BANCA D'ITALIA

EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

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

Jul-Dec 2022

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

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INTRODUCTION

1. In addition to the usual CJEU's rulings delivered in the second half of 2022, this issue of Pandectae[*] expands, when compared to the previous one, the spectrum of national court judgments analysed. Indeed, besides the summaries of the judgments of the Italian courts, this issue includes, thanks to the precious contributions of the Banco de España's Legal Department[**] and of the University of Salzburg[***], the summaries of the Spanish courts' rulings on the liability of the Banco de España in the BPE affair and those of the 2022 Austrian courts' rulings on several Banking Union topics as well as a summary and a short note on the judgment of the German Federal Constitutional Court on the amendments to the ESM treaty and the introduction of the common backstop for resolution. This issue also reports on two judgments of the European Court of Human Rights on the protection of fundamental rights in the areas of banking supervision and crisis management as well as a decision of the Board of Appeal of the ESAs.

2. Although the summaries are listed in chronological order, the ECJ's ruling on the limits to the admissibility of the central bank's liability for resolution procedures of banks in light of the prohibition of monetary financing and the principle of independence (Case C-45/21) stands out first.

The Court of Justice, requested by the Slovenian Constitutional Court to give a preliminary ruling on the interpretation of Articles 123 and 130 TFEU and Articles 7 and 21 of the Protocol on the ESCB and the ECB, held that the prohibition on monetary financing does not preclude national legislation that establishes the national central bank's liability, from its own funds, for its defective exercise of a function other than those of the ESCB. Nonetheless, when the function conferred upon the national central bank is characterized by a high degree of complexity and urgency, as it happens in the management of credit institutions' crises, only the same central bank's serious breach of the duty of due care may trigger its liability. Moreover, the Court maintained that national legislation cannot require the national central bank to meet compensation claims by levying on its general reserves in an amount likely to affect its ability to carry out its ESCB tasks effectively nor by taking out loans from other public authorities, because it would violate the principle of independence of the national central banks of the ESCB.

In addition to the summary and the usual explanatory note of the judgment, a comment on the Advocate General's opinion is included, as the Court's conclusions on the prohibition on monetary financing are quite different from those of the former as regards the liability regime stemming from the violation of the duty of due care by the Slovenian central bank in the implementation of reorganisation measures.

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1 The summaries of the judgments were drafted by the Editors with the support of Elisabetta Coronel Vera, Ignazio Corte, Matteo Passeri and Stefano Rosato. The comments on the main rulings are the same as those already published in the relevant issues of Nomos Basileus.

2 Contribution by Lucía Piazza Dobarganes and Darío Gómez de Tojeiro.

3 Contribution by Vanessa Aichstill and Paul Weismann.

Worth mentioning is also the ruling of the ECJ on the Case C-326/21 P concerning the scope of the ECB's powers to ensure compliance with the governance requirements under Article 74(1) of Directive 2013/36/EU and the judicial review of the measures adopted by it.

Ruling on the Case C-202/21 P, the ECJ decided that the change of status within the meaning of Article 12(2) of Delegated Regulation 2015/63 for which reimbursement of ex-ante contributions is excluded encompasses any kind of change in the legal or factual situation of an institution that may have an effect on the application of that provision including the loss of the banking licence. In the Court's view, the method of calculating prorated contributions provided for in Article 12(1) is to be interpreted strictly and cannot be extended to cases under Article 12(2) of said Regulation.

3. Among the General Court's judgments of which this issue of Pandectae reports the summaries and comments, the ruling on the case T-502/19 is first of all worth mentioning. Upon application of one of the bank's minority shareholders, the General Court annulled the ECB's decision placing Banca Carige S.p.A. under temporary administration. In the Court's view: (i) said shareholder in Banca Carige S.p.A. had a right to bring action against the ECB's decision to place the bank under temporary administration, as such decision directly and individually affected her and she acted for her own interest and not for that of the bank; (ii) the ECB's decision was unlawful, because the ECB erroneously relied on Article 70 of Italian Consolidated Law on Banking (TUB) that did not allow for the adoption of such measure for the reason stated by the ECB, namely the significant deterioration of the bank's situation.

In a different case on Banca Carige (T-552/19 OP) the General Court annulled the ECB's decision dismissing the requests by Malacalza Investimenti s.r.l., a shareholder of the credit institution, to have access to the documents relating to the its temporary administration. The Court found that the ECB failed to provide a sufficient statement of reasons with regard to the application of the exceptions to access envisaged in Article 4 of the ECB's Decision of 4 March 2004, since the contested decision only mentioned some detrimental consequences potentially deriving from a disclosure of the documents, but did not explain the actuality and concreteness of those prejudicial effects in the light of all the circumstances of the case.

In ruling the case T-280/18, the General Court shed light on the right to challenge SRB's 'non resolution' decisions and the substantive review of the FOLTF assessment as well as on the allocation of responsibilities between ECB and SRB. The Court dismissed the action brought by ABLV Bank against the decisions of the SRB not to put ABLV Bank and its subsidiary, ABLV Luxembourg, under resolution. The judgment's most relevant findings concern: (i) the SRB's 'non resolution' decisions appealability; (ii) the allocation of responsibilities between the ECB and SRB; (iii) the substantive review of the FOLTF assessment; (iv) the protection of the right to be heard in the phases of the resolution procedure.

Four further judgments of the General Court concerning PNB Banka are also included in this issue.

Cases T-330/19 and T-230/20 stand out first. In these cases, the General Court upheld the validity of the decisions of the ECB to oppose the acquisition by PNB Banka of a qualifying holding in another Latvian credit institution and to withdraw the PNB Banka's authorization. In particular, the Court confirmed that the ECB may intervene in the procedure under Article 15 of the SSM Regulation before the NCA sends a proposal and even from the beginning of the procedure. As for the adoption of the withdrawal decision, the Court clarified that the ECB may supplement the grounds considered in the NCA's proposal under Article 14(5) of the SSM Regulation and that, in a situation where the SRB is the competent resolution authority in respect of a credit institution, the ECB may withdraw the authorization following consultations with the SRB, not being the NRAs competent anymore.

In the third case (T-301/19), the General Court upheld the validity of the decision of the ECB to classify a LSI as a significant entity subject to its direct prudential supervision. The Court confirmed that a decision adopted pursuant to Article 6(5)(b) of Regulation No 1024/2013 shall be considered as a decision to classify a LSI as SI. In addition, the Court provided some clarifications on the purpose of such decision, its content and certain procedural requirements. In particular, the Court ruled that the report which, according to Article 68(3) of Regulation No 468/2014, accompanied the NCA's request was not an essential procedural requirement within the meaning of Article 263 TFEU and that the ECB was not required to specify how prudential requirements would change as a consequence of the take-over of direct supervision or the period of time during which the ECB would be responsible for that supervision.

In the fourth case (T-275/19), the General Court upheld the validity of the decision of the ECB to conduct an inspection at the premises of a less significant credit institution. The Court confirmed that the relevant regulatory framework confers on the ECB the power to conduct on-site inspections also vis-à-vis LSIs. These types of decisions, according to the EU Judges, are to be considered binding legal acts capable of bringing about distinct changes in the legal position of the person notified with the decision and therefore they are amenable to judicial review. In addition, the Court stated that the right to be heard could not be invoked in case of the adoption by the ECB of investigatory measures, such as the adoption of a decision to carry out an onsite inspection.

Among the many aspects addressed by the GC's ruling on the Case T-698/16, concerning the ECB's decision to withdraw a credit institution's authorisation, those relating to the right to be heard are particularly worth mentioning. In this respect the GC stated that in the relevant composite procedure the fact that the applicant was not heard by the NCA before the draft decision was sent to the ECB coannot render the contested decision unlawful. Moreover, in the Court view, an infringement of the right to be heard has no effect on the validity of said decision where it is not established that the outcome of the procedure might have been different without the alleged irregularity.

4. In its ruling No 1/2022 of 21 July 2022, the Joint Board of Appeal of the European Supervisory Authorities ruled on the EBA's decision not to open an investigation into the alleged breach or non-application of EU law on payment services by the competent national authority (NCA) of a Member State. The ruling of the ESAs' Board of Appeal did not directly concern Banking Union but rather payment services topics. Nevertheless, it sheds light on the interpretation of the EBA's general power on the breach of Union law, whose addressees include not only the NCAs and NRAs but also the ECB and the SRB.

Although in the Board of Appeal's view the complaint filed by a natural or legal person to the EBA was admissible under the applicable procedural rules, due to the complainant's clear and understandable factual interest in the EBA investigation, this factual interest did not translate into a right for the appellant to challenge before the Board of Appeal the EBA's decision not to open an investigation, as the contested decision was not adopted on the basis of Article 17 of the EBA Regulation.

5. On 30 August 2022, the European Court of Human Rights ruled on the case *Korporativna Targovska Banka AD (KTB) v Bulgaria*, pertaining to the withdrawal of the claimant bank's licence by the Bulgarian National Bank and the resulting order of winding-up. KTB challenged before the European Court of Human Rights a violation of the Convention by the Bulgarian law due to the lack of a clear and practical possibility of seeking a judicial review of the withdrawal of the bank's licence and, in a broader sense, of any possibility of contesting it. In the judgment, the Fourth Section of the Court upheld the applicant's complaints rejecting the Bulgarian Government objections.

On 1 December 2022, the European Court of Human Rights declared inadmissible, for manifest groundlessness, the appeal filed by Mr Berlusconi and Fininvest spa, who complained about an alleged violation of Article 6 of the European Convention on Human Rights. The claimants argued that – given the allocation of competences among courts stated by the ECJ in the judgment of 19 December 2018 – no judicial review over an alleged violation of res iudicata in the internal stage of a common procedure was provided. The Court, referring to its settled case-law, maintained that the EU law grants a protection to human rights equivalent to that provided by the Convention and that no "manifest deficiency" was to be found in the case at hand.

6. The section of this issue of Pandectae devoted to national judgments includes the rulings of Austrian, German, Italian and Spanish national apical courts.

The rulings of Austrian supreme courts cover a wide spectrum of cases, ranging from liability issues in the exercise of supervisory tasks to deposit protection schemes and the collection of contributions to the Single Resolution Fund. Among the several judgments, worthy of particular attention are those of the Supreme Court of Justice (*Oberster Gerichtshof* – OGH) on the liability of the Republic of Austria concerning the supervisory activities of the FMA and the Austrian National Bank.

The Austrian Supreme Court of Justice excluded the liability of the Republic of Austria for pecuniary losses of damaged bank customers on grounds of deficient banking supervision by the Financial Market Authority (*Finanzmarktaufsichtsbehörde* – FMA), because pursuant to § 3(1) (2nd sentence) of the Financial Market Authority Act (*Finanzmarktaufsichtsbehördengesetz* – FMABG) such damages do not fall within the protective purpose (*Schutzzweck*) of banking supervisory law. The legal exclusion of liability for pecuniary losses of damaged bank customers on grounds of deficient banking supervision pursuant to § 3(1) (2nd sentence) of the FMABG also applies, in the Court's view, to losses which are deduced from the activities of the Austrian National Bank within the framework of banking supervision, because such activities, from a legal perspective, are to be attributed to the FMA.

In its judgement of 13 October 2022 on the national acts approving the amendments to the ESM Treaty and to the Intergovernmental Agreement on the Transfer and Pooling of Contributions to the Single Resolution Fund, the German Federal Constitutional Court *(Bundesverfassungsgericht – BverfG)* returned to a stricter assessment of the procedural requirements for the *Verfassungsbeschwerde* than it had performed in other occasions. The Second Senate of the *BVerfG* dismissed as inadmissible a constitutional complaint raised by six members of the German Bundestag against the national acts of approval of the Agreement of 27 January 2021 amending the Treaty on the European Stability Mechanism ("ESM") and the Intergovernmental Agreement ("IGA") on the Transfer and Pooling of Contributions to the Single Resolution Fund ("SRF").

As to the rulings of the Italian courts, this issue of Pandectae includes first and foremost, like the previous one, the rulings of the Court of Cassation (Corte di cassazione) on the administrative sanctions applied by the Bank of Italy pursuant to the relevant provisions of the Consolidated Banking Act (Articles 144 and 145 of Legislative Decree No 385/1993). These judgments concern, as usual: the non-criminal nature of the sanctions applied under the previous regulatory framework to natural persons and the consequences thereof in terms of the application of the principle of lex mitior and the presumption of fault; the time limits of the relevant administrative procedure; the scope of the liability of the members of the board of statutory auditors and non-executive members of the management board of credit institutions.

Worthy of special mention in this issue, however, is the Italian Superior Administrative Court (Consiglio di Stato) first judgment on the removal of the members of the management board af a credit institution. The Consiglio di Stato conclusively rejected the appeals lodged by former members of the management body of an Italian less significant credit institution against the first – and so far only – collective removal decision issued by the Banca d'Italia. In its decision, the administrative court confirmed a number of important principles, already upheld by the court of first instance and the civil courts, such as the non-sanctioning nature of the removal of banks' managers, as an early intervention measure, and

the possibility for the authority to adopt the decision on an urgent basis, without the prior hearing of the interested parties.

As for the Spanish apical courts decisions, noteworthy in this issue of Pandectae are first of all the judgments in which the Spanish Audiencia Nacional excluded the liability of the Banco de España in relation to the supervision of the BPE both because the latter had to be considered imputable to the ECB following the entry into force of the SSM regulation, and because Banco de España could not be considered as the guarantor of the proper functioning of individual credit institutions, but of the system as a whole.

Also worthy of attention are the opinions in which the Spanish Consejo de Estado – which in Spain has only advisory and not also judicial functions – excluded the liability of the Banco de España (i) for the supervision of BPE before and after the SSM, (ii) for the provision of ELA, and (iii) for the resolution of BPE as the implementation of the relevant decision was imputable to the FROB, without the appointment by the Banco de Espana of members of the FROB itself being relevant for this purpose.

The case-law of the CJEU

ABLV Bank AS v SRB

1. Keywords and summary

ABLV Bank AS v SRB

General Court – Case T-280/18 – Judgment of 6 July 2022 – ECLI:EU:T:2022:429

Right to challenge Single Resolution Board's decision not to adopt a resolution scheme

SRB's decision whether or not to adopt a resolution scheme – Action for annulment – Admissibility – Acts open to challenge

In principle, only those measures that definitively determine the position of an institution upon the conclusion of an administrative procedure, and that are intended to have legal effects capable of affecting the interests of the applicant, constitute acts open to challenge, and not intermediate measures whose purpose is to prepare for the final decision, which do not have those effects.

As the Court of Justice has already clarified (judgment of 6 May 2021, C-551/19 P and C-552/19 P, *ABLV Bank and Others* v *ECB*), although the ECB's failing or likely to fail assessment does not constitute an act open to challenge, the subsequent adoption by the SRB of a resolution scheme, or the decision not to adopt such a scheme, may be the subject of proceedings before the Courts of the European Union, in the context of which that assessment could be subject to judicial review. Indeed, as the SRB's decision whether or not to adopt a resolution scheme definitively establishes the position of the SRB at the end of the complex administrative procedure provided for in Article 18 of Regulation No 806/2014 and triggered by the FOLTF assessment, it must be considered as an act open to challenge.

SRB's Decision not to adopt a resolution scheme – Acts open to challenge – Admissibility of the action for annulment – Effective judicial protection in complex procedures

A decision not to adopt a resolution scheme is no less an act open to challenge than a decision to adopt such a scheme. Indeed, the decision to adopt a resolution action entails the imposition of the resolution tools or even the use of the Single Resolution Fund to support the resolution action. Accordingly, the decision not to adopt such tools, some of which may enable the credit institution concerned to continue part of its activities, produces binding legal effects such as to affect the interests of the same credit institution.

