a conoscenza, dall'altro, in quello di informarsi, affinchè tanto la scelta di agire quanto quella di non agire risultino fondate sulla conoscenza della situazione aziendale che gli stessi possano procurarsi esercitando tutti i poteri di iniziativa cognitoria connessi alla carica con la diligenza richiesta dalla natura dell'incarico e dalle loro specifiche competenze. Tali obblighi si connotano in termini particolarmente incisivi per gli amministratori di società che esercitano l'attività bancaria, prospettandosi, in tali ipotesi, non solo una responsabilità di natura contrattuale nei confronti dei soci della società, ma anche quella, di natura pubblicistica, nei confronti dell'Autorità di vigilanza". Tale principio è stato poi ripreso in Cass. n. 16517/2020 (p. 2) e, da ultimo, ribadito e precisato in Cass. n. 2620/2021, dove si è ribadito che "in tema di responsabilità dei consiglieri non esecutivi di società autorizzate alla prestazione di servizi di investimento, è richiesto a tutti gli amministratori, che vengono nominati in ragione della loro specifica competenza anche nell'interesse dei risparmiatori, di svolgere i compiti loro affidati dalla legge con particolare diligenza e, quindi, anche in presenza di eventuali organi delegati, sussiste il dovere dei singoli consiglieri di valutare l'adeguatezza dell'assetto organizzativo e contabile, nonché il generale andamento della gestione della società, e l'obbligo, in ipotesi di conoscenza o conoscibilità di irregolarità commesse nella prestazione dei servizi di investimento, di assumere ogni opportuna iniziativa per assicurare che la società si uniformi ad un comportamento diligente, corretto e trasparente".

8.3. Quanto alla censura sopra riportata sub b), la stessa va giudicata inammissibile, giacché pur essa si concreta in una doglianza di insufficienza motivazionale (vedi pagina 13, ultimo rigo, del ricorso: "il decreto in epigrafe ha integralmente omesso di considerare le censure svolte dell'odierno ricorrente"), non deducibile, come sopra evidenziato (p. 7.4.), come mezzo di ricorso per cassazione. Va peraltro escluso che la motivazione dell'impugnato

decreto possa ritenersi inferiore al “minimo costituzionale” avendo la corte territoriale dato adeguatamente conto di criteri che l’hanno guidata nella valutazione del trattamento sanzionatorio (v. p. 3 del decreto impugnato, pag. 10).

9. Il ricorso va quindi, conclusivamente, rigettato.

(OMISSIS)

Corte di Cassazione, [.] and others v Banca d'Italia, 09/04/2022, n. 12435

Svolgimento del processo – Motivi della decisione

1. Con Delib. 6 settembre 2016, n. 1075593, la Banca d'Italia, a seguito di accertamenti ispettivi eseguiti presso la [banca]… nel periodo compreso tra il 9.2.2015 ed il 24.7.2015, irrogava ai sensi del D.Lgs. n. 385 del 1993, art. 145 (TUB) a L.G., presidente del consiglio di amministrazione, a Z.S., Gi.Pi.An., S.B., B.G.M. e R.M., membri del consiglio di amministrazione, e ad G.A., direttore generale, rispettivamente, dell'anzidetto istituto di credito, sanzioni pecuniarie per carenze nell'organizzazione e nei controlli e per carenza nel processo del credito.

2. Con ricorso ritualmente notificato L.G., Z.S., Gi.Pi.An., S.B., B.G.M., R.M. e G.A. proponevano opposizione alla Corte d'Appello di Roma ai sensi dell'art. 145, comma 4, TUB.

   Chiedevano farsi luogo all'annullamento del provvedimento sanzionatorio.

3. Si costituiva la Banca d'Italia.

   Instava per il rigetto dell'opposizione.

4. Con sentenza n. 1201 dei 6/20.2.2019 la Corte di Roma - per quel che qui rileva - rigettava l'opposizione e condannava in solido gli opponenti a rimborsare all'opposta le spese di lite.

5. Avverso tale sentenza hanno proposto ricorso G.A., Z.S., Gi.Pi.An., S.B., L.G., B.G.M. e R.M.; ne hanno chiesto sulla scorta di quattro motivi la cassazione con ogni conseguente statuizione anche in ordine alle spese di lite.

   La Banca d'Italia ha depositato controricorso; ha chiesto dichiararsi inammissibile o rigettarsi l'avverso ricorso con il favore delle spese.

6. I ricorrenti hanno depositato memoria (concernente in via esclusiva le ragioni addotte con il primo motivo).

7. Con il primo motivo i ricorrenti denunciano la violazione e falsa applicazione dell'art. 184 c.p.c.

   Deducono che la Corte di Roma avrebbe dovuto dichiarare inutilizzabili, siccome prodotti tardivamente con la memoria del 29.3.2018, i duplicati informatici – muniti dei relativi metadati – degli originali dei documenti nativi digitali contenenti la proposta di irrogazione delle sanzioni ed il parere dell'avvocato generale della Banca d'Italia, documenti nativi digitali di cui erano state dapprima depositate delle mere copie, prive di dichiarazione di conformità e di cui era stata contestata tempestivamente, già con l'iniziale opposizione, la conformità agli originali.

8. Con il secondo motivo i ricorrenti denunciano la violazione e falsa applicazione dell'art. 2719 c.c., dell'art. 23 c.a.d. e dell'art. 112 c.p.c.

   Premettono che la Delib. sanzionatoria 6 settembre 2016, n. 1075593, della Banca d'Italia ad essi notificata non recava attestazione di conformità agli originali, nativi digitali, della proposta di irrogazione delle sanzioni e del parere dell'avvocato generale della Banca d'Italia.

   Indi deducono che il disconoscimento, cui tempestivamente hanno atteso con il ricorso in opposizione, ha precluso alle copie inizialmente, ex adverso, prodotte di esplicare la medesima efficacia probatoria degli originali.

Deducono altresì che è inconferente il riferimento operato dalla Corte di Roma all'art. 2719 c.c., viepiù che il disconoscimento ex art. 2719 c.c., non postula la precisazione degli aspetti per i quali si assume la difformità dall'originale.

9. Con il terzo motivo i ricorrenti denunciano la violazione e falsa applicazione della L. n. 2248 del 1865, artt. 4 e 5, all. E, nonché della L. n. 689 del 1981, art. 14.

Deducono che ha errato la Corte di Roma a reputare tempestiva la contestazione delle violazioni ad essi ascritte.

Deducono segnatamente che l'ispezione avviata in data 9.2.2015 presso la [banca]…, sulla base dei cui esiti sono state irrogate le sanzioni pecuniarie, si è conclusa il 24.7.2015, cosicché, allorquando la contestazione è stata ad essi, in data 27.11.2015, notificata, il termine di novanta giorni della L. n. 689 del 1981, ex art. 14, era ampiamente decorso.

Deducono che la Banca d'Italia, sulla scorta dell'illegittimo suo provvedimento in materia di sanzioni del 18.12.2012, ha ingiustificatamente assunto, allorché ha prefigurato la tempestività della contestazione, quale dies a quo la data di apposizione del visto del direttore centrale per la vigilanza bancaria e finanziaria.

10. Con il quarto motivo i ricorrenti denunciano la violazione e falsa applicazione del D.Lgs. n. 385 del 1993, artt. 144 e 144 ter (TUB), del D.Lgs. n. 72 del 2015, la mancata applicazione del favor rei; sollevano questione di legittimità costituzionale.

Deducono che, a seguito delle modifiche apportate al TUB dal D.Lgs. n. 72 del 2015, passibile di sanzione è unicamente l'istituto di credito; che, di contro, gli amministratori ed il direttore generale sono esposti a sanzione esclusivamente in presenza di ben precise condizioni.

Deducono quindi che, quantunque le violazioni ad essi ascritte si assumono commesse in epoca antecedente all'entrata in vigore delle disposizioni emanate dalla Banca d'Italia ai fini dell'attuazione delle previsioni di cui al D.Lgs. n. 72 del 2015, ciò nondimeno, all'insegna di un'interpretazione costituzionalmente "orientata", avrebbero dovuto, essi ricorrenti, fruire della sopravvenuta più favorevole disciplina.

Sollevano in ogni caso questione di legittimità costituzionale del D.Lgs. n. 72 del 2015, art. 2, comma 3, che circoscrive l'applicabilità delle modifiche apportate al TUB alle violazioni commesse successivamente all'entrata in vigore delle disposizioni da emanarsi dalla Banca d'Italia ai fini dell'attuazione delle novelle previsioni legislative.

11. Il primo ed il secondo motivo di ricorso sono strettamente connessi; il che ne suggerisce la disamina contestuale; in ogni caso i motivi sono destituiti di fondamento.

12. In ordine all'eccezione preliminare, con cui gli opponenti avevano addotto che tardivamente, ossia unicamente con la memoria del marzo 2018, la Banca d'Italia aveva depositato il duplicato informatico dei documenti digitali – di cui erano state dapprima prodotte copie di cui era stata contestata la conformità agli originali – contenenti la proposta di irrogazione delle sanzioni ed il parere dell'avvocato generale della stessa Banca d'Italia, la Corte di Roma ha reputato quanto segue.

In primo luogo, "quanto ai profili formali del provvedimento notificato" (così sentenza impugnata, pag. 4), ha affermato che doveva reputarsi sufficiente la circostanza per cui la proposta di irrogazione delle sanzioni ed il parere dell'avvocato generale della Banca d'Italia – alle cui motivazioni la Delib. sanzionatoria rimandava – fossero stati "resi disponibili agli interessati, secondo le modalità che disciplinano il diritto d'accesso ai documenti della pubblica amministrazione" (così sentenza impugnata, pag. 4).

Cosicché agli atti anzidetti non poteva estendersi il rigore formale prefigurato per il provvedimento che irroga la sanzione (cfr. sentenza impugnata, pag. 4).

In secondo luogo, ha affermato che l'operato disconoscimento della conformità agli originali delle copie dei documenti digitali contenenti la proposta di irrogazione delle sanzioni ed il parere dell'avvocato generale della Banca d'Italia era del tutto generico, siccome non contenente la specifica e chiara indicazione dei profili atti a differenziare e copie dagli originali.

13. Ebbene è da escludere che la "ratio decidendi" che in primo luogo ed autonomamente concorre a sorreggere l'impugnato dictum, sia stata oggetto – con i mezzi de quibus – di specifica censura (cfr. al riguardo, analogamente, controricorso, pag. 10).

    Cosicché soccorre l'insegnamento di questa Corte a tenor del quale, qualora la decisione impugnata si fondi su di una pluralità di ragioni, tra loro distinte ed autonome, ciascuna delle quali logicamente e giuridicamente sufficiente a sorreggerla, è inammissibile il ricorso che non formuli specifiche doglianze avverso una di tali "rationes decidendi", neppure sotto il profilo del vizio di motivazione (cfr. Cass. sez. lav. 4.3.2016, n. 4293; Cass. 11.1.2007, n. 389).

14. D'altra parte, sia in dipendenza del difetto di attestazione di conformità agli originali delle copie informatiche, inizialmente prodotte, della proposta di irrogazione delle sanzioni e del parere dell'avvocato generale della Banca d'Italia sia in dipendenza della tardiva produzione ("con II memoria all'uopo espressamente concessa per sole repliche": così ricorso, pag. 19) dei duplicati informatici con attestazione di conformità agli originali, i ricorrenti adducono che è stato "oggettivamente impossibile vagliare gli addebiti, la fondatezza e congruità della sanzione, nonché la regolarità del procedimento amministrativo, tutti elementi che sono meramente richiamati nel provvedimento sanzionatorio" (così ricorso, pag. 20).

    In tal guisa i ricorrenti correlano l'asserita inutilizzabilità della proposta di irrogazione delle sanzioni e del parere dell'avvocato generale della Banca d'Italia (in quanto "notificati senza alcun sigillo di garanzia circa la loro effettiva conformità agli originali digitali": così ricorso, pag. 22) ad una presunta menomazione del diritto di difesa e ad un supposto concorso di vizi atti ad inficiare e lo sviluppo del procedimento amministrativo e la Delib. 6 settembre 2016, n. 1075593, che ne ha segnato l'esito.

    E tuttavia nessuna menomazione del diritto di difesa si scorge.

    E tuttavia questa Corte spiega che gli eventuali vizi del procedimento amministrativo non hanno alcuna rilevanza, siccome in tema di sanzioni amministrative il giudizio di opposizione non ha ad oggetto l'atto ma il rapporto, con susseguente cognizione piena del giudice (cfr. Cass. sez. un. 28.1.2010, n. 1786; Cass. 21.5.2018, n. 12503).

15. Tanto, ben vero, a prescindere dal rilievo della controricorrente secondo cui l'art. 184 c.p.c. "non si applica al giudizio di opposizione ex art. 145 TUB, che è retto da regole proprie e da una dinamica diversa da quella dell'ordinario giudizio di cognizione" (così controricorso, pag. 17. Cfr. Cass. 16.10.2014, n. 21952, secondo cui lo speciale procedimento di opposizione, regolato dal D.Lgs. 1 settembre 1993, n. 385, art. 145, ha natura contenziosa, non incompatibile con il rito camerale, essendo rivolto ad una decisione atta ad assumere autorità di giudicato sulla legittimità formale e sostanziale del provvedimento applicativo della sanzione e sulle posizioni di credito e debito con esso costituite).

16. In questo quadro, evidentemente, si stempera l'aggiuntiva "ratio", sulla quale pur ha fatto leva la corte d'appello, dell'irritualità del disconoscimento.

    Cosicché non ha alcuna valenza il rilievo – veicolato specificamente dal secondo mezzo – secondo cui sarebbe "inconferente (...) il richiamo (operato dalla Corte capitolina) ad una pretesa

genericità della contestazione di conformità" (così ricorso, pag. 24) nel solco della sostanziale inapplicabilità alla specie della previsione dell'art. 2719 c.c. (al riguardo cfr., altresì, memoria, pagg. 9, 13, 14 e 15).

17. Il terzo motivo di ricorso del pari è destituito di fondamento.

18. Questa Corte spiega che, in tema di sanzioni amministrative, nel caso di mancata contestazione immediata della violazione, l'attività di accertamento dell'illecito non coincide con il momento in cui viene acquisito il "fatto" nella sua materialità, ma deve essere intesa come comprensiva del tempo necessario alla valutazione dei dati acquisiti ed afferenti agli elementi (oggettivi e soggettivi) dell'infrazione e, quindi, della fase finale di deliberazione, correlata alla complessità delle indagini tese a riscontrare la sussistenza dell'infrazione medesima e ad acquisire piena conoscenza della condotta illecita, sì da valutarne la consistenza agli effetti della corretta formulazione della contestazione; e che compete, poi, al giudice di merito determinare il tempo ragionevolmente necessario all'Amministrazione per giungere a una simile, completa conoscenza, individuando il "dies a quo" di decorrenza del termine, tenendo conto della maggiore o minore difficoltà del caso concreto e della necessità che tali indagini, pur nell'assenza di limiti temporali predeterminati, avvengano entro un termine congruo, essendo il relativo giudizio sindacabile, in sede di legittimità, solo sotto il profilo del vizio di motivazione, recte, a cospetto dell'art. 360 c.p.c., comma 1, novello n. 5, solo se inficiato da "omesso esame circa fatto decisivo e controverso" (cfr. Cass. 18.4.2007, n. 9311; Cass. (ord.) 25.10.2019, n. 27405. Cfr., inoltre, propriamente in tema di sanzioni amministrative previste per la violazione delle norme che disciplinano l'attività di intermediazione finanziaria, Cass. 2.12.2011, n. 25836; Cass. 16.4.2018, n. 9254; Cass. 8.8.2019, n. 21171).

19. Or dunque, è vero senza dubbio che questa Corte ha altresì assunto che, in tema di sanzioni amministrative irrogate dalla Banca d'Italia, il termine di decadenza previsto dalla L. n. 689 del 1981, art. 14, per la notifica della violazione decorre dall'apposizione del visto del direttore centrale della vigilanza bancaria e finanziaria, suggellandosi con esso la conclusione della fase di accertamento di tutti gli elementi dell'illecito, fase comprensiva, altresì, della valutazione e dell'adeguata ponderazione dei dati acquisiti e degli atti preliminari (cfr. Cass. 19.2.2019, n. 4820).

E nondimeno è innegabile, nella specie, che la Corte di Roma, nel quadro dell'elaborazione giurisprudenziale – debitamente citata - dapprima menzionata, non ha, propriamente e tout court, assunto – sulla scorta del provvedimento della Banca d'Italia in materia di sanzioni risalente al 18.12.2012 – la data del visto del direttore centrale per la vigilanza bancaria e finanziaria quale dies a quo del termine di novanta giorni di cui alla L. n. 689 del 1981, art. 14.

Ha piuttosto puntualizzato, in ordine al primo motivo di opposizione, che la contestazione era stata certamente tempestiva; siccome nella specie l'attività di accertamento era stata particolarmente complessa, "stante la molteplicità dei profili critici emersi nell'ispezione e la necessità di inquadrarli correttamente al fine anche di adottare iniziative non sanzionatorie, ma di vigilanza vera e propria" (così sentenza impugnata, pag. 5).

20. Su tale scorta inevitabili sono i postulati che seguono.

Per un verso, non si correla puntualmente alla "ratio in parte qua decidendi" la prospettazione dei ricorrenti secondo cui la corte distrettuale avrebbe dovuto disapplicare, ai sensi della L. n. 2248 del 1865, artt. 4 e 5, all. E, il provvedimento della Banca d'Italia in materia di sanzioni risalente al 18.12.2012, siccome illegittimo per violazione di legge (cfr. ricorso, pag. 32).

Per altro verso – giacché, evidentemente all'insegna dell'elaborazione giurisprudenziale dapprima menzionata, il riscontro della tempestiva formulazione della contestazione si

risolve in un giudizio "di fatto" suscettibile di censura ai sensi dell'art. 360 c.p.c., comma 1, n. 5 e di valutazione alla luce della pronuncia n. 8053 del 7.4.2014 delle sezioni unite di questa Corte (cfr. al riguardo controricorso, pag. 32) – è da escludere recisamente che taluna delle figure di "anomalia motivazionale" destinate ad acquisire significato alla stregua della decisione delle sezioni unite testé citata (e tra le quali non è annoverabile il semplice difetto di "sufficienza" della motivazione), possa scorgersi in ordine alle motivazioni cui, in parte qua, la corte territoriale ha ancorato il suo dictum.

In particolare, con riferimento al paradigma della motivazione "apparente" – che ricorre allorquando il giudice di merito non procede ad una approfondita disamina logico/giuridica, tale da lasciar trasparire il percorso argomentativo seguito (cfr. Cass. 21.7.2006, n. 6677) – la corte d'appello ha, lo si è anticipato, compiutamente ed intellegibilmente esplicitato il percorso argomentativo adottato.

Per giunta, la corte di merito ha puntualmente esplicitato le ragioni per le quali l'esito del procedimento sanzionatorio intrapreso nel 2013 non influiva sulla legittimità della Delib. impugnata, oggetto della sua delibazione (cfr. sentenza impugnata, pag. 6).

21. Il quarto motivo di ricorso parimenti è destituito di fondamento.

22. Si prescinde dalla deduzione della controricorrente di assoluta novità delle prospettazioni veicolate dal mezzo in disamina (cfr. controricorso, pag. 38).

    Invero, in materia di sanzioni amministrative, le norme sopravvenute nella pendenza del giudizio di legittimità che dispongano retroattivamente un trattamento sanzionatorio più favorevole devono essere applicate anche d'ufficio dalla Corte di Cassazione, atteso che la natura e lo scopo squisitamente pubblicistici del principio del "favor rei" devono prevalere sulle preclusioni derivanti dalle ordinarie regole in tema d'impugnazione (cfr. Cass. 11.2.2022, n. 4522, ove si soggiunge che tale conclusione non contrasta con i principi in materia di rapporto fra "jus superveniens" e cosa giudicata, perchè la statuizione sulla misura della sanzione è dipendente dalla statuizione sulla responsabilità del sanzionato e pertanto, ai sensi dell'art. 336 c.p.c., è destinata ad essere travolta dall'eventuale caducazione di quest'ultima; cosicché essa non può passare in giudicato fino a quando l'accertamento della responsabilità del sanzionato non sia a propria volta passata in giudicato. Cfr. altresì Cass. 18.12.2020, n. 29099; Cass. sez. un. 27.10.2016, n. 21691).

23. Si rileva piuttosto quanto segue.

    Ai sensi del D.Lgs. n. 72 del 2015, art. 2, comma 3, "le modifiche apportate al titolo VIII del D.Lgs. 1 settembre 1993, n. 385, si applicano alle violazioni commesse dopo l'entrata in vigore delle disposizioni adottate dalla Banca d'Italia ai sensi del D.Lgs. 1 settembre 1993, n. 385, art. 145 quater. Alle violazioni commesse prima della data di entrata in vigore delle disposizioni adottate dalla Banca d'Italia continuano ad applicarsi le norme del titolo VIII del D.Lgs. 1 settembre 1993, n. 385, vigenti prima della data di entrata in vigore del presente D.Lgs.".

    Nel caso di specie si è senza dubbio al cospetto di violazioni commesse prima della data di entrata in vigore delle disposizioni che la Banca d'Italia è deputata ad emanare (ne danno atto gli stessi ricorrenti: cfr. ricorso, pag. 41), il cui varo, cioè, è ai sensi dell'art. 145 quater TUB alla stessa Banca d'Italia demandato.

    Il riferimento quindi, ratione temporis, è da farsi senz'altro alla disciplina del TUB antecedente alla novella di cui al D.Lgs. 12 maggio 2015, n. 72.

24. Al contempo, in ordine alla sollecitata applicazione retroattiva, alla sollecitata "interpretazione costituzionalmente orientata del D.Lgs. n. 72 del 2015, art. 2, comma 3" (così ricorso, pag. 41), questa Corte di legittimità non può che reiterare il proprio

insegnamento, quantunque espresso con riferimento alle modifiche alla parte V del D.Lgs. n. 58 del 1998 (TUF) apportate dal D.Lgs. n. 72 del 2015.