Moreover, the fact that SRB's decision not to adopt a resolution scheme may be challenged in court also allows the applicant to contest the lawfulness of the ECB's FOLTF assessment, ensuring the full observance of the right to effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights.

SRB's Decision not to adopt a resolution scheme – Action for annulment brought by shareholders of the credit institution – Lack of direct concern – Inadmissibility

The condition that a natural or legal person, who is not the addressee of the decision against which the action is brought, must be directly concerned by that decision, requires two cumulative criteria to be met. First, the contested measure must directly affect its legal situation; 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.

A decision not to adopt a resolution scheme does not directly affect the legal situation of shareholders, since the right of those shareholders to receive dividends and to participate in the management of the credit institution has not been affected by that decision.

It follows that shareholders have no standing in bringing an action for annulment against the SRB's decision not to adopt a resolution scheme.

SRB's Decision not to adopt a resolution scheme – Action for annulment brought by the credit institution concerned – Direct concern – Admissibility

If the ECB considers, in its assessment, that the entity concerned is failing or likely to fail, that results in the initiation of the procedure provided for in Article 18 of the SRM Regulation. As the subsequent SRB's decision, which may establish not to place the entity concerned under resolution, is based on the FOLTF declaration, such a decision directly affects the entity's legal situation. Moreover, the SRB's decision not imposing resolution tools, some of which may allow the applicant to continue to carry on part of its activities, directly affects the applicant's legal situation.

Furthermore, the SRB's decision not to adopt a resolution scheme leaves no discretion to the addressees entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules. Indeed, the NRA concerned has no discretion in relation to the SRB's decision not to adopt any resolution tool with regard to a bank, since that decision does not require the application of any rule or intermediate measure in order to produce its binding legal effects.

It follows that the entity concerned has standing to bring proceedings against the SRB's decision not to adopt a resolution scheme.

SRB's Decision not to adopt a resolution scheme – Action for annulment brought by the credit institution concerned – Interest in bringing proceedings – Admissibility

An action for annulment brought by a natural or legal person is admissible only as far as that person has an interest in having the contested act annulled. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences, and the action may therefore, through its outcome, procure an advantage to the party that brought it.

As the FOLTF assessment is an essential prerequisite for triggering the resolution procedure and for the decision as to whether or not to adopt a resolution scheme, the action brought by the credit institution concerned must be considered admissible, having the applicant a legitimate interest in not being subject to an assessment that makes it clear that it is failing or is likely to fail.

Decision not to adopt a resolution scheme – Conditions for resolution – Failing or likely to fail assessment – ECB's competence and powers – SRB's competence and powers

The ECB's FOLTF declaration is not a binding act and does not put the SRB in a position where its powers are circumscribed.

However, in ascertaining whether an entity is failing or likely to fail, the ECB has a primary – albeit not exclusive – role. While the SRB may also carry out such an assessment, it may do so only after informing the ECB of its intention to do so and only if the ECB, within three calendar days of receipt of that information, does not make such an assessment. The ECB is therefore recognised as having primary power to carry out such an assessment, based on its expertise as supervisory authority, since, having access in that capacity to all supervisory information regarding the entity concerned, it is best placed to determine whether the conditions of the FOLTF assessment are satisfied. Consequently, the SRB, while not bound by the ECB's examination and view, may base its decision on the FOLTF declaration.

Failing or likely to fail assessment – Degree of judicial review

The review by the EU judicature of the complex economic assessments made by the EU institutions, bodies, offices, and agencies is limited in that it is necessarily confined to verifying whether the rules on procedure and on the

statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. When conducting such a review, the EU Courts must not substitute their own economic assessment for that of the competent EU authority. Such principles also apply to the review of the FOLTF assessment.

Right to be heard – Resolution procedure – Phases of complex administrative procedures

Under Article 41(2)(a) of the Charter of Fundamental Rights, the right to good administration includes, inter alia, the right of every person to be heard before any individual measure that affects him adversely is taken. The right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely, pursuing a dual objective. First, it enables the case to be examined and the facts to be established in as precise and correct a manner as possible, and, second, it ensures that the person concerned is in fact protected. Such a right applies in all proceedings which are liable to culminate in an act adversely affecting a person, even where the applicable legislation does not expressly provide for such a procedural requirement.

Even though the SRM Regulation provides for a speedy decision-making process, which often takes place in emergency circumstances, the need for speed in that procedure must be reconciled with the right to be heard. Having regard to the nature of that complex administrative procedure conducted by the ECB and the SRB jointly and successively, neither Article 41 of the Charter nor the provisions of the SRM Regulation require that the credit institution concerned by the decision to adopt or not a resolution scheme be heard at each stage of the procedure by each of those two bodies separately.

If the ECB's assessment is carried out after hearing the credit institution concerned and after examining its arguments, the SRB, to which the ECB's assessment is subsequently sent, is fully aware of those arguments when it adopts its decision. In this context, the applicant's right to be heard is not infringed in respect of the FOLTF assessment.

Right to good administration – Duty to state reasons

Under Article 41(2)(c) of the Charter of Fundamental Rights, the right to good administration includes, inter alia, the obligation of the administration to give reasons for its decisions. The statement of reasons required must be appropriate to the act adopted and must disclose in a clear and unequivocal fashion the reasoning followed by the institution such as to enable the persons concerned to ascertain the reasons for the measure and to enable

the Courts of the European Union to exercise their power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the statement of reasons must be assessed not only with regard to its wording, but also to its context and to all the legal rules governing the matter in question.

It follows that a statement of reasons must be regarded as sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision.

2. Right to challenge SRB's 'non resolution' decisions and the substantive review of the FOLTF assessment. The allocation of responsibilities between ECB and SRB

by Emanuele Abbate

The background of the case can be summed up as follows. The applicant and ABLV Luxembourg were categorised as 'significant institutions' and, as such, were subject to the ECB's supervision under the SSM regulation. In 2018, the ABLV Bank and its subsidiary were declared by the ECB failing or likely-to-fail within the meaning of Article 18(1) of the SRM regulation. Thereafter, the SRB endorsed the ECB's assessment that those credit institutions were failing or were likely-to-fail and that there was no reasonable prospect that other measures would prevent their failure. However, the SRB concluded that the resolution was not necessary in the public interest within the meaning of point (c) of the first subparagraph of Article 18 (1) and Article 18 (5) of the SRM regulation. The decisions of the SRB were addressed to the national resolution authorities (NRAs). Subsequently, four annulment actions were brought against the ECB's FOLTF assessments and the SRB's decisions, respectively. The Court of Justice declared actions brought by the banks' shareholders inadmissible as the latter were not directly concerned by the SRB's decisions (see *Bernis v SRB*, T-282/18, appealed *Bernis v SRB*, C-364/20 P).[1] Actions brought against the ECB's FOLTF assessments were, too, inadmissible as the Court of Justice ruled that the FOLTF assessment was not an act open to challenge and could only be reviewed in the context of a challenge brought against the SRB's decision (see *ABLV v ECB*, T-281/18; *Bernis v ECB*, T-283/18, appealed *ABLV v ECB*, C-551/19 P and C-552/19 P[2]). Finally, with this judgment the General Court confirmed and clarified certain points raised in the previous rulings, but also addressed some new issues.

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1 Judgment 24 February 2021. *Bernis and others vs SRB*, C-364/20, ECLI:EU:C:2022:115. See no. 14 of Nomos Basileus.

2 Judgment 6 May 2021, *ABLV Bank vs ECB,* C-551/19 P and C-551/19 P, ECLI:EU:C:2021:369. See no. 5 of Nomos Basileus.

Right to challenge SRB's 'non resolution' decisions

According to SRB, the contested decisions in the case T-280/18 would not be acts that are open to challenge, since they are not intended to produce binding legal effects such as to affect the interests of the applicant by bringing about a distinct change in its legal position. However, the GC ruled that the contested decisions definitively established the position of the SRB at the end of the complex administrative procedure provided for in Article 18 of the SRM Regulation and triggered by the FOLTF assessment initially carried out by the ECB. That procedure is intended to produce binding legal effects vis-à-vis the applicant in that it will not be the subject of a resolution scheme. Following the findings of the Court of Justice in the joined cases *ABLV v ECB* (C-551/19 P and C-552/19 P), according to which the FOLTF assessment carried out by the ECB does not constitute a reviewable act, while the subsequent decision of the SRB does (see also below), the CG ruled that this reasoning applies irrespective of whether the SRB decides to put an entity under resolution (resolution decision) or not (non-resolution decision). Indeed, both decisions conclude the procedure and produce legal effects vis-à-vis the concerned entity, meaning they are both amenable to judicial review.

Contrary to the claimant's assertion that the SRB does not have the power to issue a formal decision not to adopt a resolution scheme, the GC found that, once the ECB has initiated the procedure by declaring an entity FOLTF, the SRB must conclude it by adopting either a resolution or a non-resolution decision. This conclusion is based on some clues contained in the legal framework[3] and on considerations regarding the financial stability (that could be jeopardised by doubts arising over the follow-up action of the ECB assessment). Moreover, negative decision seems crucial "*if only to prevent a lacuna in the judicial protection of an entity, especially with regard to the ECB's FOLTF assessment*" (paras 29-35; 79-86).[4] Consequently, the contested decisions were due and open to challenge.

Moreover, the SRB disputed that the applicant would not be directly concerned by the contested decisions. In SRB's views liquidation of the applicant and its subsidiary would be the result of decisions taken at national level and not of the application of the rules of EU law. The CG preliminarily recalled the ECJ's established case-law, according to which the condition laid down in the fourth paragraph of Article 263 TFEU ("direct concern" of a natural or legal person who is not the addressee of the decision), requires two cumulative criteria to be met:

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[3] In particular, the Court considers Article 82(2) BRRD.

[4] As it is also apparent from the Opinion of the Advocate General in Joined Cases *ABV Bank and Others v ECB* (C-551/19 P and C-552/19 P, EU:C:2021:16, point 93), observance of the right to effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union is ensured by the fact that the SRB's decision which concludes the procedure referred to in Article 18 of Regulation No 806/2014 is an act open to challenge, with the result that any unlawfulness vitiating the ECB's FOLTF assessment, which is carried out at the first stage of the procedure, can be relied upon in support of an action against that decision of the SRB (I-280/18, paras 35).

namely, the first requirement is that the contested measure must directly affect its legal situation; secondly, 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.[5] That said, the Court of Justice ruled that the credit institution itself, as opposed to its shareholders (see *Bernis v SRB*, C-346/20 P), is directly concerned by a non-resolution decision. In the CG view particular aspects of the present case mean that it is impossible to deny that the applicant does have an interest in 'non resolution' decisions. This decision has direct legal consequences, as no discretion is left to the NRAs to the extent that the latter may not implement any resolution tools. Any NRA measures aimed at winding up the institution in accordance with national law lie outside the resolution framework (paras 46-52). Secondly in so far as the SRB decision states that the applicant is failing or likely to fail, that decision directly affects the applicant's legal situation.

The allocation of responsibilities between the ECB and SRB

On the first condition of Article 18 SRM Regulation (FOLTF), the CG reiterated that SRB has the power to assess the conclusions by the ECB and is not bound by the latter's assessment. However, in this decision, the Court acknowledged more clearly, compared to its 2021 precedent, that the ECB has "a primary – albeit not exclusive –, role", since it is the first required to carry out the assessment; the SRB, instead, may only assess the FOLTF condition after informing the ECB and in case the ECB does not proceed right after. Thus, according to the Court, not recognising any value to ECB's evaluation would render it meaningless;[6] as a consequence, the SRB may legitimately rely on the ECB assessment and endorse it in its final decision (paras 103-109).

As for resolution second requirement, the absence of alternatives, the assessment of whether there are reasonable prospects that alternative measures would prevent the entity's failure is, according to Article 18 SRM Regulation, a condition separate from the FOLTF assessment and to be carry out by the SRB. Nonetheless, before the ECB concludes that a bank is FOLTF, it will inevitably assess various measures that could avoid its failure. Therefore, the GC stated that the SRB "cannot be criticised" for relying "in its examination on evidence

[5] See ECJ, judgments of 22 March 2007, *Regione Siciliana v Commission*, C-15/06 P, EU:C:2007:183, paragraph 31; of 13 October 2011, *Deutsche Post and Germany v Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 66; and of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, *Commission v Scuola Elementare Maria Montessori* and *Commission v Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42.

[6] See para 104: "*That objection* [that the SRB could not rely solely on the FOLTF assessment of the ECB against the applicant without conducting its own examination paragraph 103] *amounts to disregarding the role of the ECB in the system established by Article 18 of Regulation No 806/2014 as found by the Court of Justice in the judgment of 6 May 2021, ABLV Bank and Others v ECB (C-551/19 P and C-552/19 P, EU:C:2021:369)*".

produced by the ECB in the context of its FOLTF assessment" (paras 103-109; 150-151).

Finally, the CG stated that the hearings conducted by the ECB concerning the FOLTF assessment and the examination of potential alternative measures were sufficient to comply with the right to be heard. In the Court's view, it is necessary to take into account the need for promptness in the procedure provided for in Article 18 SRM Regulation. The GC stressed in the paragraph 164 that although the applicant was not heard by the SRB before the negative decision, it was, by contrast, heard on several occasions by the ECB. Moreover, ABLV was given the opportunity to comment on the relevant elements in the FOLTF assessment. As no new information was brought forward between the adoption of the FOLTF assessment and the SRB's final decision, the SRB based its decision on grounds the applicant already had the opportunity to react to so that it did not have to hear the latter again (paras 154-168).[7]

Review of the FOLTF assessment

In line with the established case law on judicial review on complex economic assessments made by the EU institutions and agencies, the Court maintained that such review is confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers.[8] However, in the present case the GC ruled that the ECB, in its FOLTF assessment, "*provided a plausible explanation of the reasons why the assets whose actual availability in the applicant's account with the Bank of Latvia at the deadline had not been proved could not be taken into account for the purposes of calculating the counterbalancing capacity*" (T-280/18, paras 125-133). As determined by the CG in the light of the discretion available to the SRB in its complex economic analysis, the applicant in this case has not demonstrated that it made a manifest error of assessment in concluding that it was failing or likely to fail.

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7 See para 166 of the commented judgment: "*It is true that, in Decision SRB/EES/2018/09, the SRB examined for the first time the condition laid down in Article 18(1)(c) of Regulation No 806/2014 requiring resolution action to be necessary in the public interest. However, none of the applicant's objections is directed against the alleged absence of any public interest; instead, they are directed against, first, the conclusion that the applicant was failing or was likely to fail, in accordance with Article 18(1)(a) of Regulation No 806/2014, and, second, the assertion that, having regard to timing and other relevant circumstances, there was no reasonable prospect that any alternative private-sector measures or supervisory action would prevent its failure within a reasonable timeframe within the meaning of Article 18(1)(b) of that regulation. Therefore, the applicant was heard on the points which it is contesting during the administrative procedure*".

8 See, by analogy, ECJ, judgments of 22 November 2007, *Spain v Lenzing*, C-525/04 P, EU:C:2007:698, paragraph 57 and the case-law cited therein; of 26 March 2019, *Commission v Italy*, C-621/16 P, EU:C:2019:251, paragraph 104 and the case-law cited; and of 10 December 2020, *Comune di Milano v Commission*, C-160/19 P, EU:C:2020:1012, paragraph 115 and the case-law cited. This case-law was also thoroughly followed in the judgments on the Banco Popular pilot cases, issued by the General Court on 1 June. See no 18 of Nomos Basileus.