Ossia che le modifiche testé menzionate si applicano alle violazioni commesse dopo l'entrata in vigore delle disposizioni di attuazione adottate dalla Consob, in tal senso disponendo del D.Lgs. n. 72 del 2015, art. 6, e non è possibile ritenere l'applicazione immediata della legge più favorevole, atteso che il principio cosiddetto del "favor rei", di matrice penalistica, non si estende in assenza di una specifica disposizione normativa alla materia delle sanzioni amministrative, che risponde invece a distinto principio del "tempus regit actum" (cfr. Cass. 9.8.2018, n. 20689; Cass. 2.3.2016, n. 4114; Cass. 30.6.2016, n. 13433. Cfr. altresì Cass. 21.3.2019, n. 8047, ove in motivazione si legge testualmente: "l'esito decisionale a cui è pervenuta la sentenza n. 4114/16 in punto di non retroattività della lex mitior per gli illeciti sanzionati dall'art. 191, comma 2, TUF, dev'essere confermato e, ciò, per la decisiva considerazione che alla sanzione contemplata in tale disposizione non può riconoscersi natura sostanzialmente penale secondo i criteri Engel. In numerosi e recenti arresti di questa Sezione (sentt. nn. 1621/18, 8805/18, 8806/18, 27365/18) si è, infatti, evidenziato che le sanzioni previste dall'art. 191 TUF (anche quelle che presentano massimi editali più alti di quello previsto per la sanzione di cui al comma 2 di tale articolo) non sono equiparabili a quelle previste per la manipolazione del mercato ex art. 187-ter TUF (la cui natura sostanzialmente penale è stata affermata dalla Corte EDU nella sentenza Grande Stevens) e, ciò, in ragione dalla 'diversa tipologia, severità, nonché incidenza patrimoniale e personale, di queste ultime rispetto alle prime, dovendosi a tal fine tenere conto anche dell'assenza di sanzioni accessorie e della mancata previsione di una confisca 5 obbligatoria (elementi presenti nella fattispecie scrutinata dalla Corte EDU)' (così, in particolare, Cass. 8805/18, pag. 19, p. 6.2, in fine)". Cfr. inoltre Cass. (ord.) 28.12.2011, n. 29411, secondo cui, in tema di sanzioni amministrative; i principi di legalità, irretroattività e di divieto dell'applicazione analogica di cui alla L. 24 novembre 1981, n. 689, art. 1, comportano l'assoggettamento della condotta illecita alla legge del tempo del suo verificarsi, con conseguente inapplicabilità della disciplina posteriore più favorevole, sia che si tratti di illeciti amministrativi derivanti da depenalizzazione, sia che essi debbano considerarsi tali "ab origine", senza che possano trovare applicazione analogica, attesa la differenza qualitativa delle situazioni considerate, a opposti principi di cui all'art. 2 c.p., commi 2 e 3, i quali, recando deroga alla regola generale dell'irretroattività della legge, possono, al di fuori della materia penale, trovare applicazione solo nei limiti in cui siano espressamente richiamati dal legislatore).

Va soggiunto che nelle stesse occasioni dapprima menzionate (il riferimento è a Cass., 21.3.2019, n. 8047, a Cass. 9.8.2018, n. 20689, a Cass. 2.3.2016, n. 4114, e a Cass. 30.6.2016, n. 13473) questo Giudice ha specificato che la surriferita interpretazione non viola i principi convenzionali enunciati dalla Corte E.D.U. con la sentenza 4.3.2014 ("Grande Stevens ed altri c/o Italia"), giacché tali principi non possono indurre a ritenere che una sanzione, qualificata come amministrativa dal diritto interno, abbia sempre ed a tatti gli effetti natura sostanzialmente penale.

25. Analogamente, con precipuo riferimento alle sanzioni amministrative pecuniarie irrogate dalla Banca d'Italia ai sensi del D.Lgs. n. 385 del 1993, artt. 144 e segg. (nella formulazione anteriore alle modifiche di cui al D.Lgs. n. 72 del 2015) nei confronti di soggetti che svolgono funzioni di direzione, amministrazione o controllo di istituti bancari, questo Giudice del diritto ha espressamente chiarito che le sanzioni anzidette non sono equiparabili, quanto a gravosità economica ed incidenza sui diritti e libertà fondamentali, avuto riguardo alle concrete estrinsecazioni professionali, imprenditoriali e manageriali della persona, a quelle previste dall'art. 187 ter TUF, per manipolazione del mercato, sicché esse non hanno natura sostanzialmente penale e non pongono, quindi,

problema di compatibilità con le garanzie riservate ai processi penali dall'art. 6 C.E.D.U. (cfr. Cass. 31.7.2020 n. 16517; Cass. 24.2.2016, n. 3656).

26. Alla luce delle surriferite puntualizzazioni è da reputare dunque manifestamente infondata la prospettata questione di legittimità costituzionale.

Del resto, questa Corte ha, in materia di intermediazione finanziaria, ritenuto manifestamente infondata la questione di legittimità costituzionale del D.Lgs. n. 72 del 2015, art. 6, comma 2, per violazione degli artt. 3 e 117 Cost., nella parte cui non prevede l'applicazione del principio di retroattività della legge più favorevole con riferimento alle sanzioni amministrative irrogate (nella specie, ai sensi del D.Lgs. n. 58 del 1998, art. 190) antecedentemente all'entrata in vigore dello stesso D.Lgs. n. 72 del 2015; all'uopo ha specificato che, alla luce della giurisprudenza della C.E.D.U., principio del "favor rei", di matrice penalistica, non ha ad oggetto il complessivo sistema delle sanzioni amministrative, bensì singole e specifiche discipline sanzionatorie che, pur qualificandosi come amministrative ai sensi dell'ordinamento interno, siano idonee ad acquisire caratteristiche punitive alla luce dell'ordinamento convenzionale; in pari tempo, ha soggiunto che non può ritenersi che una sanzione, qualificata come amministrativa dal diritto interno, abbia sempre ed a tutti gli effetti natura sostanzialmente penale (cfr. Cass. 24.9.2019, n. 23814. Cfr. altresì Corte Cost. 24.4.2002, n. 140). (OMISSIS)

P.Q.M.

La Corte così provvede:

rigetta il ricorso;

(OMISSIS).

Corte di Cassazione, [.] v Banca d'Italia, 09/04/2022, n. 12436

Svolgimento del processo – Motivi della decisione

1. A seguito di accertamenti ispettivi eseguiti presso la [banca]… – accertamenti dapprima intrapresi, nel periodo compreso tra il … ed il…, dalla Banca Centrale Europea – la Banca d'Italia, con lettera dell'8.7.2016, notificata in data 15.7.2016, comunicava a M.M.C., membro del consiglio di amministrazione della Banca Popolare di Vicenza dal 24.1.2012 al 7.7.2016, l'avvio di procedimento sanzionatorio e le contestava le seguenti violazioni: a) "carenze nell'organizzazione, nella gestione dei rischi e nei controlli interni"; b) "carenze nel governo societario, con particolare riferimento all'assetto del gruppo, alla ripartizione delle deleghe e ai flussi informativi".

2. All'esito del procedimento amministrativo, con provvedimento n. 0683186 del 25.5.2017, la Banca d'Italia, ai sensi del D.Lgs. n. 385 del 1993, art. 145 (TUB), irrogava a M.M.C., con riferimento all'illecito sub a), la sanzione pecuniaria di Euro 93.000,00, con riferimento all'illecito sub b), la sanzione pecuniaria di Euro 70.000,00.

3. Con ricorso ritualmente notificato M.M.C. proponeva opposizione alla Corte d'Appello di Roma ai sensi dell'art. 145, comma 4, TUB. Chiedeva farsi luogo all'annullamento del provvedimento sanzionatorio.

4. Si costituiva la Banca d'Italia.

   Instava per il rigetto dell'opposizione.

5. Con sentenza n. 8173/2018 l'adita corte rigettava l'opposizione e condannava l'opponente a rimborsare all'opposta le spese di lite.

   Evidenziava, tra l'altro, la corte, in ordine al primo motivo di opposizione, che la contestazione delle violazioni era stata senz'altro tempestiva, nel rispetto del termine di cui alla L. n. 689 del 1981, art. 14.

6. Avverso tale sentenza ha proposto ricorso M.M.C.; ne ha chiesto sulla scorta di tre motivi la cassazione con ogni conseguente statuizione anche in ordine alle spese di lite.

   La Banca d'Italia ha depositato controricorso; ha chiesto dichiararsi inammissibile o rigettarsi l'avverso ricorso con il favore delle spese.

7. La ricorrente ha depositato memoria.

8. Con il primo motivo la ricorrente denuncia ai sensi dell'art. 360 c.p.c., comma 1, nn. 3 e 5, la violazione della L. n. 689 del 1981, art. 14.

   Deduce che ha errato la corte territoriale a reputare tempestiva la contestazione delle violazioni ad ella ascritte.

   Deduce che dai verbali delle riunioni, tenute nel periodo compreso tra il 28.1.2016 ed il 29.2.2016, del Gruppo per l'Esame delle Irregolarità si desume che tanto le asserite violazioni, e nei loro elementi di diritto e nei loro elementi di fatto, quanto i presunti responsabili risultavano esattamente individuate e identificati, sicché alla data del 29.2.2016 "l'accertamento poteva dirsi senz'altro compiuto" (così ricorso, pag. 10), tant'è che nei successivi quattro mesi e sino alla data – 6.7.2016 – di apposizione del visto da parte del Capo del Dipartimento per la Vigilanza Bancaria e Finanziaria della Banca d'Italia non si ha documentale riscontro del compimento di ulteriori attività istruttorie.

9. Con il secondo motivo la ricorrente denuncia ai sensi dell'art. 360 c.p.c., comma 1, n. 3, la falsa applicazione degli artt. 2381 e 2392 c.c.

Deduce che il dovere ex art. 2381 c.c., u.c., dei consiglieri deleganti di agire "in modo informato" è destinato ad esplicarsi unicamente in seno al consiglio di amministrazione e non implica l'esercizio di poteri individuali ed autonomi di informazione a carattere ispettivo.

10. Con il terzo motivo la ricorrente denuncia ai sensi dell'art. 360 c.p.c., comma 1, nn. 3, 4, e 5, c.p.c. la nullità dell'impugnata sentenza per violazione dell'art. 132 c.p.c. e dell'art. 118 disp. att. c.p.c., l'omesso esame di fatti rilevanti ai fini del decidere.

    Deduce che la Corte di Roma ha respinto nel merito l'opposizione, "richiamando integralmente e in 'virgolettato' le osservazioni di cui agli atti della Banca d'Italia" (così ricorso, pag. 34).

    Deduce quindi che l'impugnata sentenza è del tutto priva di motivazione, siccome quella esposta si risolve nell'integrale acritica riproduzione delle controdeduzioni della Banca d'Italia.

11. Il primo motivo di ricorso va respinto.

12. Il primo motivo è da qualificare in via esclusiva in relazione alla previsione dell'art. 360 c.p.c., comma 1, n. 5.

    Invero, con il primo mezzo la ricorrente censura il giudizio "di fatto" in virtù del quale la corte d'appello ha opinato per la tempestiva - nel rispetto del termine di 90 giorni - contestazione degli addebiti (si condivide in parte qua la prospettazione della Banca d'Italia: cfr. controricorso, pag. 9).

    Del resto, la stessa ricorrente espressamente adduce che la corte di merito ha disatteso "la chiara ricostruzione fattuale emergente dalla documentazione in atti" (così ricorso, pag. 11). Ed è propriamente il motivo di ricorso ex art. 360 c.p.c., comma 1, n. 5, che concerne l'accertamento e la valutazione dei fatti rilevanti ai fini della decisione della controversia (cfr. Cass. sez. un. 25.11.2008, n. 28054; cfr. Cass. 11.8.2004, n. 15499).

    In tal guisa i presunti "errores" che il motivo in disamina veicola, rilevano, se del caso, oltre che nei limiti dell'art. 360 c.p.c., comma 1, n. 5, nel solco della pronuncia n. 8053 del 7.4.2014 delle sezioni unite di questa Corte.

13. In quest'ottica si evidenzia ulteriormente quanto segue.

    È da escludere senz'altro che taluna delle figure di "anomalia motivazionale" destinate ad acquisire significato alla stregua della decisione delle sezioni unite testé menzionata – e tra le quali non è annoverabile il semplice difetto di "sufficienza" della motivazione – possa scorgersi in ordine alle motivazioni cui, in parte qua, la corte distrettuale ha ancorato il suo dictum.

    In particolare, con riferimento al paradigma della motivazione "apparente" – che ricorre allorquando il giudice di merito non procede ad una approfondita disamina logico/giuridica, tale da lasciar trasparire il percorso argomentativo seguito (cfr. Cass. 21.7.2006, n. 16672) – la corte territoriale ha compiutamente ed intellegibilmente esplicitato il percorso argomentativo adottato.

    Invero, la Corte di Roma ha chiarito che l'apposizione del visto del Capo del Dipartimento per la Vigilanza della Banca d'Italia in data 6.7.2016 costituiva l'esito dell'autonoma valutazione delle risultanze della complessa ispezione avviata dalla B.C.E. ed avente altre finalità. Ed ha soggiunto che siffatte risultanze non erano de plano utilizzabili nel procedimento sanzionatorio avviato in danno di M.M.C., ma postulavano, nel quadro della normativa nazionale, un'autonoma analisi in special modo in ordine al profilo dell'imputabilità agli esponenti aziendali, profilo, quest'ultimo, esulante, dall'accertamento condotto dalla B.C.E. (cfr. sentenza impugnata, pag. 4).

In questi termini, è del tutto ingiustificato l'assunto della ricorrente per cui l'impugnato dictum risulta, per giunta, "oggettivamente privo di motivazione" (così ricorso, pag. 16. Cfr. in tal senso, altresì, memoria, pag. 2).

14. In ogni caso, l'iter motivazionale che sorregge la pronuncia della Corte di Roma risulta in toto ineccepibile sul piano della correttezza giuridica.

Invero, questa Corte spiega che, in tema di sanzioni amministrative, nel caso di mancata contestazione immediata della violazione, l'attività di accertamento dell'illecito non coincide con il momento in cui viene acquisito il "fatto" nella sua materialità, ma deve essere intesa come comprensiva del tempo necessario alla valutazione dei dati acquisiti ed afferenti agli elementi (oggettivi e soggettivi) dell'infrazione e, quindi, della fase finale di deliberazione, correlata alla complessità delle indagini tese a riscontrare la sussistenza dell'infrazione medesima e ad acquisire piena conoscenza della condotta illecita, sì da valutarne la consistenza agli effetti della corretta formulazione della contestazione; e che compete, poi, al giudice di merito determinare il tempo ragionevolmente necessario all'Amministrazione per giungere a una simile, completa conoscenza, individuando il "dies a quo" di decorrenza del termine, tenendo conto della maggiore o minore difficoltà del caso concreto e della necessità che tali indagini, pur nell'assenza di limiti temporali predeterminati, avvengano entro un termine congruo, essendo il relativo giudizio sindacabile, in sede di legittimità, solo sotto il profilo del vizio di motivazione, recte, al cospetto dell'art. 360 c.p.c., comma 1, novello n. 5,solo se inficiato da "omesso esame circa fatto decisivo e controverso" (cfr. Cass. 18.4.2007, n. 9311; Cass. (ord.) 25.10.2019, n. 27405. Cfr., inoltre, propriamente in tema di sanzioni amministrative previste per la violazione delle norme che disciplinano l'attività di intermediazione finanziaria, Cass. 2.12.2011, n. 25836; Cass. 16.4.2018, n. 9254; Cass. 8.8.2019, n. 21171).

Su tale scorta ineccepibilmente la Corte romana ha assunto quale dies a quo dell'ottemperato termine di contestazione (contestazione avvenuta con lettera in data 8.7.2016, notificata in data 15.7.2016) la data del 6.7.2016, di dell'apposizione del visto del Capo del Dipartimento per la Vigilanza della Banca d'Italia.

E ciò viepiù chè questa Corte spiega che, in tema di sanzioni amministrative irrogate dalla Banca d'Italia, il termine di decadenza previsto dalla L. n. 689 del 1981, art. 14, per la notifica della violazione decorre dall'apposizione del visto del direttore centrale della vigilanza bancaria e finanziaria, suggellandosi con esso la conclusione della fase di accertamento di tutti gli elementi dell'illecito, fase comprensiva, altresì, della valutazione e dell'adeguata ponderazione dei dati acquisiti e degli atti preliminari (cfr. Cass. 19.2.2019, n. 4820).

15. D'altro canto, la ricorrente si duole per l'omessa, erronea considerazione delle risultanze istruttorie, "non avendo la Corte di Appello considerato gli elementi documentali in atti" (così ricorso, pag. 16), non avendo considerato che dal tenore del visto in data 6.7.2016 non si evince alcuna particolare difficoltà atta a giustificare il decorso di oltre quattro mesi a far data dalle riunioni del Gruppo per l'Esame delle Irregolarità (cfr. ricorso, pag. 17; "appare altresì evidente che l'attività dell'Amministrazione italiana si è limitata a tradurre l'atto della BCE (...)": così ricorso, pag. 17).

E tuttavia l'omesso esame di elementi istruttori non integra, di per sé, il vizio di omesso esame di un fatto decisivo, qualora il fatto storico, rilevante in causa, sia stato comunque preso in considerazione dal giudice, ancorchè la sentenza non abbia dato conto di tutte le risultanze probatorie (cfr. Cass. (ord.) 29.10.2018, n. 27415).

E tuttavia il cattivo esercizio del potere di apprezzamento delle prove non legali da parte del giudice di merito non dà luogo ad alcun vizio denunciabile con il ricorso per

cassazione, non essendo inquadrabile nel paradigma dell'art. 360 c.p.c., comma 1, n. 5, né in quello del precedente n. 4, disposizione che – per il tramite dell'art. 132 c.p.c., n. 4 –dà rilievo unicamente all'anomalia motivazionale che si tramuta in violazione di legge costituzionalmente rilevante (cfr. Cass. 10.6.2016, n. 11892; Cass. (ord.) 26.9.2018, n. 23153; Cass. (ord.) 19.7.2021, n. 20553).

16. Il secondo motivo di ricorso parimenti va respinto.

17. Senza dubbio la "riforma societaria" del 2003 ha espunto dall'incipit dell'art. 2392 c.c., comma 2, l'obbligo di vigilanza sul generale andamento della gestione.

    Senza dubbio il potere-dovere dei consiglieri deleganti ex art. 2381 c.c., u.c., di "agire in modo informato", è destinato a "compiersi" in sede collegiale ("ciascun amministratore può chiedere agli organi delegati che in consiglio siano fornite informazioni relative alla gestione della società": art. 2381 c.c., u.c., seconda parte).

    Senza dubbio i consiglieri deleganti non sono, diversamente dai sindaci, investiti del potere-dovere (ex art. 2403 bis c.c., comma 1) di procedere in qualsiasi momento, anche individualmente, ad atti di ispezione e controllo.

    Nondimeno il potere-dovere dei consiglieri non esecutivi "di agire in modo informato" si qualifica teleologicamente, ex art. 2381 c.c., comma 3, u.p., nella valutazione – "sulla base della relazione degli organi delegati" – del "generale andamento della gestione".

    Ebbene in siffatta proiezione finalistica, che ulteriormente si specifica alla stregua del rilievo per cui gli organi delegati, ex art. 2381 c.c., comma 5, riferiscono al consiglio di amministrazione pur sulla possibile evoluzione del "generale andamento della gestione" e "sulle operazioni di maggior rilievo", è da escludere recisamente che i consiglieri deleganti versino nella posizione meramente passiva di "destinatari di informazioni": così come si è chiarito in dottrina, "gli amministratori devono attivarsi al fine di entrare in possesso di tutte le informazioni necessarie per assumere le relative decisioni e per conoscere l'andamento della gestione" e "non potranno andare esenti da responsabilità né attraverso l'allegazione di un'insufficiente spontanea informazione da parte degli organi delegati, né adducendo l'ignoranza di fatti pregiudizievoli che avrebbero potuto conoscere esercitando il loro potere – dovere di esigere più puntuali informazioni".

18. In questo quadro, da un lato, va ribadito l'insegnamento di questa Corte.

    Ovvero l'insegnamento, propriamente espresso sul terreno delle sanzioni amministrative previste dall'art. 144 TUB, secondo cui il dovere di agire informati dei consiglieri non esecutivi delle società bancarie, sancito dall'art. 2381 c.c., commi 3 e 6 e art. 2392 c.c., non va rimesso, nella sua concreta operatività, alle segnalazioni provenienti dai rapporti degli amministratori delegati, giacché anche i primi devono possedere ed esprimere costante e adeguata conoscenza del "business" bancario ed, essendo compartecipi delle decisioni di strategia gestionale assunte dall'intero consiglio, hanno l'obbligo di contribuire ad assicurare un governo efficace dei rischi di tutte le aree della banca e di attivarsi in modo da poter efficacemente esercitare una funzione di monitoraggio sulle scelte compiute dagli organi esecutivi non solo in vista della valutazione delle relazioni degli amministratori delegati ma anche ai fini dell'esercizio dei poteri, spettanti al consiglio di amministrazione, di direttiva o avocazione concernenti operazioni rientranti nella delega (cfr. Cass. 26.2.2019, n. 5606; Cass. 5.2.2013, n. 2737).

19. In questo quadro, dall'altro, non possono che formularsi i seguenti rilievi.

    Per nulla può essere condiviso l'assunto della ricorrente secondo cui il dovere ex art. 2381 c.c., u.c., dei consiglieri deleganti di agire "in modo informato" è "subordinato a un inadempimento totale o anche solo parziale degli amministratori delegati ai loro doveri di informazione 'transitiva'" (così ricorso, pag. 23).

Era preciso obbligo della ricorrente attivarsi, rendersi parte attiva, in seno – certo – al consiglio di amministrazione, onde sollecitare gli organi delegati a riferire (ex art. 2381 c.c., comma 5) debitamente e puntualmente in ordine al "fenomeno del capitale 'finanziato'; (in ordine a)i benefici particolari riconosciuti alla clientela sempre in tema di acquisto/sottoscrizioni di azioni di BPV; (in ordine agli storni alla clientela sempre connessi a tale fenomeno" (così ricorso, pag. 26).

Per nulla può esser condiviso, al contempo, l'assunto della ricorrente secondo cui era onere della Banca d'Italia dimostrare che le informazioni a disposizione dei consiglieri deleganti palesassero "'anomalie' tali da richiamare la loro attenzione" (così ricorso, pag. 25).

Per nulla può essere condiviso, inoltre, l'assunto secondo cui "in materia bancaria, le informazioni fornite dai delegati godono di una speciale 'presunzione di attendibilità'" (così memoria della ricorrente, pag. 4).

20. D'altra parte, allorchè prospetta, con riferimento ai findings 4, 5 e 9, che nessuna "anomalia" poteva – con giudizio da formularsi ex ante – dai consiglieri non esecutivi essere percepita, "in ragione delle condotte dolose poste in essere dalle strutture dirigenziali della Banca" (così ricorso, pag. 26), la ricorrente in tal guisa si duole per l'asserita erronea valutazione delle risultanze probatorie.

    E tuttavia a siffatta doglianza osta l'insegnamento di questa Corte già in precedenza menzionato (cfr. Cass. 10.6.2016, n. 11892; Cass. (ord.) 26.9.2018, n. 23153; Cass. (ord.) 19.7.2021, n. 20553).