3. Reference to "notes de doctrine"

ROBERTA LO CONTE, *Valutazione del dissesto o rischio di dissesto bancario e impugnabilità delle decisioni del "Single Resolution Board"*, Rivista Trimestrale di Diritto dell'Economia, 3/2022.

BARBORA BUDINSKÁ, *ABLV Bank AS v SRB: judicial review of non-resolution decisions and failing or likely-to-fail assessments*, EU Law Live, 13 september 2022.

Banka Slovenije v Državni zbor Republike Slovenije

1. Keywords and summary

Banka Slovenije v Državni zbor Republike Slovenije

Court of Justice – Case C-45/21 – Judgment of 13 September 2022 – ECLI:EU:C:2022:670

Compatibility of a national liability regime of a Eurosystem National Central Bank concerning the adoption of reorganisation measures of credit institutions with the prohibition on monetary financing (Article 123 TFEU) and the principle of independence (Article 130 TFEU)

Conferral of national tasks upon Eurosystem National Central Banks – Implementation of reorganisation measures for credit institutions pursuant to Directive 2001/24/EC – Admissibility – Liability regime under national law

Article 14.4 of the Statute of the European System of Central Banks and of the European Central Bank stipulates that national central banks may perform functions other than those specified in the same Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.

Moreover, Article 35.3 of the Statute of the European System of Central Banks and of the European Central Bank specifies that national central banks are liable according to their respective national laws.

Therefore, a Member State may confer upon its national central bank the function to be the competent authority for the implementation of reorganisation measures for credit institutions, within the meaning of Directive 2001/24/EC. Under Article 127(2) TFEU and Article 3.1 of the Statute of the European System of Central Banks and of the European Central Bank, such a function does not constitute a task incumbent on the ESCB, in general, or on the national central banks, in particular. It follows that such a function must be carried out by the national central bank concerned on its own responsibility, the liability regime being regulated by national law.

It follows from the foregoing that it is for the Member State concerned to define the conditions in which the liability of its national central bank may be incurred as a result of the implementation by that central bank of a reorganisation measure, within the meaning of Directive 2001/24, where that Member State has decided to designate that central bank as the authority empowered to implement such a measure.

Liability of national central banks – Reorganisation measures of credit institutions – Serious breach of the duty to exercise due care – Compatibility with the prohibition on monetary financing

Pursuant to Article 131 TFEU and Article 14.1 of the Statute of the ESCB and of the ECB, each Member State shall ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB. Therefore, when the Member State defines by law the conditions in which the liability of its national central bank may be incurred as a result of the implementation by that central bank of a reorganisation measure, within the meaning of Directive 2001/24, it must the compatibility of such liability regime with the Treaties and the Statute of the ESCB and of the ECB and, in particular, with the prohibition on monetary financing enshrined in Article 123(1) TFEU and Article 21.1 of the Statute of the ESCB and of the ECB.

In accordance with such provisions, the ECB and the Eurosystem National Central Banks shall not grant overdraft facilities or any other type of credit facility to public authorities and bodies of the EU and of Member States and shall not purchase directly from them their debt instruments.

Article 1(1)(a) of Council Regulation (EC) No 3603/93 defies ‘overdraft facilities’ as any provision of funds to the public sector resulting or likely to result in a debit balance; while, under Article 1(1)(b) of the same Regulation, the expression ‘other type of credit facility’ means (i) any claim against the public sector existing at 1 January 1994, (ii) any financing of the public sector’s obligations vis-à-vis third parties or (iii) any transaction with the public sector resulting or likely to result in a claim against that sector.

A national legal regime under which the national central bank is liable, from its own funds, for damage suffered by holders of financial instruments cancelled or written down pursuant to reorganisation measures it ordered in accordance with Directive 2001/24/EC, manifestly cannot be classified as the direct acquisition by that central bank of debt instruments of a public body.

The same liability regime cannot be regarded as leading to the grant of an overdraft facility, to public authorities or bodies as long as the relevant national law does not require the national central bank to establish a debit balance in favour of the public sector.

The same liability regime cannot be regarded as falling under the first and third categories of ‘other type of credit facility’ pursuant to Article 1(1)(b) of Council Regulation (EC) No 3603/93, since the establishment of that liability does not imply the existence of either a claim by that central bank on the public sector existing on 1 January 1994, or of a transaction between that central bank and the public sector resulting or likely to result in a claim against that sector.

The same liability regime cannot be regarded as constituting, in all circumstances, financing of a public sector’s obligation vis-à-vis third parties for

the purposes of Article 123(1) TFEU, Article 21.1 of the Statute of the ESCB and of the ECB and Article 1(1)(b) of Council Regulation (EC) No 3603/93.

In particular, the national legal regime under which the national central bank is liable, from its own funds, for damage suffered by holders of financial instruments cancelled or written down pursuant to reorganisation measures it ordered in accordance with Directive 2001/24/EC, where the same central bank cannot prove that such measures were necessary in the public interest and that the 'no creditor worse off' principle was not infringed, does not constitute financing, by that central bank, of a public sector's obligation vis-à-vis third parties.

Indeed, where the liability of a national central bank is incurred in relation to the exercise of a function other than those of the ESCB because of the infringement by that central bank of the rules imposed on it in that context, the compensation of third parties who have suffered harm is the consequence of the actions of that central bank and not the assumption of a pre-existing obligation vis-à-vis third parties incumbent on the other public authorities. Moreover, a regime under which the liability of a national central bank arises from its infringement of rules governing the exercise of a function conferred on it by national law cannot normally be regarded as allowing other public authorities to reduce the impetus to comply with a sound budgetary policy stemming from Article 123(1) TFEU, which was the primary objective pursued by the EU legislator when it included in Article 1(1)(b) of Council Regulation No 3603/03 the reference to 'any financing of the public sector's obligations vis-à-vis third parties'.

Nevertheless, in light of the high degree of complexity and urgency characterising the implementation of reorganisation measures in accordance with Directive 2001/24/EC, a central bank's liability regime cannot be applied to damage resulting from the implementation of those measures without requiring that the infringement of the duty to exercise due care alleged against the central bank concerned is of a serious nature. Otherwise, that would have the effect, in reality, of imposing on that central bank most of the financial uncertainties inherent in that implementation and, therefore, would require that central bank, in breach of the prohibition on monetary financing, to be responsible, in place of the other public authorities of the Member State concerned, for the effective financing of obligations vis-à-vis third parties which might result from the economic policy choices made by those public authorities.

Liability of national central banks – Reorganisation measures of credit institutions – Obligation to compensate damaged parties in absence of a breach of the duty to due care – Incompatibility with the prohibition on monetary financing

A national liability regime entailing an obligation on the part of the national central bank to compensate, from its own funds, certain former holders of financial instruments cancelled by it in consequence of a reorganisation measure

it adopted in accordance with Directive 2001/24/EC solely on account of that cancellation, even if it is established that that central bank fully complied with the relevant rules in that regard, in particular by acting with due care, shall be regarded as leading the central bank to discharge a public sector's obligation vis-à-vis third parties. Indeed, such obligation to compensate stems directly and exclusively from the political choice made by the national legislature to prevent the effects of the financial stability policies from imposing an excessive burden on certain persons and does not stem from the national central bank's way of exercising its function.

As a consequence, such a national liability regime is in contrast with the prohibition on monetary financing as established by Article 123(1) TFEU, Article 21.1 of the Statute of the ESCB and of the ECB, and Article 1(1)(b) of Council Regulation (EC) No 3603/93.

The fact that such a liability regime applies only within the limit of certain ceilings is, in that regard, irrelevant, since it is in no way apparent from those provisions that the prohibition of monetary financing arising from them is subject to the amount of that financing.

LIABILITY OF NATIONAL CENTRAL BANKS – Reorganisation measures of credit institutions – Obligation to compensate damaged parties in absence of a breach of the duty to due care – Incompatibility with the prohibition on monetary financing

A national liability regime entailing an obligation on the part of the national central bank to compensate, from its own funds, certain former holders of financial instruments cancelled by it in consequence of a reorganisation measure it adopted in accordance with Directive 2001/24/EC solely on account of that cancellation, even if it is established that that central bank fully complied with the relevant rules in that regard, in particular by acting with due care, shall be regarded as leading the central bank to discharge a public sector's obligation vis-à-vis third parties. Indeed, such obligation to compensate stems directly and exclusively from the political choice made by the national legislature to prevent the effects of the financial stability policies from imposing an excessive burden on certain persons and does not stem from the national central bank's way of exercising its function.

As a consequence, such a national liability regime is in contrast with the prohibition on monetary financing as established by Article 123(1) TFEU, Article 21.1 of the Statute of the ESCB and of the ECB, and Article 1(1)(b) of Council Regulation (EC) No 3603/93.

The fact that such a liability regime applies only within the limit of certain ceilings is, in that regard, irrelevant, since it is in no way apparent from those provisions that the prohibition of monetary financing arising from them is subject to the amount of that financing.

Liability of national central banks – Reorganisation measures of credit institutions – Compensation for damage – Independence of ECB and national central banks – General reserves of the national central bank

Article 130 TFEU, reproduced, in essence, in Article 7 of the Statute of the ESCB and of the ECB, enshrines the principle of independence and therefore expressly prohibits the ECB, the national central banks, and the members of their decision-making bodies from seeking or taking instructions from EU institutions, bodies, offices or agencies, from any government of a Member State or from any other body, on the one hand, and prohibits those EU institutions, bodies, offices or agencies and any government of a Member State from seeking to influence the members of the decision-making bodies of the ECB and the national central banks in the performance of their tasks, on the other.

In the light of the hybrid status of the national central banks, that constitute both national authorities and authorities acting under the ESCB, the principle of independence of those central banks does not necessarily apply in the same way when they carry out a task falling within the scope of the ESCB and when they perform a function not falling within that scope which has been assigned to them under national law by virtue of Article 14.4 of the Protocol on the ESCB and the ECB, such as the function to be the competent authority for the implementation of reorganisation measures for credit institutions, within the meaning of Directive 2001/24/EC.

Furthermore, since Article 14.4 of the Statute of the ESCB and of the ECB provides that national central banks are to perform functions other than those of the ESCB conferred upon them by Member States under their own responsibility and liability, the establishment by the national legislature of a regime enabling such national central banks to incur liability for damage caused in the performance of those functions cannot, as such, be regarded as incompatible with the independence of those central banks.

However, national rules put in place for that purpose cannot, without infringing the abovementioned provisions, place the national central bank concerned in a situation which in any way undermines its ability to carry out independently a task falling within the scope of the ESCB.

In this regard, while neither the TFEU nor the Statute of the ESCB and of the ECB lay down in respect of the national central banks a rule imposing their independent management of their finances, equivalent to the rule established by Article 282(3) TFEU in respect of the ECB, such independent management is necessary for national central banks to be able to perform their ESCB tasks. Indeed, in order to participate in the implementation of the European Union’s monetary policy, the establishment of reserves by the national central banks is essential, in particular in order to be able to offset any losses resulting from monetary policy operations and to finance open market operations provided for in Article 18 of the Statute of the ESCB and of the ECB.

In the described legal context, a national liability regime enabling the national central bank to incur liability for damage caused in the performance of the function to be the competent authority for the implementation of reorganisation measures for credit institutions, within the meaning of Directive 2001/24/EC, that foresees a levy on the general reserves of such national central bank in an amount likely to affect its ability to carry out its tasks effectively under the ESCB, combined with an inability to restore those reserves independently because all its profits are systematically allocated to reimbursement of damage which it has caused, places that central bank in a situation of dependence on the political authorities of the Member State to which it belongs. Indeed, in order to have at its disposal the funds necessary to carry out its tasks under the ESCB, that central bank will be forced to seek the consent of those political authorities in order to obtain funding or recapitalisation.

Similarly, the imposition, in such circumstances, on the national central bank of a legal obligation to take out a loan from other public authorities of the Member State to which it belongs, where sources of financing linked to reserves have been exhausted due to the reimbursement of damage it has caused in the exercise of its function of implementing reorganisation measures, places it in a situation in which, in order to be able to carry out its tasks under the ESCB, it must negotiate with those public authorities the amount of such a loan and the conditions to which it is subject.

It follows that legislation such as that described above places the national central bank concerned in a situation where it is potentially exposed to political pressure, in violation of the principle of independence as enshrined in Article 130 TFEU and Article 7 of the Statute of the ESCB and of the ECB.

Such a violation would not occur if the Member State which established a liability regime for its national central bank such as that referred above had ensured in advance that that central bank would have the funds necessary to be able to pay the compensation resulting from that regime, while retaining its ability to carry out its tasks falling within the scope of the ESCB effectively and completely independently.

Duty to protect confidentiality and professional secrecy – Reorganisation measures of credit institutions – Disclosure of confidential information – Information and consultation procedures between competent authorities

In case a national authority is entrusted by the legislation of a Member State not only with the function of supervising credit institutions but also with other functions not covered by Directives 2006/48/EC or 2013/36/EU, the obligations of professional secrecy and confidentiality laid down by those Directives in Article 44 and Article 53 respectively may not, without going beyond the scope

of harmonisation brought about by those Directives, be imposed on information which has been obtained or generated in the exercise of those other functions.

With specific regard to Directive 2001/24/EC on the reorganisation and winding up of credit institutions, its Article 33, which lays down an obligation of professional secrecy by making reference to the rules and conditions laid down in Article 30 of Directive 2000/12/EC, shall be understood as not providing for a general harmonisation of the rules on professional secrecy and confidentiality applicable to reorganisation and winding up of credit institution, by making them subject to those applicable in the field of prudential supervision of banking institutions, but as providing solely for the application of such rules in the context of information and consultation procedures between competent authorities intended to ensure the mutual recognition of reorganisation measures.

Accordingly, Article 33 of Directive 2001/24/EC cannot lead to the application of the rules set out in Articles 44 to 52 of Directive 2006/48/EC and Articles 53 to 61 of Directive 2013/36/EU to information which was obtained or generated during the implementation of reorganisation measures.

2. Central bank's liability for resolution procedures of banks as a possible violation of NCBs' independence and of the prohibition of monetary financing. Opinion of the Advocate General Mrs. Kokott

by Carmine De Vito and Giuseppe Pala

1. In the case C-45/21 *Banka Slovenije* v *Državni zbor Republike Slovenije*, the Court of Justice of the European Union (CJEU) is requested by the Constitutional Court of the Republic of Slovenia (*Ustavno sodišče Republike Slovenije*) to provide a preliminary ruling on the interpretation of Articles 123 and 130 TFEU and Articles 7 and 21 of the Statute of the European System of Central Banks (ESCB) and of the ECB (the ESCB Statute).

As well known, Article 123 TFEU and Article 21 of the ESCB Statute enshrine the so-called 'prohibition of monetary financing', pursuant to which Member States are prohibited to have the ECB and, more importantly, their respective national central banks (NCBs) finance their obligations *vis-à-vis* third parties. Moreover, according to Article 130 TFEU and Article 7 of the ESCB Statute, neither the ECB nor the NCBs nor the members of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body (principle of independence).