21. Ovviamente, va da ultimo rimarcato che, in tema di sanzioni amministrative pecuniarie irrogate dalla Banca d'Italia, del D.Lgs. n. 385 del 1993, ex art. 144, nei confronti di soggetti che svolgono funzioni di direzione, amministrazione o controllo di istituti bancari, il legislatore limita l'indagine sull'elemento oggettivo dell'illecito all'accertamento della "suità" della condotta inosservante, sicché, integrata e provata dall'autorità amministrativa la fattispecie tipica dell'illecito, grava sul trasgressore, in virtù della presunzione di colpa posta dalla L. n. 689 del 1981, art. 3, l'onere di provare di aver agito in assenza di colpevolezza (cfr. Cass. 18.4.2018, n. 9546; cfr. altresì Cass. 22.1.2018, n. 1529, ove si specifica che la "presunzione di colpa" non si pone in contrasto con l'art. 6 CEDU e art. 27 Cost., anche nel caso la sanzione abbia natura sostanzialmente penale in quanto afflittiva).

22. Il terzo motivo di ricorso del pari va respinto.

23. Va richiamato in premessa l'insegnamento delle sezioni unite.

    Ovvero l'insegnamento secondo cui nel processo civile ed in quello tributario, la sentenza la cui motivazione si limiti a riprodurre il contenuto di un atto di parte (o di altri atti processuali o provvedimenti giudiziari), senza niente aggiungervi, non è nulla qualora le ragioni della decisione siano, in ogni caso, attribuibili all'organo giudicante e risultino in modo chiaro, univoco ed esaustivo, atteso che, in base alle disposizioni costituzionali e processuali, tale tecnica di redazione non può ritenersi, di per sé, sintomatica di un difetto d'imparzialità del giudice, al quale non è imposta l'originalità né dei contenuti né delle modalità espositive, tanto più che la validità degli atti processuali si pone su un piano diverso rispetto alla valutazione profèssionale o disciplinare del magistrato (cfr. Cass. sez. un. 16.1.2015, n. 642; Cass. (ord.) 7.11.2016, n. 22562).

24. Su tale scorta di rappresenta quanto segue.

    Da un canto, la Corte d'Appello di Roma, in ordine al merito delle contestazioni sollevate in danno della opponente, ha reputato che le controdeduzioni di cui alla comparsa di risposta della Banca d'Italia non erano state adeguatamente confutate dalla medesima

M.M.C. con le note all'uopo depositate, sicché, in parte qua, ineccepibilmente ha ritenuto che fossero senz'altro da richiamare le argomentazioni della Banca d'Italia.

D'altro canto, è da escludere che siffatta tecnica redazionale "non permette oggettivamente di individuare il percorso motivazionale del giudice e di rilevarne la ratio decidendi" (così ricorso, pag. 37). È da escludere che, in dipendenza dell'adoperata tecnica redazionale, i passaggi fondanti la motivazione sul merito non siano attribuibili all'organo giudicante. È da escludere che la Corte di Roma non abbia adeguatamente ponderato le ragioni hinc et inde addotte. (OMISSIS).

P.Q.M.

La Corte così provvede:

rigetta il ricorso;

(OMISSIS).

Corte di Cassazione, [.] v Banca d'Italia, 31/05/2022, n. 17567

Svolgimento del processo – Motivi della decisione

1. La Banca d'Italia ha irrogato nei confronti dell'odierno ricorrente, D.C.F.M., quale componente del C.d.A. della (OMISSIS), la sanzione di Euro 90.000,00 (al pari degli altri componenti), per la violazione delle disposizioni in materia di politiche e prassi di remunerazione e incentivazione da parte dei componenti il C.d.A., di cui al D.Lgs. n. 385 del 1993, art. 53, comma 1, lett. d), in relazione alla determinazione del compenso riconosciuto al Direttore Generale in sede di cessazione dell'incarico per risoluzione consensuale, liquidato in 4 milioni di Euro, nonostante i risultati negativi conseguiti nella gestione.

2. Con ricorso in riassunzione, D.C. ha riassunto davanti alla Corte d'Appello di Roma l'opposizione avverso detto provvedimento già tempestivamente proposta dinnanzi al TAR, chiedendo l'annullamento della sanzione o, in subordine, la sua riassunzione.

3. La Banca d'Italia si è costituita in giudizio, chiedendo il rigetto delle domande proposte.

4. Con decreto n. 4447/2017 pubblicato l'8 maggio 2017 (non notificato), la Corte d'Appello di Roma ha rigettato l'opposizione.

5. Secondo la Corte territoriale, il procedimento sanzionatorio non poteva essere considerato illegittimo, non essendo riscontrabile alcuna violazione del principio del contraddittorio, né la genericità della contestazione, la quale indicava precisamente le norme che erano state violate e gli addebiti mossi, in ordine ai quali il D.C. aveva ampiamente argomentato nel merito già in sede amministrativa.

6. Nel merito, la Corte d'Appello ha rilevato che l'accordo di risoluzione consensuale deliberato dal C.d.A. con il direttore generale era stato adottato in violazione delle disposizioni vigenti in tema di politiche e prassi di remunerazione, in quanto i compensi liquidati non erano stati collegati alla performance realizzata e ai rischi assunti.

7. Per la Corte di merito, le predette disposizioni regolamentari adottate dalla Vigilanza della Banca D'Italia ai sensi dell'art. 53 TUB, ben potevano considerarsi integrative dei contratti collettivi di lavoro, i quali sono suscettibili di essere contemperati con altre norme di legge, fermo il limite della retribuzione minima garantita dall'art. 39 Cost., (evidentemente non superato nel caso di specie, stante la rilevante somma riconosciuta al direttore generale).

8. La Corte ha ritenuto legittima anche la contestazione mossa dalla Vigilanza in relazione alla clausola dell'accordo di risoluzione consensuale con cui MPS si era impegnata a tenere indenne il Direttore uscente da azioni, anche di terzi, in relazione al suo operato, la quale appariva irragionevole alla luce dei pessimi risultati ottenuti dal predetto Direttore.

9. D.C. ha proposto ricorso per la cassazione di detto decreto, notificato in data 6 novembre 2017, ed articolato in due motivi, illustrati da memoria, cui resiste la Banca d'Italia con controricorso notificato in data 18 dicembre 2017.

10. Con il primo motivo (violazione e falsa applicazione della L. n. 241 del 1990, artt. 1, 3, 7, 8 E 9; L. n. 689 del 1981, art. 14, L. n. 262 del 2005, art. 24 comma 1, della circolare n. 229/1999, del titolo II della circolare n. 263/2006,) si deduce, in relazione all'art. 360 c.p.c., comma 1, n. 3, che la Corte d'Appello avrebbe errato nell'escludere la genericità della c.d. comunicazione della Banca d'Italia del 3 dicembre 2012 di avvio del procedimento.

11. Il ricorrente che già aveva censurato avanti alla Corte d'Appello la genericità degli addebiti contenuti nell'avvio del procedimento sanzionatorio, ripropone la doglianza avanti al giudice di legittimità rubricandola ai sensi dell'art. 360 c.p.c., comma 1, n. 3.

12. La censura è inammissibile.

13. In tema di ricorso per cassazione, l'onere di specificità dei motivi, sancito dall'art. 366 c.p.c., comma 1, n. 4), impone al ricorrente che denunci il vizio di cui all'art. 360 c.p.c., comma 1, n. 3), a pena d'inammissibilità della censura, di indicare le norme di legge di cui intende lamentare la violazione, di esaminarne il contenuto precettivo e di raffrontarlo con le affermazioni in diritto contenute nella sentenza impugnata, che è tenuto espressamente a richiamare, al fine di dimostrare che queste ultime contrastano col precetto normativo, non potendosi demandare alla Corte il compito di individuare – con una ricerca esplorativa ufficiosa, che trascende le sue funzioni – la norma violata o i punti della sentenza che si pongono in contrasto con essa (cfr. Cass. Sez. Un. 23745/2020).

14. Ciò posto nel caso di specie il ricorrente non mette in discussione l'applicazione delle disposizioni invocate fatta come operata dalla Corte d'Appello che aveva motivatamente respinto la doglianza di genericità addotta dall'opponente

15. Il ricorrente inoltre precisa di non ignorare l'orientamento di questa Corte in merito alla sufficienza del fatto che alla base dell'avvio del procedimento vi sia la individuazione del nucleo del fatto contestato (cfr. pag. 6 penultimo cpv. del ricorso).

16. Nondimeno propone una critica costruita attorno al confronto del contenuto della comunicazione con la proposta di sanzione del luglio 2013, poi recepita nel provvedimento sanzionatorio, che non è in alcun modo riconducibile nel quadro della violazione di legge così come sopra ricordato.

    Del resto, la Corte d'Appello aveva dato atto della adeguatezza della contestazione quanto al contenuto delle disposizioni violate, e della insussistenza di contraddittorietà tra contestazione e sanzione alla luce della giurisprudenza di questa Corte ivi richiamata.

    In ogni caso, in tema di sanzioni amministrative, sussiste la violazione del principio di correlazione tra fatto contestato e fatto assunto a base della sanzione irrogata, previsto dalla L. n. 689 del 1981, art. 14, tutte le volte in cui la sanzione venga comminata per una fattispecie, individuata nei suoi elementi costitutivi e nelle circostanze rilevanti delineate dalla norma, diversa da quella attribuita al trasgressore in sede di contestazione, posto che in tali casi viene leso il diritto di difesa del trasgressore medesimo; la relativa indagine rientra tra i compiti del giudice di merito, le cui conclusioni, evo adeguatamente motivate, sono insindacabili in sede di legittimità (cfr. Sez. 2, Sentenza n. 18883 del 28/07/2017 Rv. 645227; Sez. 2, Sentenza n. 9790 del 04/05/2011 Rv. 617642).

17. Con il secondo motivo (violazione dell'art. 39 Cost., comma 1, e violazione e falsa applicazione del D.Lgs. n. 358 del 1993, art. 53, comma 1, lett. d)) si deduce, in relazione all'art. 360 c.p.c., comma 1, n. 3, che la corte d'appello avrebbe errato nel ritenere che il contratto collettivo nazionale di lavoro per i dirigenti delle aziende di credito, finanziarie e strumentali potesse essere derogabile dal D.Lgs. n. 358 del 1993, art. 53, comma 1, lett. d), nonché per aver ritenuto violata la predetta disposizione.

18. L'art. 53, comma 1, lett. d) dispone che la Banca d'Italia emana disposizioni di carattere generale aventi ad oggetto fra l'altro i sistemi di remunerazione e di incentivazione.

19. La censura è infondata.

20. Come già sopra evidenziato, l'accordo di risoluzione consensuale del rapporto con il direttore Vigni aveva comportato altre erogazioni rispetto a quelle contrattualmente

previste: veniva infatti erogata con la delibera del 12/1/2012, oltre ai benefici contrattuali, l'ulteriore somma lorda di Euro 4 milioni "a titolo di incentivo per agevolare la risoluzione anticipata del rapporto di lavoro e quale integrazione del trattamento di fine rapporto, oltre alle competenze di fine rapporto, al t.f.r. maturato e ad ogni altra spettanza prevista dalla legge e dal contratto nazionale di lavoro per i dirigenti di aziende di credito", nonché veniva rilasciata garanzia idonea a tenerlo "immune da azioni, anche di terzi, in relazione al suo operato di direttore generale".

21. La corte d'appello ha dunque rilevato (cfr. pag. 7, terzo cpv.) che le erogazioni si sono aggiunte, non già conformate, a quelle spettanti contrattualmente e che l'accordo raggiunto non rispettava le disposizioni legittimamente emanate sia in forza dei poteri riconosciuti dal D.Lgs. n. 385 del 1993, art. 53 comma 1, lett. d), sia delle modifiche apportate dalla legge comunitaria del 2010.

22. Da ciò conseguiva ad avviso del giudice del merito, l'applicabilità delle norme in tema di compensi aggiuntivi, posto che la natura aggiuntiva dei benefici, al di fuori del riconoscimento della c.d. retribuzione minima ai sensi dell'art. 36 Cost., priva di ogni fondamento la tesi del ricorrente circa la previsione degli stessi in base al c.c.n.l. (in tesi, prevalente sulle disposizioni di vigilanza) e la a prospettata lesione della libertà sindacale, non attinta dalle disposizioni in tema di politiche e prassi di remunerazione.

23. La corte territoriale osserva, altresì, che la finalità da esse perseguita, di ancorare i compensi pattuiti in caso di conclusione anticipata del rapporto di lavoro, sulla base della performance realizzata e dei rischi assunti, è comprensibile tenuto conto che deve escludersi che la banca per reperire le somma occorrenti a detto compenso possa adoperare le somme a qualunque titolo affidate dai risparmiatori, oppure il patrimonio di vigilanza della banca stessa (cfr. pagg. 7 e 8 della sentenza).

23. Del tutto legittime sono quindi le sin qui esposte statuizioni della corte d'appello circa il contrasto tra l'accordo di risoluzione in esame e le disposizioni del 2011 volte a introdurre meccanismi incentivanti correlati alla performance della banca e con correzioni ex post (o claw back), nonché a prevedere che una quota non fosse in contanti e altra quota fosse a pagamento differito.

24. Come peraltro già affermato da questa Corte in fattispecie analoghe (cfr. Cass. 9371/2020) palese è anche il contrasto con tali norme della clausola volta a tenere indenne il direttore generale da responsabilità.

25. Il ricorso è quindi rigettato (OMISSIS).

Index

I – The case law of the CJEU

1. Synthesis

European Central Bank's decision to withdraw a credit institution's authorisation

Case T-27/19

Case T-797/19

Procedure to adopt a resolution scheme by the Single Resolution Board

Case C-364/20 P

Single Resolution Board's decision fixing the ex ante contribution to the Single Resolution Fund

Cases C-663/20 P, C-664/20 P

Admissibility of claims brought by investors following the resolution of the issuer

Case C-410/20

Request of preliminary ruling on the Banco de Portugal's decision to place Banco Espirito Santo SA in resolution, based on national law, before the entry into force of the Directive 2014/59/EU

Case C-83/20

ECB's decision not to authorise the acquisition of a qualifying holding in a credit institution

Case T 913/16

European Central Bank's decision refusing access to its decision to place Banca Carige S.p.A. under special administration

Case T-501/19

Single Resolution Board's and Commission's decision to place Banco Popular Español SA in resolution

Cases T-481/17, T-510/17, T-523/17, T-570/17, T-628/17

2. Series of keywords

KEYWORDS	CASES
Acquisition of a qualifying holding	T-913/16 (x2)
Act not addressed to the applicant	C-364/20 P
Action brought against the resolved entity or its successor	C-410/20
Action brought by shareholders	T-27/19 // C-364/20 P // T-797/19
Action brought only against the SRB's decision	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Action for annulment	C-364/20 P // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Action for annulment of the share subscription contract	C-410/20
Action for liability on the grounds of the incorrectness of the prospectus	C-410/20
Advocate General's opinion	C-410/20
Authentication of a SRB's decision	C-664/20 P, C-663/20 P
Authorisation	T-913/16
Bail-in	C-410/20
Bridge institution	C-83/20
Broad interpretation	T-913/16
Burden of proof	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Case-by-case analysis	T-27/19 // T-501/19
Change in the quality of the holding	T-913/16
Compatibility with the "Meroni doctrine"	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Concept of acquisition of a qualifying holding	T-913/16 (x3)
Conditions for resolution	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x3)
Conditions of admissibility	C-364/20 P
Consequences of annulment	C-664/20 P, C-663/20 P
Criteria for assessing the request	T-501/19
Criteria for the withdrawal	T-797/19
Decision fixing the ex ante contribution to the Single Resolution Fund	C-664/20 P, C-663/20 P (x2)
Decision not to adopt a resolution scheme	C-364/20 P (x2)
Decision to place a credit institution in resolution	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x5)
Decision to withdraw a credit institution's authorisation	T-27/19 (x2) // T-797/19 (x5)
Denial	T-797/19 // T-501/19 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Direct concern	C-364/20 P
Disclosure of confidential information	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Discretion	T-27/19 // C-364/20 P (x2) // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Duty to protect confidentiality and professional secrecy	C-664/20 P, C-663/20 P // T-501/19 (x2) // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x4)
Duty to state reasons	C-664/20 P, C-663/20 P // T-501/19 (x2) // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
ECB's exclusive competence	T-913/16
Effects of resolution	C-410/20 (x2) // C-83/20 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
European Commission's decision to endorse a resolution scheme	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Failing or likely to fail	C-364/20 P // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Failure to state reasons	T-501/19

Financial stability	C-410/20 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Good repute	T-27/19 // T-913/16
Handwritten signature	C-664/20 P, C-663/20 P
Impossibility of application by analogy	T-27/19
Inadmissibility	T-27/19 // C-364/20 P // C-410/20
Inapplicability of Directive 2014/59/EU	C-83/20
Indictment of the main shareholder in a third country	T-27/19
Institution on special administration	T-501/19
Invalid plea in law	T-797/19
Irrelevance	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Lack of alternative supervisory or private sector measures	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Lack of direct concern	T-27/19 // C-364/20 P // T-797/19
Lack of discretion	C-364/20 P // T-913/16
Leak of information by an anonymous source	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Liability of the SRB and the European Commission	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Likely influence of the proposed acquirer	T-913/16 (x2)
Maintenance of effects until a new decision is adopted	C-664/20 P, C-663/20 P
Merger	T-913/16
Need of weighing up	C-664/20 P, C-663/20 P // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
No breach	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
No impact	T-797/19
Notification to the person concerned	T-501/19
Ordinary insolvency proceedings	C-410/20
Perception by the market	T-27/19
Prevalence over some other provisions of Union law	C-410/20
Principle of proportionality	C-83/20 // T-913/16 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Procedure for assessing acquisitions of qualifying holdings	T-913/16
Procedure for withdrawal of authorisation	T-27/19
Proposal by the National Competent Authority	T-797/19
Public general remarks of the Chair of the SRB	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Public interest	C-410/20 // C-83/20 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Request of suspension	T-797/19
Request to reopen the oral procedure	C-410/20
Res judicata	T-913/16
Resolution based on national law	C-83/20 (x2)
Resolution procedure	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x3)
Restrictions	C-83/20 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Right to access	T-501/19 (x2) // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Right to be heard	T-913/16 // T-797/19 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Right to complete and effective judicial protection	T-797/19
Right to obtain a full disclosure of the resolution scheme	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Right to property	C-83/20 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17

Scope of resolution	C-410/20
Scope of the assessment of the Court	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Serious breach of national law on anti-money laundering and countering the financing of terrorism	T-797/19
Shareholders and creditors	C-83/20 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x4)
Sufficient information in collective and anonymised form	C-664/20 P, C-663/20 P
Technically complex cases	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Time limit of the procedure	T-913/16
Time limits for authorising qualifying holdings	T-27/19
Valuation 2	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Valuation for the purposes of resolution	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Winding-up of a credit institution	C-364/20 P
Write-down and conversion power	C-410/20 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Wrong legal basis not affecting the substantive assessment	T-797/19

3. Series of legal provisions

ARTICLE	CASES
TFEU, art. 122(2)	C-83/20
TFEU, art. 263	C-364/20 P // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
TFUE, art. 264	C-663/20 P, C-664/20 P
TFEU, art. 267	C-83/20
TFEU, art. 296	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2) // C-663/20 P, C-664/20 P
TFEU, art. 339	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x3)
TFEU, art. 340(2)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
CFREU, art. 17	C-410/20 // C-83/20 (x10) // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
CFREU, art. 41	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
CFREU, art. 47	C-410/20
CFREU, art. 51(1)	C-83/20
CFREU, art. 52(1)	C-83/20 (x2) // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x4)
ECHR, Protocol 1, art. 1	C-83/20
Council Regulation (EU) 1024/2013, art. 4(1)(a)	T-27/19 // T-797/19
Council Regulation (EU) 1024/2013, art. 4(1)(c)	T-913/16
Council Regulation (EU) 1024/2013, art. 14(5)	T-27/19 // T-797/19
Council Regulation (EU) 1024/2013, art. 15	T-913/16 (x3)
Council Regulation (EU) 1024/2013, art. 22(1)	T-913/16
Regulation (EU) 468/2014 of the ECB, art. 31(1)	T-797/19
Regulation (EU) 468/2014 of the ECB, art. 31(3)	T-913/16
Regulation (EU) 468/2014 of the ECB, art. 32(1)	T-913/16
Regulation (EU) 575/2013, art. 460(2)(c)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, Recital 57	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Regulation (EU) 806/2014, Recital 116	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)

Regulation (EU) 806/2014, art. 14	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x4)
Regulation (EU) 806/2014, art. 16(1)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, art. 18	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x5)
Regulation (EU) 806/2014, art. 18(1)	C-364/20 P (x2) // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x9)
Regulation (EU) 806/2014, art. 18(4)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x4)
Regulation (EU) 806/2014, art. 18(5)	C-364/20 P
Regulation (EU) 806/2014, art. 18(7)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x7)
Regulation (EU) 806/2014, art. 18(9)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, art. 20(1)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x3)
Regulation (EU) 806/2014, art. 20(3)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Regulation (EU) 806/2014, art. 20(5)(a)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, art. 20(10)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x4)
Regulation (EU) 806/2014, art. 20(11)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, art. 20(12)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x3)
Regulation (EU) 806/2014, art. 20(13)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Regulation (EU) 806/2014, art. 20(15)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Regulation (EU) 806/2014, art. 21	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, art. 22	C-410/20
Regulation (EU) 806/2014, art. 23	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, art. 24	C-410/20 // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, art. 29	C-364/20 P
Regulation (EU) 806/2014, art. 70	C-663/20 P, C-664/20 P
Regulation (EU) 806/2014, art. 85(3)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, art. 86	C-364/20 P // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, art. 88(1)	C-663/20 P, C-664/20 P // T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x5)
Regulation (EU) 806/2014, art. 90(1)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Regulation (EU) 806/2014, art. 90(4)	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Council Regulation (EU) 407/2010, art. 3(5)	C-83/20
Directive 2003/71/EC, art. 6	C-410/20
Directive 2013/36/EU, art. 14(2)	T-27/19
Directive 2013/36/EU, art. 18(1)(c)	T-27/19 (x2)
Directive 2013/36/EU, art. 18(1)(f)	T-797/19 (x2)
Directive 2013/36/EU, art. 22	T-913/16 (x2)
Directive 2013/36/EU, art. 23(1)(a-e)	T-27/19 // T-913/16
Directive 2013/36/EU, art. 67(1)(o)	T-797/19 (x3)
Directive 2014/59/EU, Recital 120	C-410/20
Directive 2014/59/EU, art. 32	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
Directive 2014/59/EU, art. 34(1)(a-b)	C-410/20
Directive 2014/59/EU, art. 36(9-10)	C-83/20
Directive 2014/59/EU, art. 53(3)	C-410/20 (x2)
Directive 2014/59/EU, art. 60(2)	C-410/20 (x2)
Directive 2014/59/EU, art. 73	C-83/20
Directive 2014/59/EU, art. 74	C-83/20
Directive 2014/59/EU, art. 75	C-410/20 (x2)