In the case at hand, issues regarding the correct interpretation and application of such provisions arised in relation to the new liability regime imposed by the Slovenian legislator in 2019 on the national central bank (*Banka Slovenije*) for the resolution measures it ordered *vis-à-vis* Slovenian credit institutions in 2013 and 2014, in its capacity as resolution authority (NRA).[1]

After an account of the main facts of the case pending before the Slovenian Constitutional Court that led the latter to refer to the CJEU, this article briefly examines the opinion delivered by Advocate General (AG) Mrs. Kokott on 31 March 2022 and offers a few comments.

2. According to a previous judgement by the Slovenian Constitutional Court, the national law did not sufficiently provide for the possibility of adequate compensation for shareholders and creditors of credit institutions subject to resolution measures.

[1] The Slovenian legislator also established that documents relating to the resolved entities (e.g. stress tests, asset quality review etc.) shall be published or be accessible to the shareholders and creditors concerned. The aim is to make it easier for the compensation claims to be granted. Therefore, in the case at hand, the Slovenian Constitutional Court requested a preliminary ruling also on the interpretation of the professional secrecy provisions of the directive 2013/36 (CRD) and of its antecedent directive 2006/48, in order to establish if such provisions are applicable to *Banka Slovenjie* as the resolution authority before the introduction of the Single Resolution Mechanism and, if so, if they are incompatible with the new rules laid down by the Slovenian legislator. In this article, we will concentrate only on the possible infringement of Articles 123 and 130 TFEU.

Therefore, in late 2019, the Slovenian legislator amended the Law on the procedure applicable to the judicial and extrajudicial protection of former holders of eligible bank liabilities (*Zakon o postopku sodnega in izvensodnega varstva nekdanjih imetnikov kvalificiranih obveznosti bank* - ZPSVIKOB) and the Law on the banking sector (*Zakon o bančništvu* - ZBan-1). The newly introduced provisions regulate, *inter alia*, the conditions and the judicial proceedings of liability and compensation claims of shareholders and creditors of credit institutions whose capital instruments were written down or cancelled as part of the measures ordered in 2013 and 2014 by *Banka Slovenije* in its capacity as the resolution authority.

In particular, according to Article 31 of the ZPSVIKOB, such shareholders and creditors may be entitled to compensation if *Banka Slovenije* cannot prove that the resolution measures ordered were necessary in the public interest or that the 'no creditor worse off' principle was not infringed. At the same time, pursuant to Articles 4 to 7 of the ZPSVIKOB, retail investors with low annual gross income are entitled to a flat-rate sum of compensation in the amount of 80% of the nominal value of their capital instruments that were written down during the mentioned resolution procedures, up to a maximum amount of Euro 20 000, irrespective of whether or not that value could have been obtained in an ordinary insolvency procedure.

In both cases, the obligation to meet the claims falls on *Banka Slovenije*. To this end, the central bank is required to create special reserves to be financed by its profits earned from 1 January 2019 forward, 25% of which is normally allocated to the Republic of Slovenia, while the remaining 75% is normally used to establish general reserves of the same NCB, according to the ZBS-1. Moreover, if the newly created reserves were to be insufficient to pay in full the compensations, *Banka Slovenije* would have to draw from its general reserves up to a limit of 50%. In case of any remaining shortfall, the new legislative provisions envisage the possibility for the Republic of Slovenia to grant a bridging loan to its central bank; the loan would be repaid with *Banka Slovenije*'s future profits that would therefore not be usable to build up the general reserves.

Banka Slovenjie deemed the new liability regime an infringement of the prohibition of monetary financing and of the principle of independence. Indeed, on one hand, the compensation of creditors and shareholders of failing credit institutions who have been expropriated or whose property rights have been restricted in the public interest is an obligation of the State, the cost of which cannot be borne by the NCB. On the other hand, the envisaged impact on the NCB's general reserves may jeopardise the independent performance of its tasks as part of the European System of Central Banks (ESCB).

As mentioned before, the Slovenian Constitutional Court, called upon to conduct an abstract review of the constitutionality of the described legislative reform, decided to stay the proceeding and refer to the CJEU in order to establish if the new national provisions indeed conflict with the EU law and, in particular, with Articles 123 and 130 TFEU and Articles 7 and 21 of the Statute.

3. In her conclusions, the AG addresses the possible infringement of the principle of independence and of the prohibition of monetary financing, in this order.

As to the question whether the financing mechanism for compensation payments provided for by the Slovenian legislation at issue might impair the **independence** of the Slovenian central bank, the AG observes that the independence of the ESCB central banks «*is not an end in itself, but is intended to ensure that they can perform their tasks properly and effectively and, consequently, to safeguard the functioning of the ESCB*». To this end, NCBs shall have their financial resources so as to be able to perform in full independence the tasks and obligations conferred upon them by the Treaty and, first among all, the implementation of monetary policy.

The AG notes that the referring court appears to consider that the national provisions at issue could affect *Banka Slovenije*'s capability of complying with the obligation to contribute to the ECB's capital increases pursuant to Article 28.2 of the ESCB Statute (such obligation being touched upon also in the ECB's submission, as the AG reports); on this the AG takes the different view that ECB's capital increases are effected via TARGET transfers and not by means of capital raised from the NCBs' actual own funds, therefore the provisions at stake would not in fact impair the Slovenian CB's ability to fulfil that obligation. In the same vein, the AG notes that also the fulfilment of the other financial obligations of NCBs mentioned by the ECB in its submission – namely the obligation to pay in further foreign reserve assets upon request as per Article 30.4 of the ESCB Statute or to offset the ECB's losses as per Article 33.2 thereof – does not in fact depend on an NCB having sufficient own funds.

As for the former, the AG observes that «*it cannot be inferred from the order for reference that Banka Slovenije's foreign reserve assets could be used to finance the compensation payments*»; as for the latter, in the AG's view NCBs are subject to the obligation to contribute to offset ECB's losses only up to the amounts of monetary income to be allocated to each, but there is no further obligation to offset losses using their own funds.

It is indeed the AG's view that «*the decisive point with regard to the independence of the NCBs is, rather, the following: the financing mechanism provided for in Article 40 of the ZPSVIKOB fully deprives Banka Slovenije, for a period of several years, of its power to decide on the use of its resources and therefore of the possibility to hold reserves in the amount that it deems appropriate*». Such decision-making freedom «*expresses the NCB's risk assessment with regard to its monetary policy operations*», taking into account that the general reserves are meant precisely to cover the financial risks inevitably associated with such operations. Therefore, «*an adequate level of reserves to absorb any losses arising from monetary policy operations reflects the fact that the NCB concerned has foreseen and is in control of the impact of its measures*».

In that respect, the AG finds the Slovenian legislation at hand problematic for three reasons.

First, it is «*harmful*» because the central bank «*sets an example for the banking sector, which in turn must comply with ever stricter rules on capital requirements*».

Second, «*it may give the markets the impression that the NCB is misjudging or no longer in control of the impact of its monetary policy measures*». On this count, drawing also on doctrinal studies, the AG observes that «*if a central bank is placed in a situation where it has very low or negative capital for a prolonged period of time due to a legal restriction on its ability to build up sufficient reserves, it may be incentivized to use monetary policy operations for the purpose of generating revenue to counter the perception of instability and to maintain market confidence. Such measures often tend to have inflationary effects*», and this «*would clearly run counter to the primary objective of maintaining price stability*». In the ESCB, the impairment of the financial soundness of NCBs would also affect the ECB's room for manoeuvre in monetary policy.

Third, in extreme cases lack of funds to meet the claims of creditors and shareholders of the resolved entities could lead to a liquidity problem for the Slovenian CB, with potential reputational implications if the ECB were to step in or authorise additional money creation for that purpose.

Based on the foregoing, the AG advises the Court to find that legislation such as that at issue is liable to impair the independence and thus the functioning of the NCB. «*This is because such legislation entails the risk that, in the event that losses are incurred in connection with monetary policy operations, the net equity of that NCB will be less than the amount of its share capital or even negative for a prolonged period of time*».

4. Since the **prohibition of monetary financing** under Article 123 TFEU forbids NCBs to finance Member States to fulfil their obligations *vis-à-vis* third parties (pursuant to Article 1(1)(b)(ii) of Regulation No 3603/93), the AG observes that one has to examine, first, whether *Banka Slovenije*'s obligation to compensate, by means of its own resources, investors of banks that have been resolved or restructured constitutes a public sector obligation *vis-à-vis* third parties; and, in the positive, whether the liability regime envisaged by the Slovenian legislator entails prohibited 'financing' by the NCB of the Member State.

4.1 As for the first issue, the AG notes that all parties to the proceeding took the view that the decisive factor is whether the NCB liability is fault-based: only if the liability is a consequence of fault on the part of *Banka Slovenije*, the resulting claims would have to be considered as its 'own' obligations, *i.e.* not 'public sector's obligations *vis-à-vis* third parties'.

In fact, the compensation that would be due by *Banka Slovenjie* because its resolution measures were not in the public interest or infringed the NCWO principle would appear to be based on negligence on the part of the Slovenian CB, consisting of the failure to take into account facts and circumstances which *Banka Slovenije* was aware of or could have been aware of when it took its decision,

and therefore on an element of fault. In turn, the obligation to compensate small investors with a flat-rate sum would constitute objective liability.

Nonetheless, the AG deems the fault-based nature of the liability irrelevant.

The qualification as a 'public sector obligation' within the meaning of Regulation No 3603/93 only depends on whether the liability follows from to the performance by the NCB of a task within the framework of the ESCB or, conversely, from the exercise of other public tasks within the meaning of Article 14.4 of the ESCB Statute. The irrelevance of the fault-based nature of the liability is evident, in the AG's opinion, considering that, otherwise, a Member State could evade its financial obligations by transferring to its NCB tasks that are urgently needed in the public interest but are particularly intrusive and costly because they entail significant liability risks, more so if such liability is easily triggered by a breach of the duty to exercise due care.

Now, in the AG's opinion, «*The sovereign reorganisation and orderly resolution of banks is* […] *another public task within the meaning of Article 14.4 of the Statute of the ESCB and of the ECB*». Indeed, Article 127(5) TFEU and Article 3(3) of the BRRD show that the transfer of bank resolution tasks to an NCB is not in principle incompatible with the objectives and tasks of the ESCB, but do not imply that such task may be considered as within the framework of the ESCB. It follows that *Banka Slovenije*, as the resolution authority, performed another public task within the meaning of Article 14.4 of the ESCB Statute in 2013 and 2014.

Therefore, according to the AG, both types of compensation payments as provided for by the Slovenian legislation at hand must be considered as 'public sector's obligations' within the meaning of Regulation No 3603/93, the costs of which must be borne by the Republic of Slovenia (directly or by means of a reimbursement to the NCB that carries it out) in order to avoid an infringement of the prohibition of monetary financing.

4.2 The next step regards the question whether it constitutes a violation of Article 123 TFEU to finance public sector's obligations from the resources of the NCB and, more specifically, from the profits it generates through its monetary policy operations.

On this aspect the AG notes that the use of part of an NCB's profits to finance general public expenditure is common practice in the EU and «[i]*n principle, this is not regarded as an infringement of the prohibition of monetary financing, since the profits are merely a 'by-product' of the monetary policy measures of an NCB and are not the result of an economic activity aimed at generating revenue for the State*». However, there would be a deflection of this profits from their intended use and thereby circumvention of the prohibition of monetary financing if, in order to achieve financing objectives, the purpose of monetary policy receded into the background.

This, according to the AG, is exactly the case that results from the application of the Slovenian legislation at stake, because, according to its provisions, «*not only the share of profit that is normally allocated to the State budget, but in particular also the part that is intended to establish the general reserves* [of the Slovenian CB] *is used for financing purposes – and thus for purposes other than monetary policy purposes*». In general the income deriving from the conduct of monetary policy operations should serve the performance of the ESCB's tasks; in turn, the specific provisions at hand «*could create an incentive or, in the extreme case, even political pressure to act with the intention of making a profit when using monetary policy instruments and to allow monetary policy objectives to recede into the background*» because the NCB would end up having an interest in «*restoring as soon as possible its decision-making freedom as regards the use of its profits for the purpose of establishing reserves*».

Indeed, according to the AG, the prohibition of monetary financing does not only aim to stimulate Member States' budget discipline; in fact it has the purpose «*on the one hand, to prevent the governments of the Member States from increasing the monetary base through their fiscal policy decisions and thereby possibly influencing the monetary policy of the ESCB*»; on the other hand, «*by precluding national governments from having extensive access to the resources of the NCBs, that prohibition is also intended to prevent governments from undermining the financial independence of their central bank in that way*».

In light of the reasons here briefly reported, the AG proposes to the Court to find that the Slovenian legislation at hand infringes on Articles 123 and 130 TFEU.

5. The AG's observations regarding the possible prejudice to the Slovenian central bank's independence stemming from the new national legislation appear to be well founded. Indeed, at least potentially, *Banka Slovenjie* would lose all or most of its margin of autonomy in relation to the build-up and use of its own general reserves, which in turn would affect its autonomy also in the discharge of its fundamental monetary policy tasks. The principle of financial independence requires that the Member States may not put their NCBs in a such position that they may find themselves with insufficient financial resources to carry out their ESCB or Eurosystem-related tasks.

More problematic appears to be the AG's conclusion that the performance by the NCB of bank resolution tasks falls outside the tasks conferred upon the ESCB and therefore any subsequent cost (such as those stemming from liability) must be borne by the Member State, directly or by means of a reimburse to the NCB.

Indeed, the definition of 'public sector's obligations *vis-à-vis* third parties' pursuant to Article 1(1)(b)(ii) of Regulation No 3603/93, the financing of

which by the NCB is prohibited, does not appear to be equivalent to (or even to necessarily include) the definition of 'functions other than those specified in [the ESCB] Statute' that NCBs can perform pursuant to Article 14(4) of the ESCB Statute. In other words, contrary to what the AG appears to argue, the fact that a NCB performs a task other than the tasks described in the ESCB Statute does not entail *per se* that such task falls within the competence of the State and, therefore, any costs it generates must be borne by the State, directly or indirectly.

Rather, for the purposes of the prohibition of monetary financing pursuant to Article 123 TFEU, it is necessary to distinguish between central bank tasks (which include, but are not limited to, the ESCB tasks) and governmental tasks. Only the costs of the latter may entail 'public sector's obligations *vis-à-vis* third parties' that the NCB (and the ECB) may not finance, directly or indirectly.

In this vein, when requested for an opinion on the compatibility with Article 123 TFEU of national legislation conferring new tasks upon the concerned NCB,[1] the ECB has consistently considered as central bank tasks those that are typically performed by central banks in the Member States' legal traditions, including those in the field of prudential supervision.[2] In line with this reasoning, the ECB held that resolution tasks are central banking tasks and therefore fall outside the scope of the prohibition of monetary financing, «*provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty*» and that «*the discharge of these tasks by central banks* [do] *not extend to the financing of resolution funds or other resolution financial arrangements as these are government tasks*».[3]

In the case at hand, it will be interesting to see if the Court will follow the same line of reasoning as the one expressed by the ECB. In the positive, the Court will need to evaluate if each of *Banka Slovenjie*'s liabilities established by the Slovenian legislation is to be considered as a normal consequence of the performance of a central bank task (bank resolution) or, on the contrary, for its very characteristics, falls within the definition of 'public sector's obligations *vis-à-vis* third parties', the costs of which cannot be borne by the central bank.

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1 Pursuant to Articles 127(4) and 282(5) TFEU and the third indent of Article 2(1) of Council Decision 98/415/EC.

2 See the recent ECB Opinion of 26 February 2021 on the reform of *Latvijas Banka* (CON/2021/9).

3 See, *ex multis*, ECB Opinion of 1 July 2015 (CON/2015/22); for further reference: ECB Opinions of 21 January 2015 (CON/2015/2) and (CON/2015/3); ECB Opinion of 22 September 2015 (CON/2015/33); ECB Opinion of 16 October 2015 (CON/2015/35) on the conferral of resolution tasks to the Bank of Italy; ECB Opinion of 1 February 2016 (CON/2016/5); ECB Opinion of 3 May 2016 (CON/2016/28). See also ECB Opinion of 29 November 2012, on the BRRD proposal (CON/2012/99).

3. Limits to the admissibility of the central bank's liability for resolution procedures of banks in light of the prohibition of monetary financing and the principle of independence

by Giuseppe Pala

1. In relation to the reorganisation measures pursuant to the Directive 2001/24/EC ordered by *Banka Slovenije* vis-à-vis some Slovenian credit institutions in 2013 and 2014, the Slovenian Constitutional Court stated in a judgment of 2016 that the national law did not sufficiently provide for the possibility of adequate compensation for shareholders and creditors of credit institutions involved.

Therefore, in late 2019, the national legislator amended the law on the procedure applicable to the judicial and extrajudicial protection of former holders of eligible bank liabilities (*Zakon o postopku sodnega in izvensodnega varstva nekdanjih imetnikov kvalificiranih obveznosti bank* - ZPSVIKOB) and the law on the banking sector (*Zakon o bančništvu* - ZBan-1). The new provisions established, *inter alia*, two separate regimes under which *Banka Slovenije*, as the national competent authority for reorganisation measures on credit institutions, may be liable.

On the one hand, *Banka Slovenjie* is liable vis-à-vis shareholders and creditors of credit institutions whose capital instruments were written down or cancelled, if the same central bank cannot prove that the reorganisation measures it ordered were necessary in the public interest and that the 'no creditor worse off' principle was not infringed.

On the other hand, retail investors with low annual gross income are entitled to a flat-rate sum of compensation, to be paid by *Banka Slovenije*, in the amount of 80% of the nominal value of their capital instruments that were written down as a consequence of reorganisation measures, up to a maximum amount of Euro 20 000, irrespective of whether or not that value could have been obtained in an ordinary insolvency procedure.

In order to meet the claims, *Banka Slovenjie* is required to create special reserves to be financed by its profits earned from 1 January 2019 forward, 25% of which is normally allocated to the Republic of Slovenia, while the remaining 75% is normally used to establish general reserves of the same central bank. If the newly created reserves are insufficient, *Banka Slovenije* has to draw from its general reserves up to a limit of 50%. In case of any remaining shortfall, the new legislative provisions envisage the possibility for the Republic of Slovenia or other national authorities to grant a bridging loan to the central bank; the loan would be repaid with *Banka Slovenije*'s future profits that would therefore not be usable to build up the general reserves.

Banka Slovenije made an application for review of the constitutionality of the described provisions, in particular in light of the prohibition of monetary financing and the principle of independence, provided for by Articles 123 TFEU

and 21 of the Protocol on the ESCB and the ECB ('ESCB Statute') and by Articles 130 TFEU and 7 of the ESCB Statute, respectively. The Slovenian Constitutional Court decided to stay the case and asked for the preliminary ruling of the Court of Justice of the European Union (CJEU).

2. The Grand Chamber of the Court of Justice published its decision on 13 September 2022 (case C-45/21).

2.1 First, the Court of Justice focused on the compatibility with the **prohibition on monetary financing** of *Banka Slovenije*'s new liability, from its own funds, for damage suffered by holders of financial instruments cancelled or written down pursuant to reorganisation measures it ordered in accordance with Directive 2001/24/EC, where the same central bank cannot prove that such measures were necessary in the public interest and that the 'no creditor worse off' principle was not infringed.

In this regard, the Court recalled that, under Article 127(2) TFEU and Article 3.1 of the ESCB Statute, the implementation of reorganisation measures for credit institutions, within the meaning of Directive 2001/24/EC, does not constitute a task incumbent on the ESCB, in general, or on the national central banks, in particular. Article 14.4 of the ESCB Statute states that the functions other than those of the ESCB carried out by national central banks under national law must be performed "*on the responsibility and liability*" of the same central banks. Moreover, Article 35.3 of the ESCB Statute specifies that national central banks are liable according to their respective national laws.

When the national legislator sets out the conditions for the national central bank's liability, it must comply with obligations deriving from EU law and specifically, as regards the prohibition on monetary financing, from Article 123(1) TFEU and Article 21.1 of the ESCB Statute.

Such provisions forbid the ECB and the national central banks from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the EU and of Member States and from purchasing directly from them their debt instruments. According to Article 1(1)(a) of Council Regulation (EC) No 3603/93, 'overdraft facilities' are defined as any provision of funds to the public sector resulting or likely to result in a debit balance; while, under Article 1(1)(b) of the same Regulation, the expression 'other type of credit facility' means (i) any claim against the public sector existing at 1 January 1994, (ii) any financing of the public sector's obligations vis-à-vis third parties or (iii) any transaction with the public sector resulting or likely to result in a claim against that sector.

In the case at hand, the Court obviously excluded that the above described *Banka Slovenije*'s liability may imply the acquisition by the same central bank of the Slovenian State's debt instruments, or the granting of overdraft facilities, or the discharge of a claim against the national public sector existing at 1 January 1994, or a transaction between that central bank and the public sector resulting or likely to result in a claim against that sector.

The Court also ruled that a central bank's liability, from its own funds, vis-à-vis holders of financial instruments written down or cancelled by it pursuant to reorganisation measures it ordered cannot be regarded as constituting, in all circumstances, the financing of a public sector obligation vis-à-vis third parties.

Indeed, in the first place, "[i]*f the authors of the Treaties had considered that the incurring of liability of a national central bank by reason of the exercise of a function conferred on it by national law was, in any event, incompatible with Article 123(1) TFEU, they would not have expressly provided, in Article 14.4 and Article 35.3 of the Protocol on the ESCB and the ECB, that such functions are to be performed by the national central banks under their own responsibility and liability, under conditions defined by their national laws*". In the second place, where the liability of a national central bank is incurred in relation to the exercise of a function other than those of the ESCB because of the infringement by that central bank of the rules imposed on it in that context, "*the compensation of third parties who have suffered harm is the consequence of the actions of that central bank and not the assumption of a pre-existing obligation vis-à-vis third parties incumbent on the other public authorities*". In the third place, a regime under which the liability of a national central bank arises from its infringement of rules governing the exercise of a function conferred on it by national law cannot normally be regarded as allowing other public authorities to reduce the impetus to comply with a sound budgetary policy stemming from Article 123(1) TFEU, which was the primary objective pursued by the EU legislator when it included in Article 1(1)(b) of Council Regulation No 3603/03 the reference to '*any financing of the public sector's obligations vis-à-vis third parties*'.

It follows, as anticipated, that a central bank's liability stemming from its own defective exercise of a function conferred upon it by national law does not constitute, per se, a violation of the prohibition on monetary financing. In the Court's view, such conclusion is not excluded by the fact that the burden of proof relating to compliance with the duty to exercise due care falls on the same national central bank, rather than on the applicants, because it is still preserved the possibility for that national central bank to release itself from its liability by proving that it did not infringe that duty.

Nevertheless, the Court maintained that in light of the high degree of complexity and urgency characterising the implementation of reorganisation measures, a central bank's liability regime cannot be applied to damage resulting from the implementation of those measures without requiring that the infringement of the duty to exercise due care alleged against the central bank concerned be "*of a serious nature*". Otherwise, "*that would have the effect, in reality, of imposing on that central bank most of the financial uncertainties inherent in that implementation and, therefore, would require that central bank, in breach of the prohibition on monetary financing, to be responsible, in place of the other public authorities of the Member State concerned, for the effective financing of obligations vis-à-vis third parties which might result from the economic policy choices made by those public authorities*".

2.2 In line with the described reasoning, the Court of Justice stated, on the contrary, that Articles 123(1) TFEU and 21.1 of the ESCB Statute preclude national legislation that establish a central bank's liability regime such as the second one imposed on *Banka Slovenije*.

Indeed, differently from the first one examined above, the liability regime at hand entails an obligation on the part of the national central bank to compensate former holders of financial instruments cancelled by it solely on account of that cancellation, even if it is established that the same central bank fully complied with the relevant rules and acted with due care. Such obligation stems directly and exclusively from the political choice made by the legislature to prevent the effects of the financial stability policies from imposing an excessive burden on natural persons with a modest income; it does not stem from *Banka Slovenije*'s way of exercising its function.

Therefore, the establishment of such a liability regime must be regarded as leading the central bank to be responsible, in place of the other public authorities of the Member State, for the financing of public sector obligations vis-à-vis third parties under the national legislation.

Irrelevant, in this respect, is the fact that the central bank's liability is capped, since the prohibition on monetary financing is in no way dependent on the amount of that financing. At the same time, the Court of Justice rejected the Slovenian government's argument according to which the violation of the prohibition on monetary financing was avoided by establishing that the funds necessary to *Banka Slovenije* to meet the claims for compensation are to be drawn from its annual profits, thus simply entailing a change in the distribution of the same profits and a reduction or even cancellation of the share of those profits to be transferred to the Republic of Slovenia. The Court argued, on the contrary, that the request for a preliminary ruling made clear that according to the new legislative reform, both the liability regimes are financed not only by such an allocation of profits but also, where necessary, by a levy on the general reserves of the central bank, or by a loan to that bank from the Republic of Slovenia, and accordingly from that central bank's own funds.

3. As regards the question posed by the Slovenian Constitutional Court relating to the possibility that the described two liability regimes constitute breach of the **principle of independence** of Banka Slovenije pursuant to Articles 130 TFEU and 7 of the ESCB Statute, the Court of Justice underlined, at the outset, that such question remained relevant only in relation to the first liability regime, since the second one was already deemed unlawful for breach of the prohibition on monetary financing.

The Court, then, observed that "*the principle of independence of those central banks does not necessarily apply in the same way when they carry out a task falling within the scope of the ESCB and when they perform a function not falling within that scope which has been assigned to them under national law by virtue of Article 14.4 of the Protocol on the ESCB and the ECB*" such as the one conferred upon *Banka Slovenije* in the case at hand.

That said, according to the Court, since Article 14.4 of the ESCB provides that national central banks may perform functions other than those of the ESCB under their own responsibility and liability, the establishment of a regime enabling them to incur liability for damage caused in the performance of such functions cannot, per se, be regarded as incompatible with the independence of those central banks. Nevertheless, by imposing on it a liability regime, Member States cannot place the national central bank in a situation that undermines its ability to carry out independently tasks falling within the scope of the ESCB.

In this regard, the Court underlined that while neither the TFEU nor the ESCB Statute lay down in respect of the national central banks a rule imposing their independent management of their finances, equivalent to the rule established by Article 282(3) TFEU in respect of the ECB, such independent management is necessary for national central banks to be able to perform their ESCB tasks. Indeed, "[i]*n order to participate in the implementation of the European Union's monetary policy, the establishment of reserves by the national central banks is essential, in particular in order to be able to offset any losses resulting from monetary policy operations and to finance open market operations provided for in Article 18 of the Protocol on the ESCB and the ECB*".

If follows, in the Court's view, that the new Slovenian legislative provisions, that require *Banka Slovenije* to meet the compensation claims (also) by levying on its general reserves, in an amount likely to affect its ability to carry out its ESCB tasks effectively, and at the same time preclude the same central bank from restoring those reserves independently, since all its profits are systematically allocated to reimbursement of damage which it has caused, place that central bank in a situation of dependence on the political authorities of the Member State, because it may be forced to seek the consent of those political authorities in order to obtain funding or recapitalisation needed to carry out its ESCB tasks.

Similarly, the imposition on *Banka Slovenije* to take out a loan from other national public authorities, where other sources to meet compensation claims have been exhausted, places it in a situation in which, in order to be able to carry out its ESCB tasks, it must negotiate with those public authorities the amount of such a loan and the conditions to which it is subject.

Therefore, the Slovenian legislation under scrutiny "*places the national central bank concerned in a situation where it is potentially exposed to political pressure, whereas Article 130 TFEU and Article 7 of the Protocol on the ESCB and the ECB are intended, on the contrary, to shield the ESCB from all political pressure in order to enable it effectively to pursue the objectives ascribed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law*".

The Court of Justice noted, in the end, that the position would be different "*if the Member State which established a liability regime for its national central bank such as that referred to in the first question had ensured in advance that that central bank would have the funds necessary to be able to pay the compensation*

resulting from that regime, while retaining its ability to carry out its tasks falling within the scope of the ESCB effectively and completely independently".

4. The Court of Justice's conclusions on the principle of independence are similar to those provided by its Advocate General Mrs Kokott on 31 March 2022,[1] although the reasoning followed by the latter was in some parts different from the one proposed by the Court.

Similarly, the Court of Justice's and Mrs Kokott's arguments more or less align regarding the unlawfulness of *Banka Slovenjie*'s obligation to pay a flat-sum compensation to former holders of financial instruments cancelled by it solely on account of that cancellation, even if it is established that the same central bank fully complied with the relevant rules and acted with due care. Indeed, such regime clearly imposes on the central bank the financial burden of a State's obligation, which is precisely what Article 123 TFEU was meant to forbid.

In contrast, as regards the liability regime stemming from the violation of the duty of due care by the Slovenian central bank in the implementation of reorganisation measures, the Court's conclusions on the prohibition on monetary financing are quite different from Mrs Kokott's and possibly, to some extent, to the position held by the ECB in its consultative role on national legislation conferring new tasks upon the concerned national central bank and its compatibility with Article 123 TFEU.

The Advocate General had argued that Article 123 TFEU "*is intended to prevent the ESCB from providing any financial assistance whatever to the Member States. Therefore, the transfer of other public tasks to an NCB without corresponding financing must, in principle, be regarded as financial assistance to the Member State concerned if those tasks typically entail costs which, as a result of the transfer, must now be borne by the NCB instead of the Member State*". In her opinion, therefore, the fault-based nature of the liability is irrelevant for the purposes of the respect of Article 123 TFEU. Indeed, the obligations vis-à-vis third parties imposed on a central bank can be qualified as public sector's obligations within the meaning of Article 1(1)(b) of Council Regulation (EC) No 3603/93 every time they derive from the exercise of a function other than those of the ESCB, conferred upon the central bank by the national law. In her perspective, the Slovenian legislative reform, for both *Banka Slovenije*'s liability regimes, violated the prohibition on monetary financing because it required the central bank to fund the compensation of damages incurred by third parties not only with the share of its profits that is normally allocated to the State budget, but also with the part that is intended to establish its general reserves. Such reserves would therefore be used for the purpose of financing public obligations vis-à-vis third parties, rather then, as required, for monetary policy purposes.

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[1] For a report and an analysis of the Advocate General conclusions please see also the article "*Central bank's liability for resolution procedures of banks as a possible violation of NCBs' independence and of the prohibition of monetary financing. Opinion of the Advocate General Mrs. Kokott*" in No 16 of Nomos Basileus (April 2022).

On the contrary, as seen above, the Court found that the prohibition on monetary financing does not preclude the imposition on a central bank of a liability, from its own funds, related to its exercise of a function other than those of the ESCB, as long as such liability is fault-based. The element of (serious) fault, it appears, determines in the Court's view that the obligation to meet compensation claims becomes that central bank's 'own' obligation, irrespective of any other consideration regarding the nature of the function the faulty exercise of which caused the emergence of the liability.