Directive 2014/59/EU, art. 130	C-83/20
Commission Delegated Regulation (EU) 2015/63	C-663/20 P, C-664/20 P
Commission Delegated Regulation (EU) 2018/344	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
Commission Delegated Regulation (EU) 2018/345	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17 (x2)
EBA/Guidelines/2015/07	T-481/17, T-510/17, T-523/17, T-570/17, T-628/17
2004/258/EC, ECB Decision of 4.3.2004, art. 4(1)(c)	T-501/19 (x2)
Rules of procedure of the Court of Justice, art. 83	C-410/20
Rules of procedure of the General Court, art. 84	T-913/16 (x2)
Decree of the Italian Ministry of Economy and Finance 144/1988	T-913/16 (x5)
Decree-Law 31-A/2012 of 10.2.2012, Regime Geral das Instituições de Crédito e Sociedades Financeiras	C-83/20 (x2)
Decree-Law 114-A/2014 of 1.8.2014, Alteração ao Regime Geral das Instituições de Crédito e Sociedades Financeiras, transpondo parcialmente a Diretiva 2014/59/UE	C-83/20 (x4)

II – The case law of the EU administrative review bodies

1. Synthesis

Single Resolution Board's decision to deny a waiver from the internal minimum requirement and eligible liabilities ("iMREL") for a subsidiary of a resolution entity

Case 2/2021 – Final decision of 27 January 2022

Case 3/2021 – Final decision of 8 June 2022

Whether the joint decision on the determination of the MREL taken by the resolution college can be challenged before the Appeal Panel

Case 1/2022 – Decision on admissibility of 29 June 2022

2. Series of keywords

KEYWORDS	CASES
Appealability	AP doa 1/2022
Assessment by the SRB	AP fd 2/2021, AP fd 3/2021
Conditions for the waiver	AP fd 2/2021, AP fd 3/2021 (x2)
Consequences for pending proceedings	AP doa 1/2022
Discretion	AP fd 2/2021, AP fd 3/2021
Duty to state reasons	AP fd 2/2021, AP fd 3/2021
Implementation of SRB's MREL decision	AP doa 1/2022
National resolution authority's act implementing the SRB MREL decision	AP doa 1/2022
Nature of the joint decision on MREL	AP doa 1/2022
Nature of the joint decision taken by the resolution college	AP doa 1/2022
Nature of the SRB's decision instructing the National Resolution Authority on MREL	AP doa 1/2022
Repeal of the MREL decision	AP doa 1/2022
Resolution colleges	AP doa 1/2022 (x2)
Suitable guarantee of the parent undertaking	AP fd 2/2021, AP fd 3/2021
Waiver from the iMREL	AP fd 2/2021, AP fd 3/2021 (x2)

3. Series of legal provisions

ARTICLE	CASES
CFREU, art. 47	AP doa 1/2022
Directive 2014/59/EU, art. 45(12) REPEALED	AP fd 2/2021, AP fd 3/2021 (x5)
Directive 2014/59/EU, art. 45f	AP fd 2/2021, AP fd 3/2021 (x5)
Directive 2014/59/EU, art. 45f(3)	AP fd 2/2021, AP fd 3/2021 (x4)
Directive 2014/59/EU, art. 45f(4)	AP fd 2/2021, AP fd 3/2021 (x4)
Directive 2014/59/EU, art. 45h	AP doa 1/2022

Directive 2014/59/EU, art. 45h(1)	AP doa 1/2022
Directive 2014/59/EU, art. 45h(3)	AP doa 1/2022
Directive 2014/59/EU, art. 45h(7)	AP doa 1/2022
Directive 2014/59/EU, art. 88	AP doa 1/2022
Directive 2014/59/EU, art. 88(1)	AP doa 1/2022
Directive 2014/59/EU, Recital 98	AP doa 1/2022
Regulation (EU) 575/2013, art. 7(1)	AP fd 2/2021, AP fd 3/2021 (x2)
Regulation (EU) 806/2014, art. 5	AP doa 1/2022
Regulation (EU) 806/2014, art. 12	AP doa 1/2022
Regulation (EU) 806/2014, art. 12(1)	AP doa 1/2022
Regulation (EU) 806/2014, art. 12(5)	AP doa 1/2022
Regulation (EU) 806/2014, art. 12(10) REPEALED	AP fd 2/2021, AP fd 3/2021 (x4)
Regulation (EU) 806/2014, art. 12h	AP fd 2/2021, AP fd 3/2021 (x12)
Regulation (EU) 806/2014, art. 12h(1)	AP fd 2/2021, AP fd 3/2021 (x6)
Regulation (EU) 806/2014, art. 12h(2)	AP fd 2/2021, AP fd 3/2021 (x2)
Regulation (EU) 806/2014, Recital 91	AP doa 1/2022
Commission Delegated Regulation 2016/1075, art. 86	AP doa 1/2022
Commission Delegated Regulation 2016/1075, art. 87	AP doa 1/2022
Commission Delegated Regulation 2016/1075, art. 88	AP doa 1/2022
Commission Delegated Regulation 2016/1075, art. 89	AP doa 1/2022
Commission Delegated Regulation 2016/1075, art. 90	AP doa 1/2022
Commission Delegated Regulation 2016/1075, art. 91	AP doa 1/2022
Commission Delegated Regulation 2016/1075, art. 92	AP doa 1/2022
Commission Delegated Regulation 2016/1075, art. 93	AP doa 1/2022

III – The judgments of the national apical Courts

1. Synthesis

Bank of Italy's administrative pecuniary sanctions against the general manager of a credit institution

Corte di Cassazione, sez. II, Judgement of 8 February 2022, No 4006

Bank of Italy's administrative pecuniary sanctions against members of the management body of a credit institution

Corte di Cassazione, sez. II, Judgement of 15 February 2022, No 4923

Corte di Cassazione, sez. II, Judgement of 9 April 2022, No 12436

Bank of Italy's administrative pecuniary sanctions against members of the management body and the general manager of a credit institution

Corte di Cassazione, sez. II, Judgement of 9 April 2022, No 12435

Administrative pecuniary sanctions against the member of the administrative boby of a credit institution

Corte di Cassazione, sez. II, Judgement of 31 May 2022, No 17567

2. Series of keywords

KEYWORDS	CASES
Additional benefits	Cass. 17567/2022
Administrative sanctions	Cass. 4006/2022 (x3) // Cass. 4923/2022 // Cass. 12435/2022 (x5) // Cass. 12436/2022 (x2) // Cass. 17567/2022
Agreement on consensual termination of employment with the general manager	Cass. 17567/2022
Approval of the Head of Directorate General for Financial Supervision and Regulation	Cass. 12435/2022 // Cass. 12436/2022
Article 6 ECHR	Cass. 4923/2022 // Cass. 12435/2022
Boundaries of the Court of Cassation's review	Cass. 12435/2022 // Cass. 17567/2022
Breach of the principle of correlation	Cass. 17567/2022
Burden of proof	Cass. 4006/2022 // Cass. 12436/2022
Clause aimed at indemnifying the director from his liability	Cass. 17567/2022
Denial	Cass. 4006/2022
Duty to act in an informed manner	Cass. 4923/2022 // Cass. 12436/2022
Ex officio applicability	Cass. 12435/2022
Facts out of the control of the National Competent Authority	Cass. 4006/2022
Full knowledge of the violation	Cass. 12436/2022
Idem factum	Cass. 4006/2022
Inapplicability	Cass. 4923/2022 // Cass. 12435/2022 (x2)

Ne bis in idem	Cass. 4006/2022
No criminal nature	Cass. 4923/2022 // Cass. 12435/2022
Non-executive members of the management body	Cass. 4923/2022 // Cass. 12436/2022
Notification to the person concerned	Cass. 12435/2022 // Cass. 12436/2022
Objective and subjective elements	Cass. 4006/2022 // Cass. 12436/2022
Principle of *favor rei*	Cass. 12435/2022 (x2)
Remuneration policies and practice	Cass. 17567/2022
Right to access	Cass. 4006/2022
Right to complete and effective judicial protection	Cass. 4923/2022
Request to reopen the sanctioning proceeding	Cass. 4006/2022
Rules entered into force during the proceedings	Cass. 12435/2022
Rules entered into force during the proceedings before the Corte di Cassazione	Cass. 12435/2022
Time limit of the procedure	Cass. 12435/2022 // Cass. 12436/2022
Time reasonably necessary to ascertain the violation	Cass. 12435/2022 // Cass. 12436/2022

3. Series of legal provisions

ARTICLE	CASES
CFREU, art. 47	Cass. 4923/2022
ECHR, art. 6	Cass. 4923/2022 // Cass. 12435/2022
Italian Constitution, art. 39	Cass. 17567/2022
Italian civil code, art. 2381	Cass. 4923/2022 // Cass. 12436/2022
Italian civil code, art. 2392	Cass. 4923/2022 // Cass. 12436/2022
Italian civil code, art. 2697	Cass. 4006/2022 // Cass. 4923/2022
Italian code of civil procedure, art. 360	Cass. 12435/2022
Law 689/1981, art. 14	Cass. 12435/2022 // Cass. 12436/2022 // Cass. 17567/2022
Law 689/1981, art. 3	Cass. 4006/2022 // Cass. 12436/2022
Law 241/1990, art. 25	Cass. 4006/2022
Legislative Decree 385/1993, art. 144	Cass. 4006/2022 // Cass. 4923/2022 // Cass. 12435/2022
Legislative Decree 385/1993, art. 145	Cass. 4923/2022
Legislative Decree 385/1993, art. 53(1)(d)	Cass. 17567/2022
Legislative Decree 385/1993, art. 67(1)	Cass. 4006/2022
Legislative Decree 72/2015, art. 2	Cass. 4923/2022 // Cass. 12435/2022 // Cass. 12436/2022

QUADERNI PUBBLICATI

n. 1 – Francesco Capriglione, *Evoluzione tecnica e disciplina giuridica dell'intermediazione finanziaria,* ottobre 1985 (esaurito).

n. 2 – Francesco Carbonetti, *Moneta,* dicembre 1985.

n. 3 – Pietro De Vecchis, *L'istituto di emissione,* febbraio 1986 (esaurito).

n. 4 – Giuseppe Carriero, *Governo del credito e Regioni a statuto speciale: il quadro istituzionale,* aprile 1986.

n. 5 – Giorgio Oppo, *Una svolta dei titoli di massa (il progetto Monte Titoli),* aprile 1986.

n. 6 – Luigi Desiderio, *Le norme di recepimento della Direttiva comunitaria n. 780/77 in materia creditizia,* maggio 1986 (esaurito).

n. 7 – Giorgio Sangiorgio – Francesco Capriglione, *La legge bancaria: evoluzione normativa e orientamenti esegetici,* giugno 1986.

n. 8 – Vincenzo Mezzacapo, *L'attività bancaria nell'ambito dei movimenti di capitali nella CEE,* giugno 1986 (esaurito).

n. 9 – Francesco Capriglione, *Le gestioni bancarie di patrimoni mobiliari,* luglio 1986.

n. 10 – Francesco Carbonetti, *I cinquant'anni della legge bancaria,* settembre 1986.

n. 11 – *La legge bancaria,* ottobre 1986.

n. 12 – Carmine Lamanda, *L'evoluzione della disciplina del controllo sul sistema creditizio dalla legge bancaria ad oggi,* dicembre 1986 (esaurito).

n. 13 – Giovanni Imperatrice, *L'accertamento dell'illecito amministrativo nel diritto valutario e nel diritto tributario,* marzo 1987.

n. 14 – Giorgio Sangiorgio, *Profilo istituzionale della disciplina pubblicistica del credito,* maggio 1987.