As regards this last aspect, it is worth underlining that the Court of Justice made no reference nor attributed any relevance to the circumstance that the function conferred on *Banka Slovenjie* (the implementation of reorganisation measures vis-à-vis credit institutions) is a 'central banking' task (*i.e.* a task typically performed by central banks in the Member States' legal traditions) or a government task, in light of Article 14.4 of the ESCB Statute.

Instead, on the differentiation between 'central banking' tasks and government tasks the ECB has consistently based its reasoning when asked for an opinion on the compatibility with the prohibition on monetary financing of national legislation conferring a new task upon a central bank, concluding that costs that central banks incur from exercising a government task (but not a 'central banking' task) constitute the discharge of a public sector's obligation vis-à-vis third parties within the meaning of Article 1(1)(b) of Council Regulation (EC) No 3603/93, and as such a violation of Article 123 TFEU, if they are not reimbursed by the State.

According to such position, the ECB has firmly held that resolution and reorganisation tasks are 'central banking' tasks and therefore fall outside the scope of the prohibition of monetary financing, provided that they do not undermine an NCB's independence in accordance with Article 130 of the Treaty and that the discharge of these tasks by central banks does not extend to the financing of resolution funds or other resolution financial arrangements as these are government tasks.[2]

It could be argued that if the Court concurred with the ECB's position on the relevance of the differentiation between 'central banking' tasks and government tasks, it first would have had to exclude that the functions conferred upon *Banka Slovenije* were government functions, because, otherwise, the violation of the prohibition on monetary financing would have had to be declared regardless of the specificities of the liability regimes (and, in particular, their being based on the central bank's negligence), as long as no reimbursement from the State was

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2 See, *ex multis*, ECB Opinion of 1 July 2015 (CON/2015/22); for further reference: ECB Opinions of 21 January 2015 (CON/2015/2) and (CON/2015/3); ECB Opinion of 22 September 2015 (CON/2015/33); ECB Opinion of 16 October 2015 (CON/2015/35) on the conferral of resolution tasks to the Bank of Italy; ECB Opinion of 1 February 2016 (CON/2016/5); ECB Opinion of 3 May 2016 (CON/2016/28). See also ECB Opinion of 29 November 2012, on the BRRD proposal (CON/2012/99). See also the previous article on Nomos Basileus, cited in the previous note.

provided by the national law under scrutiny. Only if the functions were in fact 'central banking' ones, the Court would have had to assess if the specificities of the liability regimes determined nonetheless the discharge by *Banka Slovenije* of public sector's obligations vis-à-vis third parties.

But no similar reasoning was proposed by the Court, that still did not shy away from analysing in general terms the EU framework regulating national central banks that are part of the ESCB, their tasks and the prohibition on monetary financing, as apparent from paragraphs 45 to 73 of its judgment.

However, it must be underlined that, pursuant to the questions posed by the referring Constitutional Court, the Court of Justice assessed the compatibility with the prohibition on monetary financing only of *Banka Slovenije*'s liability regime, not of its exercise of the national function from which the same liability regime arises.

Another aspect worth of consideration is that, as seen above, the Court specifically stated that only a serious breach of the duty of due care on the part of the central bank in its exercise of a national task may justify its liability pursuant to Article 123 TFEU. This is because, otherwise, Member States would be able to transfer on their respective central banks the financial burden of the risks inherently connected to the exercise of public tasks characterised by a "*high degree of complexity and urgency*", such as the implementation of reorganisation measures within the meaning of Directive 2001/24. Since the same reasoning appears to be applicable as regards banking resolution tasks, it follows that when such tasks are conferred upon national central banks, the respective Member States must either make use of the possibility, recognised by Article 3(12) BRRD, to limit the liability of the resolution authority, the competent authority and their respective staff for acts and omissions in the course of discharging their functions under the same Directive; or provide for a mechanism to reimburse the same central banks for any cost incurred as a consequence of third parties' claims for damages not stemming from a serious breach of the duty of due care.

4. References to "notes de doctrine"

Janja Hojnik, *Liability for damages of a national central bank acting as a resolution authority prior to the Single Resolution Mechanism (C-45/21, Banka Slovenije)*, EU Law Live, 30 september 2022.

PNB Banka v ECB

1. Keywords and summary

PNB Banka v ECB

Court of Justice – Case C-326/21 P – Judgment of 15 September 2022 – ECLI:EU:C:2022:693

Scope of the European Central Bank's powers to ensure compliance with Article 74(1) of Directive 2013/36/EU and judicial review of the measures adopted by it

ECB's COMPETENCE AND POWERS – Ensuring compliance of a credit institution with governance requirements – Absence of a power to issue ad hoc instructions to the credit institution on specific matters

In accordance with Article 4(1)(e) and (3) of Regulation (EU) No 1024/2013, with regard to a credit institution subject to its direct supervision the ECB is the competent authority to ensure compliance with Article 74(1) of Directive 2013/36/EU requiring credit institutions to have in place sound and effective governance arrangements. In this context, under the national legislation implementing Article 67(2)(b) of Directive 2013/36/EU, read in conjunction with paragraph (1)(d) of that article, the ECB may, inter alia, address to a credit institution which has failed to put in place the governance arrangements required by the national provisions transposing Article 74 of that directive an injunction ordering that institution to cease that conduct and to desist from a repetition of that conduct.

However, such provisions do not allow the ECB to issue to the governance bodies of such an institution ad hoc instructions as to which decision they must take in relation to a specific request. Therefore, under such provisions the ECB may not issue an instruction to the insolvency administrator of a credit institution under its supervision to grant the lawyer authorised by the credit institution's board of directors (whose powers were transferred to the insolvency administrator under national insolvency law) access to the same credit institution's premises, information, members of staff and resources.

ACTION FOR ANNULMENT – Actionable measures – Courtesy letter – Inadmissibility

If an institution of the European Union is not in a position to grant a request addressed to it, since there is no legal provision enabling it to adopt the requested

decision, the letter by which, as a courtesy, that institution informs the author of the request of that impossibility cannot be treated in the same way as a decision for the purposes of Article 263 TFEU and, in fact, does not constitute a measure against which an action for annulment may be brought under Article 263 TFEU.

Malacalza Investimenti v ECB

1. Keywords and summary

Malacalza Investimenti v ECB

General Court – Case T-552/19 OP – Judgment of 28 September 2022 – ECLI:EU:T:2022:587

European Central Bank's decision to refuse access to documents

Right to access – Duty to protect confidentiality and professional secrecy – No general presumption of confidentiality in Article 4(1)(c) of the ECB Decision No 2004/258

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 - does not provide for a general presumption of confidentiality (see also GC, judgment of 6 October 2021, case T-827/17, *Aeris Invest v ECB*, EU:T:2021:660).

First, its scope is not precisely defined and, as a consequence, the applicants are not able to foresee the rules based on which the ECB could reject their request of access.

Second, an interpretation according to which Article 4(1)(c) of the ECB Decision No 2004/258 does provide for a general presumption of confidentiality would run counter the case-by-case approach to assess if an information is confidential recommended by the Court of Justice in the *Baumeister* judgment (see CJEU, judgment 19 June 2018, case C-15/16, *Baumeister v Bundesanstalt für Finanzdienstleistungsaufsicht*, EU:C:2018:464).

Third, Article 4(1)(c) of the ECB Decision No 2004/258 provides for an absolute exception to the right to access, because, without requiring any case-by-case balancing of interests, it compels the ECB to refuse access to a document where the disclosure would undermine the confidentiality of information that is protected as such under Union law. Consequently, if such provision was interpreted as providing for a general presumption of confidentiality, it would preclude the possibility for the applicants to prove that a specific document falls outside the general presumption or that the disclosure would be in the public interest.

Therefore, such provision may not constitute the legal basis for the ECB to presumptively declare confidential (and, as such, not accessible) all the information included in the decision that places a credit institution under special administration.

Right to access – Duty to protect confidentiality and professional secrecy – Criteria for the assessment of the request to access – Case-by-case assessment – Duty to state reasons – Impossibility to remedy the failure to state reasons during the proceedings before the Court

When the ECB decides to refuse access to a document pursuant to one of the exceptions to the right to access provided for by Article 4(1) of the ECB Decision No 2004/258, it must explain how the 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 must be characterised by the 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 to access.

In this respect, the ECB may not refuse access based on the general assumption that, if the concerned document were disclosed, banks would not be able to rely on the secrecy of the information they provide to the ECB or the national competent authorities; nor on the general and unspecified assumption that the same disclosure would undermine the good functioning of the system of prudential supervision.

Moreover, since the statement of reasons must be notified to the person concerned at the same time as the decision adversely affecting him, 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.

Right to access – Duty to protect confidentiality and professional secrecy – Protection of commercial interests – Criteria for the assessment of the request to access – Overriding public interest in disclosure

In order to rely effectively on the first indent of Article 4(2) of the ECB Decision No 2004/258 to refuse access, the ECB has to prove that the requested documents include elements that, if disclosed, could adversely affect the commercial interests of a legal person. This condition occurs when the documents include confidential commercial information relating, in particular, to the business strategies of the undertakings concerned or to their commercial relations or where those documents contain information particular to that undertaking which reveal its expertise.

In this regard, the duty to state reasons falling on the ECB is not fulfilled by general and unspecific assumptions according to which the information contained in the requested documents, if disclosed, would harm the commercial interests of the concerned entity or according to which the requested documents were obtained by the ECB in the context of its ongoing supervision.

Furthermore, since the mere fact that a document relates to an interest protected by an exception to the right to access is not sufficient to justify the application of such an exception, the ECB must carry out a specific assessment of the confidential nature of the information contained in each of the requested documents.

Finally, according to the first indent of Article 4(2) of the ECB Decision No 2004/258, the ECB may not refuse access to a document containing confidential information that, if disclosed, could adversely affect the commercial interests of a legal person, if there is an overriding public interest in disclosure. It follows that when the ECB refuses access pursuant said provision, it must state the reasons why no overriding public interest in disclosure exists.

2. The General Court's rulings on the access to the documents relating to the Banca Carige's temporary administration

by Michelino Villani

1. By its judgments of 28 September 2022 (Malacalza Investimenti v European Central Bank - T-552/19 OP) and 29 June 2022 (Corneli v European Central Bank – T-501/19) the General Court has annulled two decisions of the ECB dismissing the requests by Ms Corneli and Malacalza Investimenti S.r.l. to have access to the documents relating to the Banca Carige's temporary administration.

At the point in time when the ECB decided for the temporary administration of Banca Carige (1 January 2019) – without any prior involvement of the interested persons –[1] Malacalza Investimenti was the main shareholder of the bank; Ms Corneli a minority one. The decision was not published in its entirety; it was only announced after its adoption by means of a press release in the ECB's website.

Hence, Ms Corneli and Malacalza Investimenti asked the ECB to disclose the decision placing Banca Carige under temporary administration pursuant to the ECB's Decision on public access of 4 March 2004.[2] Apparently the application by Malacalza Investimenti, differently from the Ms Corneli's one, was also aimed at having access to the written communications between the ECB and Banca Carige's managers during the period immediately before that decision and to the minutes of the meetings between the ECB and Banca Carige's managers during the same period.

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[1] For the measure of temporary administration to be effective, the Article 70 of *Testo unico bancario* excludes the right to be heard.

[2] Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB documents.

The ECB rejected both requests. In sum, the denial was based on the exception under Article 4(1)(c) of the Decision of 4 March 2004 pursuant to which the ECB shall refuse access where a disclosure would undermine the protection of "*the confidentiality of information that is protected as such under Union law*"; in the ECB's view, it could be inferred from said provision a general presumption of confidentiality embracing all the information falling under the scope of the prudential supervision, given that the obligation of professional secrecy established by the Union law is to be deemed as a general rule. As to the request of access by Malacalza Investimenti, which concerned also the communications between the ECB and the credit institution and the minutes of the meetings, the ECB in addition relied on the exception regarding the protection of the "*commercial interests*" of natural or legal persons under Article 4(2), first indent, of the Decision, on the ground that the disclosure of the information affecting the supervision of Banca Carige, which was ongoing, could harm the commercial interests of that company.

Both brought actions for the annulment of the ECB's denial submitting similar pleas in law, which the General Court has deemed to be well-founded.

With reference to the Malacalza Investimenti case, it must be noted that the ruling of 28 September 2022 follows the judgment by default released on 25 June 2020 (T-552/19), under which the Court granted the application of Malacalza Investimenti on the ground of a summary examination of the applicant's pleas (as per Article 123 of the Rules of Procedure)[3] and thus annulled the denial by the ECB. This second judgment rules on the ECB's application for the re-examination of the case on an *inter partes* basis;[4] differently from the previous one, it is the outcome of a full scrutiny of the pleas submitted by Malacalza Investimenti; like the previous one, it declares the unlawfulness of the ECB's refusal.

2. The motivations of the judgments at issue are specular and can be summarized jointly.

Both rulings overtly adhere to the line of reasoning supporting the recent General Court's decision in the case Aeris Invest Sàrl,[5] regarding the ECB's denial to give access to some documents pertaining to the resolution of Banco Popular.

As a preliminary point, the Court has observed that the Article 4(1)(c) of Decision of 4 March 2004 cannot be interpreted as enabling the ECB to rely on

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[3] The Court found that the ECB had failed to lodge its defence within the time limit; hence, it examinated the application following the default procedure under Article 123 of the Rules of Procedure of the General Court, according to which the Court shall adjudicate in favour of the applicant "*unless it is clear that the General Court has no jurisdiction to hear and determine the action or that the action is manifestly inadmissible or manifestly lacking any foundation in law*".

[4] The Article 166 of the Rules of Procedure enables the defendant against whom the Court has delivered a judgment by default to apply for setting it aside.

[5] Judgment of 6 October 2021, *Aeris Invest Sàrl v ECB* (T-827/17).

a general presumption of confidentiality covering all the information collected in the performance of its supervisory tasks.

The application of such a presumption would be in contrast with the principle of legal certainty, as that norm of the Decision of 4 March 2004, which aims at aligning with the other provisions "*under Union law*" establishing confidentiality regimes, has a scope that is not clearly and precisely circumscribed; it comes from the fact that the secrecy obligation incumbent on the ECB as banking supervisor is governed by a set of rules (Article 27 of the SSM Regulation;[6] Article 53 of the CRD;[7] Article 84 of the BRRD)[8] and this ends up to leaving to the discretion of the same ECB the identification of the applicable provision from time to time.

Besides, and more importantly, the General Court has pointed out that the recognition of a general presumption of confidentiality based on that provision of the Decision cannot be reconciled with the approach adopted by the European Court of Justice in *Baumeister*. In that decision, regarding the interpretation of the confidentiality regime set out in Article 54 of the MiFID,[9] the Court considered that said provision does not require to keep confidential all the information held by the supervisory authority; rather, the regime of secrecy can be applied only once the authority has verified that: i) the information is not public; ii) the disclosure is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system.[10] The Court of Justice endorsed the same approach in *Buccioni*, as regards the similar provision on professional secrecy in Article 53 of the CRD.[11]

According to the General Court, the ECB must check that the two conditions established in *Baumeister* are satisfied also when assessing the requests of public access, if it intends to deny the disclosure on the ground of the exception under Article 4(1)(c) of Decision of 4 March 2004; such a verification requires a specific and individual examination of each item of information concerned, which cannot be circumvented by the application of a general presumption of confidentiality. This implies that the motivation of the decision denying the access must explain how the disclosure of the concerned documents could specifically and effectively harm the interests protected by the exception at issue. Moreover, the risk of undermining such interests has to be reasonably foreseeable and not purely hypothetical.

By virtue of this approach, the General Court has reached the conclusion that the statement of reasons put forward in the ECB's decisions was not

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6 Regulation (EU) No 1024/2013 of 15 October 2013.

7 Directive 2013/36/EU of 26 June 2013.

8 Directive 2014/59/EU of 15 May 2014.

9 Directive 2004/39/EC of 21 April 2004.

10 Judgment of 19 June 2018, *Baumeister* (C-15/16), paras 34 – 35.

11 Judgment of 13 September 2018, *Buccioni* (C-594/16), paras 39 – 40.

sufficient, as it was formulated in very general terms; in essence, in the Court's opinion, the contested decisions only mentioned some detrimental consequences potentially deriving from a disclosure of the documents (the risk of damaging the same Banca Carige as well as the banking system as a whole and the proper functioning of the prudential supervision), but did not explain the actuality and concreteness of those prejudicial effects in the light of all the circumstances of the case.

In particular the motivation provided by the ECB is found devoid of any specification of the risks Banca Carige would have incurred if the access had been granted, although an explanation in this respect would have been particularly necessary, given that – amongst other things –[12] the ECB had published a press release the day after the adoption of the temporary administration, in which some information on the underlying reasons and the factual background of said measure had already been divulged.

Besides, since the ECB has tried to complement the motivation of the contested decisions in the course of the lawsuit, the Court has reminded that 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 judicial proceedings.[13]

For the same arguments as above, the Court has found that the ECB has also failed to provide a sufficient motivation for the purposes of the exception envisaged in Article 4(2), first indent, of the Decision of 4 March 2004, due to the lack of any indication of the circumstances proving that the disclosure of the documents could have been effectively prejudicial for the commercial interests of Banca Carige.

In the light of all the above, the General Court has ruled in favour of the applicants and thus has annulled the ECB's decisions.

3. The reasoning followed by the General Court – which in turn mirrors, as above said, the approach adopted in Aeris Invest Sàrl – aligns to the settled case-law elaborated by the European courts in interpreting the Regulation (EC) No 1049/2001,[14] whose structure and governing principles are identical to that of the Decision.

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[12] In the Corneli ruling, the Court has further pointed out that Banca Carige, before being put under temporary administration, had already divulged some information about its troubled situation (para 109).

[13] See in this respect, among others, judgment of 26 November 1981, *Michel v Parliament* (C-195/80), para 22.

[14] Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.

According to this case-law,[15] the institution that decides to refuse access to a document must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception upon which it is relying (among those provided for in Article 4 of Regulation No 1049/2001). The exceptions must be interpreted strictly because they derogate from the principle of transparency enshrined in Article 15 TFEU. Nevertheless, the institution may base its decisions on general presumptions in relation to certain categories of documents; but the use of such presumptions must be founded on reasonable and convincing grounds, given that relying on general presumptions, instead of examining each document individually and specifically, would restrict the general principle of transparency.

The Court considers the use of presumptions as a means of simplification to be applied carefully and only where appropriate;[16] it cannot result in a general exemption from the obligation to evaluate, on a case by case basis, the potential impact of the disclosure on the interests the confidentiality regime aims at preserving.

This has led the General Court to conclude, in the cases at issue, that the ECB, when assessing a request of public access to documents relating to its activity of supervision, cannot benefit from those presumptions, at least to the extent that it is not compatible with the "confidentiality test" as envisaged in *Baumeister* and *Buccioni*.

On the other hand, it's worth noting that the ECB seems to have based the existence of a presumption of confidentiality on the argument that, according to the logic inherent to the secrecy regime under Article 53 CRD, confidentiality should be the rule, the disclosure the exception; indeed, as recognized by the European Court of Justice,[17] the relationship between secrecy and transparency emerging from the Union legislation in the field of financial and banking supervision is the opposite than the one behind the rules on public access. In this perspective, inspired on the same jurisprudence of the Court of Justice, the application of such a presumption would be consistent with the peculiarity of the professional secrecy laid down in the CRD, in which the access to the information held by the

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[15] See, for example, judgment of 21 September 2010, *Kingdom of Sweden and Others v API and Commission* (C-514/07), paras 72 – 75; judgment of 16 July 2015, *ClientEarth v Commission* (C-612/13), paras. 57 – 84; judgment of 28 June 2012, *European Commission v Edition Odile Jacob* (C-404/10 P), paras 116 – 123; judgment of 27 February 2014, *Commission v EnBW Energie Baden-Württemberg AG,* (C-365/12 P), paras 78 – 99; judgment of 11 May 2017, *Kingdom of Sweden v European Commissio*n (C-562/14), paras 36 – 52; judgment of 25 September 2014, *Spirlea v Commission* (T-306/12), paras 39 – 80.

[16] Indeed, the ECJ has acknowledged the existence of general presumptions as regards documents relating to specific categories of procedures, e.g. in the field of State aid (judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, para 61), merger control (judgments of 28 June 2012, *Commission* v *Éditions Odile Jacob*, cited above, para 123) and anti-competitive agreements (judgment of 27 February 2014, *Commission* v *EnBW*, cited above, para 81).

[17] See, in particular, *Baumeister* (C-15/16), paras 40 – 43; the argument is implicit in *Buccioni* (C-594/16), para 30.

supervisory authority can be authorized only in the specific cases "exhaustively set out in that directive".[18]

Said argument has not persuaded the General Court.

18 *Buccioni* (C-594/16), para 30.

ABLV Bank v SRB

1. Keywords and summary

ABLV Bank v SRB

Court of Justice – Case C-202/21 P – Judgment of 29 September 2022 – ECLI:EU:C:2022:734

Non-reimbursement rule applying to *ex-ante* contribution to the Single Resolution Fund

Ex ante contributions to the Single Resolution Fund – Non-reimbursement rule

It follows from the clear wording of Article 70(4) of Regulation No 806/2014 that the legislator intended to exclude, in a general manner, the reimbursement of ex-ante contributions received in due form. Furthermore, on the meaning of the word 'due', that provision refers to 'duly received contributions', thus indicating that the non-reimbursement rule applies to ex-ante contributions which were properly received on the date of their payment. Such wording reflects the EU legislature's decision to establish a rule with no exceptions, which cannot be called into question by an alleged analogy between *ex ante* contributions and insurance premiums.

Ex ante contributions to the Single Resolution Fund – Concept of change of status – Broad interpretation – Decision withdrawing a credit institution's authorisation

Article 12(2) of Delegated Regulation 2015/63 states that a change of status of an institution, including a small institution, during the contribution period is not to have an effect on the ex-ante contribution to be paid in that particular year. The word 'change of status' used in Article 12(2) of Delegated Regulation 2015/63 can encompass any kind of change in the legal or factual situation of an institution that may have an effect on the application of that provision. The context of that provision means that a transaction that constitutes a change of status does not, in principle, benefit from the method of calculating prorated contributions as provided for in Article 12(1) of Delegated Regulation 2015/63, since that latter provision is to be interpreted strictly.

Indeed, if NCAs were required to take into account changes occurring in the legal and financial situation of institutions throughout the financial year, it would hardly be possible for them reliably to calculate the ordinary contributions due in the following year and, consequently, achieve the objective of at least 1% of the

amount of covered deposits of all the institutions authorised in the territory of a Member State, by 31 December 2024.

The loss of banking licence constitues a ‘change of status’ within the meaning of Article 12(2) of Delegated Regulation 2015/63, being not relevant that the institution concerned no longer falls within the scope of the SRM. Indeed, the wording of Article 12(2) of Delegated Regulation 2015/63 makes no distinction between changes in the status of institutions according to whether or not they cause the institution concerned to fall outside of the scope of the SRM.

Corneli v ECB

1. Keywords and summary

Corneli v ECB

General Court – Case T-502/19 – Judgment of 12 October 2022 – ECLI:EU:T:2022:627

Conditions for the ECB's decision placing a credit institution under temporary administration

Decision placing a credit institution under temporary administration – Action brought by shareholders of the credit institution – Admissibility – Direct and individual concern

Under Article 263(4) TFEU, a person can challenge a decision addressed to another person only if such a decision (i) directly and (ii) individually concerns him or her. In particular, a decision affects the applicant directly if it alters the applicant's legal situation and it does so in an automatic way, as an immediate result of its adoption, without the need for any intermediate act by the addressee, that has no discretionary powers regarding the implementation. Moreover, the applicant is individually affected by a decision if he or she has certain peculiar attributes or if other peculiar circumstances exist so that he or she is differentiated from all other persons.

The decision placing a credit institution under temporary administration directly concerns the shareholder of said credit institution, because, without the intervention of an intermediate measure, it alters the applicant's rights to participate in the management of the bank in accordance with the applicable rules, and, specifically, impinges on the right to elect the management and supervisory bodies of the bank, the right to convene the general meeting of shareholders and to set the agenda, and the right to hold liable the management of the bank.

In this regard, it is irrelevant that the effects of the decision on the applicant's rights are only temporary, since nothing in the case-law indicates that situations in which the legal position of a party would be adversely affected for a limited period must be excluded from judicial protection. Similarly, of no consequence is the circumstance that under the temporary administration certain decisions affecting the bank can still be taken only by the shareholders at a general meeting, because there is no basis for singling out, from among the rights of the shareholders, those that are essential and deserve protection while those that are considered less important are deprived of such protection. Moreover, while it is true that the vote cast by one particular shareholder does not, in itself, provide a basis for a decision to be taken at the meeting in the case where that shareholder

does not hold a sufficiently large proportion of the share capital, that fact does not mean, as regards each shareholder, that that right to vote does not exist and accordingly does not have its necessary judicial protection.

The conclusion that the decision placing a credit institution under temporary administration directly concerns the shareholder of said credit institution is not in contrast with the Court of Justice's ruling that excluded that the shareholders of a bank have standing in bringing action against the ECB's decision withdrawing the authorisation as a credit institution (ECJ, Grand Chamber, 5 November 2019, Joined Cases C-663/17 P, C-665/17 P e C-669/17 P, *Trasta Komercbanka AS v BCE*). Indeed, the decision withdrawing the authorisation, as the Court of Justice clarified in said ruling, does not prevent the shareholders from exercising their rights.

Furthermore, the decision placing a credit institution under temporary administration concerns the shareholder of said institution individually, because at the time when it is taken such a shareholder is clearly identifiable as part of the closed group of the shareholders, that were affected in respect of an attribute which characterised them individually, namely, first, that of holding shares in the bank and, second, that of being prevented, by the effect of those decisions, from exercising certain rights attaching to those shares.

DECISION PLACING A CREDIT INSTITUTION UNDER TEMPORARY ADMINISTRATION – Action brought by shareholders of the credit institution – Admissibility – Legal interest in bringing the proceeding

In order to bring an action, the applicant must establish that he or she has an interest in bringing proceedings by demonstrating that the binding legal effects produced by the contested decision are capable of affecting his or her interests; such proof may be provided by establishing that the act has brought about a distinct change in his or her legal position.

The shareholder of a credit institution has a legal interest in bringing the proceeding against the decision placing such a credit institution under temporary administration if said shareholder relies not on the effects produced by the contested decision on the bank, but rather on those produced on his or her own rights as a shareholder.

DECISION TO PLACE A CREDIT INSTITUTION UNDER TEMPORARY ADMINISTRATION – Conditions of admissibility under Article 70 of the Italian Consolidated Law on Banking – Deterioration of the situation of the bank – Not included

Article 70 of the Italian Consolidated Law on Banking (Legislative Decree No 385/1993) – which regulates the "extraordinary administration" of banks, i.e. the early intervention measure of the "temporary administration" foreseen

by Article 29 of the BRRD – establishes that such measure can be applied to a bank in the event of «*violations and irregularities referred to in Article 69-*octiesdecies*(1)(b)*», or if serious financial losses are expected, or where dissolution of the management and supervisory bodies of the bank is requested by reasoned application from the administrative bodies or by an extraordinary meeting of its shareholders. Conversely, Article 69-*octiesdecies*(1)(b) of the same Law stipulates that the different early intervention measure of the removal of senior management and management body, foreseen by Article 28 of the BRRD, can be applied to a bank in the event of «*serious violations of laws, regulations or statutes or serious irregularities in the administration*», or where «*the deterioration in the situation of the bank is particularly significant*».

Therefore, according to the textual analysis of said Article 70, only the "violations" and "irregularities" referred to in Article 69-*octiesdecies*(1)(b) of the same Law can lead to the temporary administration of a bank, while such measure cannot be based on the serious deterioration of the situation of a bank, because such condition, foreseen in Article 69-*octiesdecies*(1)(b), is not specifically referred to in Article 70.

INTERPRETATION OF NATIONAL LAW – Duty to interpret national law in light of the wording and purpose of the Directive it transposes – Duty to interpret national law in light of the interpretation given to it by national courts – Limit of the literal content of the national law

When national courts apply domestic law transposing a Directive they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the Directive concerned in order to achieve the result sought by that Directive. The Court of Justice has the same duty to interpret national law in conformity with EU law in the light of the Directive concerned.

However, the principle of conforming interpretation has certain limits stemming from general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem*, i.e. counter to the wording used in the national measure transposing a Directive.

In this perspective, the "deterioration of the situation of the bank" is not a generic expression, but rather a specific condition laid down by Article 69-*octiesdecies*(1)(b) of the Italian Consolidated Law on Banking for the removal of senior management and management body of a credit institution. Such a condition is not explicitly referred to by Article 70 of said Law for the adoption of the most intrusive measure in the system of early intervention, i.e. that of the placement of a bank under temporary administration. Therefore, an interpretation of Article 70 of the Italian Consolidated Law on Banking that, in light of Article 29 BRRD, allows for the adoption of a decision placing a bank under temporary administration based on the deterioration of the situation of said bank, is inadmissible because runs counter the wording of said national provision.

Application of national law by the ECB – Union law composed of directives – ECB's duty to apply only national law transposing those directive – ECB's direct application of directive imposing an obligation to an individual contrary to Article 288 TFEU

It follows from Article 4(3) of Regulation No 1024/2013 that, where the EU law is composed of directives, it is the national law transposing those directives that must be applied. The provision cannot be read as having two distinct sources of obligations, namely EU law in its entirety, including directives, to which the national law transposing them should be added. Such an interpretation would imply that the national provisions differ from directives and that, in such a case, the two types of document are binding on the ECB as separate legislative sources.

This interpretation cannot be accepted, since it would be contrary to Article 288 TFEU, which provides that 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Furthermore, according to settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.

2. Upon application of one of the bank's minority shareholders, the General Court annulled the ECB's decision placing Banca Carige S.p.A. under temporary administration

by Francescopaolo Chirico and Giuseppe Pala

1. In late 2018, Banca Carige S.p.A., an Italian significant credit institution, was experiencing serious problems regarding, in particular, its capital position, liquidity situation, and governance. Following the ECB's request to submit a strategy restoring compliance with the requirements and ensuring the sustainability of that compliance by 1 January 2019, the bank's board of directors adopted, on 12 November 2018, a plan that foresaw, first, the issue of Class 2 subordinated bonds and, second, an increase in capital subject to shareholder approval.

While the first stage was carried out with a subscription of bonds in the amount of EUR 318.2 million by the voluntary intervention fund of the Italian deposit guarantee scheme (*Fondo interbancario di tutela dei depositi*) and in the amount of EUR 1.8 million by Banco di Desio e della Brianza S.p.A., the second stage could not be implemented following the objection of shareholders holding 70% of the capital at an extraordinary general meeting held on 22 December 2018.