n. 15 – Francesco Capriglione, (a cura di) *La disciplina comunitaria del credito al consumo,* luglio 1987.

n. 16 – Carlo Taglienti, *Il credito documentario: nozione, fondamento, problematica,* settembre 1987.

n. 17 – Pietro De Vecchis, *Aspetti legali delle crisi bancarie in Italia,* gennaio 1988.

n. 18 – Vincenzo Mezzacapo, *Il mercato secondario organizzato dei titoli emessi o garantiti dallo Stato,* agosto 1988.

n. 19 – Francesco Carbonetti, *Il controllo della Banca d'Italia sulle emissioni di titoli atipici,* ottobre 1988.

n. 20 – Francesco Capriglione, *Le polizze di credito commerciale,* dicembre 1988.

n. 21 – Francesco Capriglione, *La responsabilità penale del banchiere: evoluzione giurisprudenziale e prospettive di riforma,* dicembre 1989 (esaurito).

n. 22 – Marcello Condemi, *Le sanzioni amministrative bancarie e la giurisprudenza della Corte d'Appello di Roma,* aprile 1991.

n. 23 – Marco Mancini – Marino Perassi, *I trasferimenti elettronici di fondi,* maggio 1991.

n. 24 – Enrico Galanti, *La crisi degli enti creditizi nella giurisprudenza: la liquidazione coatta amministrativa*, giugno 1991.

n. 25 – Francesco Capriglione, *Note introduttive alla disciplina delle s.i.m. e dell'organizzazione dei mercati finanziari,* giugno 1991.

n. 26 – AA.VV., *La ristrutturazione della banca pubblica e la disciplina del gruppo creditizio,* gennaio 1992.

n. 27 – Giorgio Sangiorgio, *Le Autorità creditizie e i loro poteri,* marzo 1992.

n. 28 – Francesco Capriglione, *Il recepimento della seconda direttiva Cee in materia bancaria. Prime riflessioni,* febbraio 1993.

n. 29 – *Il Sistema dei pagamenti. Atti del Convegno giuridico* (Perugia S.A.Di.Ba., 23-24 ottobre 1992), settembre 1993.

n. 30 – Olina Capolino, *L'amministrazione straordinaria delle banche nella giurisprudenza,* ottobre 1993.

n. 31 – P. Ferro-Luzzi – P. G. Marchetti, *Riflessioni sul gruppo creditizio,* dicembre 1993 (esaurito).

n. 32 – *Testo Unico delle leggi in materia bancaria e creditizia,* marzo 1994.

n. 33 – *Testo Unico delle leggi in materia bancaria e creditizia. The 1993 Banking Law,* marzo 1994.

n. 34 – Giuseppe Carriero, *Struttura ed obiettivi della legge sui fondi immobiliari chiusi,* novembre 1994.

n. 35 – Lucio Cerenza, *Profilo giuridico del sistema dei pagamenti in Italia,* febbraio 1995.

n. 36 – Giovanni Castaldi, *Il riassetto della disciplina bancaria: principali aspetti innovativi,* marzo 1995.

n. 37 – Vincenzo Pontolillo, *L'evoluzione della disciplina dell'attività di emissione di valori mobiliari,* giugno 1995.

n. 38 – O. Capolino – G. Carriero – P. De Vecchis – M. Perassi, *Contributi allo studio del Testo Unico delle leggi in materia bancaria e creditizia,* dicembre 1995.

n. 39 – Francesco Capriglione, *Cooperazione di credito e Testo Unico bancario,* dicembre 1995 (esaurito).

n. 40 – Marino Perassi, *L'attività delle banche in "securities" e la disciplina dei contratti-derivati in Giappone,* aprile 1996.

n. 41 – Enrico Galanti, *Norme delle autorità indipendenti e regolamento del mercato: alcune riflessioni,* novembre 1996.

n. 42 – M. Perassi – R. D'Ambrosio – G. Carriero – O. Capolino – M. Condemi, *Studi in materia bancaria e finanziaria,* novembre 1996.

n. 43 – Convegno *Per un diritto della concorrenza* (Perugia, giugno 1996), dicembre 1996.

n. 44 – *Crisi d'impresa, procedure concorsuali e ruolo delle banche,* marzo 1997.

n. 45 – Donatella La Licata, *La cessione di rapporti giuridici "individuabili in blocco" nell'art. 58 del T.U. bancario,* aprile 1997.

n. 46 – Paolo Ciocca – Antonella Magliocco – Matilde Carla Panzeri, *Il trattamento fiscale dei rischi sui crediti,* aprile 1997.

n. 47 – P. De Vecchis – G.L. Carriero – O. Capolino, M. Mancini, R. D'Ambrosio, *Studi in materia bancaria e finanziaria 1996,* settembre 1997.

n. 48 – Giuseppe Carriero, *Il credito al consumo,* ottobre 1998 (esaurito).

n. 49 – *Fondamento, implicazioni e limiti dell'intervento regolamentare nei rapporti tra intermediari finanziari e clientela*, marzo 1999.

n. 50 – A. Magliocco – D. Pitaro – G. Ricotti – A. Sanelli, *Tassazione del risparmio gestito e integrazione finanziaria europea*, settembre 1999.

n. 51 – Enrico Galanti, *Garanzia non possessoria e controllo della crisi di impresa: la* floating charge *e l'*administrative receivership*,* gennaio 2000.

n. 52 – *Bankruptcy Legislation in Belgium, Italy and the Netherlands* (Brussels, 7 July 2000), giugno 2001.

n. 53 – Vincenzo Troiano, *Gli Istituti di moneta elettronica,* luglio 2001.

n. 54 – Stefano Cappiello, *Prospettive di riforma del diritto di recesso dalle società di capitali: fondamento e limiti dell'autonomia statutaria,* luglio 2001.

n. 55 – Bruna Szego, *Il* venture capital *come strumento per lo sviluppo delle piccole e medie imprese: un'analisi di adeguatezza dell'ordinamento italiano,* giugno 2002.

n. 56 – AA.VV., *Diritto Societario e Competitività in Italia e in Germania*, luglio 2003.

n. 57 – Gianmaria Marano, *I patrimoni destinati in una prospettiva di analisi giuseconomica*, giugno 2004.

n. 58 – Enrico Galanti e Mario Marangoni, *La disciplina italiana dei* Covered Bond, giugno 2007.

n. 59 – Marco Mancini, Vincenza Profeta e Nicola De Giorgi, *La Centrale d'Allarme Interbancaria nella disciplina sanzionatoria dell'assegno*, settembre 2007 (esaurito).

n. 60 – Marcello Condemi e Francesco De Pasquale, *Lineamenti della disciplina internazionale di prevenzione e contrasto del riciclaggio e del finanziamento del terrorismo*, febbraio 2008.

n. 61 – Bruna Szego, *Le impugnazioni in Italia: perché le riforme non hanno funzionato?*, luglio 2008.

n. 62 – Renzo Costi e Francesco Vella, *Banche, governo societario e funzione di vigilanza*, settembre 2008.

n. 63 – Marco Mancini e Marino Perassi, *Il nuovo quadro normativo comunitario dei servizi di pagamento. Prime riflessioni*, dicembre 2008.

n. 64 – Enrico Galanti, *Discrezionalità delle autorità indipendenti e controllo giudiziale*, giugno 2009.

n. 65 – David Pitaro, *Le disposizioni italiane di contrasto all'elusione fiscale internazionale*, luglio 2009.

n. 66 – Cristina Giorgiantonio, *Le riforme del processo civile italiano tra* adversarial system *e* case management, settembre 2009.

n.66en – Cristina Giorgiantonio, *Civil procedure reforms in Italy: concentration principle, adversarial system or case management?*, September 2009.

n. 67 – Olina Capolino e Raffaele D'Ambrosio, *La tutela penale dell'attività di Vigilanza*, ottobre 2009.

n. 68 – Giuseppe Boccuzzi, *I sistemi alternativi di risoluzione delle controversie nel settore bancario e finanziario: un'analisi comparata*, settembre 2010.

n. 69 – AA.VV., *Insolvency and Cross-border Groups. UNCITRAL Recommendations for a European Perspective?*, febbraio 2011.

n. 70 – Bruno De Carolis, *L'Arbitro bancario finanziario come strumento di tutela della trasparenza*, giugno 2011.

n. 71 – Giuseppe Boccuzzi, *Towards a new framework for banking crisis management. The international debate and the italian model*, ottobre 2011 (esaurito).

n. 72 – *Legislazione bancaria, finanziaria e assicurativa: la storia, il presente, il futuro*. Atti della conferenza tenutasi a Roma il 14 ottobre 2011, ottobre 2012.

n.72app – Enrico Galanti, *Cronologia della crisi 2007-2012,* maggio 2013.

n. 73 – Marco Mancini, *Dalla vigilanza nazionale armonizzata alla* Banking Union*,* settembre 2013.

n. 74 – Raffaele D'Ambrosio, *Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings*, dicembre 2013.

n. 75 – *Dal Testo unico bancario all'Unione bancaria: tecniche normative e allocazione di poteri.* Atti del convegno tenutosi a Roma il 16 settembre 2013, marzo 2014.

n. 76 – Giuseppe Napoletano, *Legal aspects of macroprudential policy in the United States and in the European Union,* giugno 2014.

n. 77 – Nicola De Giorgi e Maria Iride Vangelisti, *La funzione di sorveglianza sul sistema dei pagamenti in Italia – Il provvedimento della Banca d'Italia del 18.9.2012 sui sistemi di pagamento al dettaglio,* settembre 2014.

n. 78 – Raffaele D'Ambrosio, *The ECB and NCA liability within the Single Supervisory Mechanism,* gennaio 2015.

n. 79 – Marco Lamandini – David Ramos Muñoz – Javier Solana Álvarez, *Depicting the limits to the SSM's supervisory powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection,* novembre 2015.

n. 80 – Luigi Donato, *La riforma delle stazioni appaltanti. Ricerca della qualità e disciplina europea,* febbraio 2016.

n. 81 – Raffaele D'Ambrosio, *Scritti sull'Unione Bancaria,* luglio 2016.

n. 82 – *Gustavo Bonelli, Un giurista in Banca d'Italia,* dicembre 2017.

n. 83 – *Qualità ed efficienza nel nuovo codice dei contratti pubblici. Prospettive e questioni aperte,* aprile 2018.

n. 84 – *Judicial review in the Banking Union and in the EU financial architecture. Conference jointly organized by Banca d'Italia and the European Banking Institute,* giugno 2018.

n. 85 – *The role of the CJEU in shaping the Banking Union: notes on Tercas (T-98/16) and Fininvest (C-219/17),* maggio 2019.

n. 86 – *A 20 anni dal TUF (1998-2018): verso la disciplina della Capital Market Union?,* agosto 2019.

n. 87 – Fabrizio Maimeri e Marco Mancini, *Le nuove frontiere dei servizi bancari e di pagamento fra PSD2, criptovalute e rivoluzione digitale,* settembre 2019.

n. 88 – Raffaele D'Ambrosio, *Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)*, Aprile 2020.

n. 89 – Luigi Donato, *Gli appalti pubblici tra istanze di semplificazione e normativa anticorruzione. Alla ricerca di un equilibrio tra legalità ed efficienza*, Giugno 2020.

n. 90 – Raffaele D'Ambrosio e Stefano Montemaggi, *Private and public enforcement of EU investor protection regulation*, Ottobre 2020.

n. 91 – Raffaele D'Ambrosio e Donato Messineo, *The German Federal Constitutional Court and the Banking Union*, Marzo 2021.