As a consequence, the vice-chair and another member of the board of directors resigned on 23 December 2018, while the chairman, the managing director, and three other members of the same board resigned on 2 January 2019, leading to the disqualification of the board pursuant to Article 2386 of the Italian Civil Code.

In light of the above, on 1 January 2019 the ECB decided to place Banca Carige S.p.A. under temporary administration, pursuant to Articles 69-*octiesdecies*, 70 and 98 of the Italian Legislative Decree No. 385/1993, as amended (hereinafter, the "Italian Consolidated Law on Banking"), implementing Article 29 of the BRRD. As a consequence, both the bank's board of directors and the supervisory committee were dissolved, the former members were replaced by three temporary directors and three supervisors and the prerogatives of the general assembly of the bank's shareholders were limited. The new temporary management was mandated to «*take the necessary steps to ensure that* [the bank] *once again complies with asset requirements on a sustainable basis*». The ECB's decision was made public on 2 January 2019.

Ms Francesca Corneli, a minority shareholder in Banca Carige S.p.A., applied to the General Court of the European Union seeking the annulment of the ECB's decision. She alleged: the infringement of the rules on proportionality; the infringement of the duty to state reasons and of the right to be heard; the unlawful appointment, as temporary administrators, of persons who had previously performed important duties in the bank's management and administration; an error of law in the determination of the legal basis used to adopt the contested decisions; the infringement of the rights of the shareholders, the right of property, the freedom of private economic initiative; the inadequacy of the temporary administration to resolve the problems of the bank. The European Commission intervened in the proceeding in support of the ECB.

With its judgment of 12 October 2022, the General Court upheld the application and annulled the ECB's decision.

2. As regards the **admissibility of the action** brought by the applicant, that was contested by the ECB and the Commission during the proceeding, the General Court recalled that under Article 263(4) TFEU a person can challenge a decision addressed to another person only if such a decision (i) directly and (ii) individually concerns him or her. In particular, according to the case-law, a decision affects the applicant directly if it alters the applicant's legal situation and it does so in a purely automatic way, as an immediate result of its adoption, without the need for any intermediate act by the addressee, that has no discretionary powers regarding the implementation. Moreover, the applicant is individually affected by a decision if he or she has certain peculiar attributes or if other peculiar circumstances exist so that he or she is differentiated from all other persons.

In the case at hand, the ECB's decision was addressed, of course, to Banca Carige S.p.A. and not to its shareholders. Nonetheless, the General Court held that **the decision concerned the applicant directly**, because, without the intervention of an intermediate measure, it «*alter*[ed] *the applicant's rights to participate, as a shareholder, in the management of the bank in accordance with the applicable rules*», and, in particular, it impinged on her right to elect the management and supervisory bodies of the bank, her right to convene the general meeting of shareholders and to set the agenda, and her right to hold liable the management of the bank.

In this regard, the General Court rejected all the opposing arguments proposed by the ECB and the Commission. Specifically, in the General Court's view, it was irrelevant that the effects of the decision on the applicant's rights were only temporary, since «*nothing in the case-law indicates that situations in which the legal position of a party would be adversely affected for a limited period must be excluded from judicial protection*». Similarly, of no consequence was the circumstance that under the temporary administration certain decisions affecting the bank could still be taken only by the shareholders at a general meeting, because «[t]*here is no basis for singling out, from among the rights of the shareholders, those that are essential and deserve protection while those that are considered less important are deprived of such protection*». Moreover, the General Court rejected the ECB and Commission's argument according to which the rights affected by the decision belonged to the general meeting and not to the shareholders individually. Indeed, while «[i]*t is true that the vote cast by one particular shareholder does not, in itself, provide a basis for a decision to be taken at the meeting in the case where that shareholder does not hold a sufficiently large proportion of the share capital* […], *that fact does not mean, as regards each shareholder, that that right to vote does not exist and accordingly does not have its necessary judicial protection*».

Furthermore, the ECB and the Commission argued that the applicant's action should be declared inadmissible in line with the Court of Justice's ruling that excluded that the shareholders of a bank have standing in bringing action against the ECB's decision withdrawing the authorisation as a credit institution (ECJ, Grand Chamber, 5 November 2019, Joined Cases C-663/17 P, C-665/17 P e C-669/17 P, *Trasta Komercbanka AS v BCE*).[1] Indeed, in such instance the Court held that the authorisation is issued to the bank itself and not to its shareholders *ad personam*, and therefore the decision to withdraw the authorisation does not alter the legal situation of the shareholders, being irrelevant, in this respect, any non-legal, economic effects.[2]

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[1] In previous judgments, the Court of Justice also declared inadmissible (i) the action brought by shareholders against the SRB's decision not placing an entity under resolution, considering that such a decision may not be deemed as being of direct concern to the shareholder (CG, Tenth Chamber, order of 14 May 2020, T-282/18, *Bernis and others v SRB*, upheld by ECJ, Seventh Chamber, judgment of 24 February 2022, C-364/20 P, *Bernis and others v SRB*); (ii) the ECB's decision declaring the bank is failing or likely to fail within the meaning of Article 18(1) of SRM Regulation (GC, Eighth Chamber, order of 6 May 2019, case T-283/18, *Bernis v BCE*, upheld by ECJ, Third Chamber, 6 may 2021, Joined Cases C-551/19 P and C-552/19 P, *ABLV and Bernis v BCE*), because such a decision is a preparatory measure, designed to allow the SRB to take a decision regarding the resolution of the bank in question, and cannot, for that reason, form the subject of an action for annulment. See the notes published in issues 14 and 20 of Nomos Basileus.

[2] «*The right of shareholders to receive dividends and to participate in the management of Trasta Komercbanka, as a company constituted under Latvian law, has not been affected by the decision at issue. It is true that, following the withdrawal of its authorisation, Trasta Komercbanka is no longer in a position to continue its activity as a credit institution and, consequently, its ability to distribute dividends to its shareholders is questionable. However, the negative effect of that withdrawal is economic in nature; the right of shareholders to receive dividends, just like their right to participate in the management of that company, if necessary by changing its object, has in no way been affected by the decision at issue*».

On the contrary, the General Court underlined that, as the Court of Justice clarified in the previous ruling, the decision to withdraw the authorisation did not prevent the shareholders from exercising their rights (such as the right to receive dividends and to vote in the general meetings); conversely, the decision placing a bank under temporary administration, as said before, does affect the individual rights of the shareholders.

Additionally, the General Court also maintained that **the ECB's decision to place Banca Carige S.p.A. under temporary administration concerned the applicant individually**, because at the time when it was taken she was clearly identifiable as part of the closed group of the shareholders, that «*were affected in respect of an attribute which characterised them individually, namely, first, that of holding shares in the bank and, second, that of being prevented, by the effect of those decisions, from exercising certain rights attaching to those shares*».

Finally, the General Court recognised that **the applicant had a legal interest in bringing the proceeding**, because she did not rely on the effects produced by the contested decision on the bank, but rather on those produced «*on her own rights as a shareholder*».

In light of the above, the application was deemed admissible.

3. On the substance of the application, the General Court upheld the applicant's plea alleging that the ECB erred in law in determining the legal basis used to adopt its decision.

Indeed, in the Court's assessment, in order to place Banca Carige S.p.A. under temporary administration the ECB relied exclusively and expressly upon the existence of a «*significant deterioration*» of the bank's situation, wrongly assuming that such circumstance was among the ones that allowed the adoption of such measure pursuant to Articles 69-*octiesdecies* and 70 of the Italian Consolidated Law on Banking.

More precisely, Article 70 of the Italian Consolidated Law on Banking – which regulates the "extraordinary administration" of banks, *i.e.* the early intervention measure of the "temporary administration" foreseen by Article 29 of the BRRD – establishes that such measure can be applied to a bank in the event of «*violations and irregularities referred to in Article 69-*octiesdecies*(1)(b)*», or if serious financial losses are expected, or where dissolution of the management and supervisory bodies of the bank is requested by reasoned application from the administrative bodies or by an extraordinary meeting of its shareholders.

Conversely, Article 69-*octiesdecies*(1)(b) of the same Law stipulates that the different early intervention measure of the removal of senior management and management body, foreseen by Article 28 of the BRRD, can be applied to a bank in the event of «*serious violations of laws, regulations or statutes or serious irregularities in the administration*», or where «*the deterioration in the situation of the bank is particularly significant*».

Therefore, in the General Court's view, according to the textual analysis of Article 70 of the Italian Consolidated Law on Banking, only the "violations" and "irregularities" referred to in Article 69-*octiesdecies*(1)(b) of the same Law can lead to the temporary administration of a bank, while such measure cannot be based on the serious deterioration of the situation of a bank, because such condition, foreseen in Article 69-*octiesdecies*(1)(b), is not specifically mentioned in Article 70.

As a consequence, in the case at hand, «*the ECB infringed Article 70 of the Consolidated Law on Banking by relying, even though that condition was not provided for in that provision, on the 'significant deterioration in the situation of* [the bank]*' in order to dissolve the bank's management and supervisory bodies* [and] *set up a temporary administration*».

The opposing arguments submitted by the ECB and the Commission were rejected.

The Court weighed firstly whether Article 70 of the Italian Consolidated Law on Banking – notwithstanding its wording – could be interpreted in conformity with Article 29 of the BRRD. Such rule clearly allows for the temporary administration measure to be adopted when the same conditions for the removal measure under Article 28 of the same Directive are met (including the deterioration of the situation of the concerned bank) but the latter measure is deemed to be insufficient by the competent authority to remedy the situation. However, the General Court underlined that the obligation to interpret national law in conformity with EU law cannot serve as a basis for an interpretation which runs counter to the wording used in the national law transposing a directive.

Moreover, the Commission and the ECB submitted that the latter, when acting as the competent authority under banking legislation, was required to apply, in addition to national law, all the standards laid down in EU law and, in particular, in Article 29 of the BRRD, which, as already mentioned, allows for the temporary administration measure to be also adopted in the case of the deterioration of the situation of the concerned bank.

In this regard, the General Court recognised that under Article 4(3) of the SSM Regulation the ECB, for the purpose of carrying out the tasks conferred on it by the same Regulation, must apply «*all relevant Union law, and where this Union law is composed of directives, the national legislation transposing those directives*». Nonetheless, contrary to the ECB and Commission's assumptions, it follows from such provision of the SSM Regulation that «*where the EU law involves directives, it is* [only] *the national law transposing those directives that must be applied*», also in accordance with Article 288 TFEU, which provides that «*a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*», and with the settled case-law pursuant to which a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.

Thus, concluded the General Court, «*the error made by the ECB in the application of Article 70 of the Consolidated Law on Banking cannot be remedied by a free interpretation of the texts which would allow the conditions for the application of provisions conceived separately in Directive 2014/59 and national law to be reconstructed*».

As anticipated, the applicant's plea was therefore upheld and the ECB's decision was annulled, without there being any need to examine the other pleas.

4. As regards the substance of the case, the General Court adopted a formalistic approach, both in its interpretation of the relevant provisions of the Italian Consolidated Law on Banking and in its assessment of the content of the ECB's decision.

It is undeniable that the literal wording of Article 70 of the Consolidated Law on Banking may raise doubts as to whether the condition of the deterioration of the bank's situation – not expressly referred to among those of Article 69-*octiesdecies*(1)(b) of the same law – allows for the adoption of the measure of temporary administration.

Nevertheless, from a logical and systematic point of view, the measures of removal (pursuant to Article 69-*octiesdecies*(1)(b) of the Consolidated Law on Banking) and of temporary administration (pursuant to Article 70 of the same law) differ, in terms of their prerequisites, only in the greater or lesser seriousness of the situation in which the bank finds itself, in the light of which it is necessary to assess whether the removal measure, being less incisive, is sufficient to remedy the situation or whether, instead, the temporary administration is necessary.

It follows that it would not correspond to logic to maintain that the supervisory authority, faced with the serious deterioration of a bank's situation, can remove its senior management and management body but, if it does not deem such a measure sufficient to remedy the situation, it cannot decide to subject the same bank to temporary administration.

In accordance with such framework, fully confirmed by Articles 28 and 29 of the BRRD, the reference in Article 70 of the Consolidated Law on Banking to the «*violations and irregularities*» foreseen by Article 69-octiesdecies(1)(b) of the same law should have been understood in a unitary sense, as encompassing all the conditions of the bank that allow for the adoption of the removal measure.

Such reasoning could possibly find its confirmation, in the case at hand, in the reasons that supported the ECB's decision to proceed with the temporary administration of Banca Carige S.p.A.; reasons that, as mentioned above, the Court seems to have omitted to analyse, limiting itself to the textual reference made by the ECB to the «*deterioration of the situation*» of the bank. Indeed, in light of the factual circumstances regarding the bank precisely recalled in the first part of the judgment, undoubtedly considered by the ECB when it adopted the contested decision, it could be argued that «*serious irregularities*» had occurred, also according to the established national case-law on the point. Such a condition,

also in the General Court's view, allowed the temporary administration to be ordered. All the more so since, as the Court did not fail to recognise, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts.

It follows that, with a less formalistic approach, both the concerned national law and the substantial reasons stated in the ECB's decision could have led to a different outcome.

3. Reference to "notes de doctrine"

Daniel Sarmiento, *Setting the limits of implementation of national law by EU Institutions: the Corneli v ECB case (T-502/19)*, EU Law Live, 24 october 2022.

Filippo Annunziata, Thomaz De Arruda, *The Corneli Case (T-502/19). Challenges and issues in the application of national law by the ECB and EU Courts*, EU Law Live, weekend edition no 131, 18 february 2023.

Trasta Komercbanka and Others v ECB

1. Keywords and summary

Trasta Komercbanka and Others v ECB

General Court – Case T-698/16 – Judgment of 30 November 2022 – ECLI:EU:T:2022:737

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

Decision withdrawing a credit institution's authorisation – Action brought by shareholders of the credit institution – Lack of direct concern – Decision adopted by the ECB following the opinion issued by the Administrative Board of Review – Inadmissibility

As already clarified by the Court of Justice (judgment 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), the decision to withdraw a credit institution's authorisation does not directly concern its shareholders, leading to the inadmissibility of the action for annulment brought by them. The same principle also applies to the decision adopted by the ECB, following the opinion issued by the Administrative Board of Review, to replace, with retroactive effect, the first withdrawal decision.

Decision withdrawing a credit institution's authorisation – Infringement of national law on anti-money laundering and countering the financing of terrorism – Allocation of tasks and powers between the ECB and the NCAs

It is apparent from recitals 28 and 29 of Regulation No 1024/2013 that the task of preventing the use of the financial system for the purposes of money laundering and terrorist financing remains a national competence and that the ECB has, in that regard, a duty of cooperation vis-à-vis the national authorities. However, under Article 4(1)(a) of Regulation n. 1024/2013, and subject to Article 14 of that regulation, the ECB is exclusively competent, in respect of the tasks conferred by that regulation, to withdraw authorisations of credit institutions, irrespective of the significance of such institutions.

It follows that, while the national authorities are competent to implement the anti-money laundering provisions or to propose that the ECB withdraw authorisation on the ground of infringement of those provisions, they do not have the power to withdraw the authorisations of credit institutions, which falls exclusively within the competence of the ECB. In order to carry out such a task,

the ECB is required to apply not only EU law but also the provisions of national law transposing the directives.

Relationship between the ECB and NCAs within the SSM – Decentralised framework – Distribution of competences

It is apparent from the examination of the interaction between Article 4(1) and Article 6 of Regulation No 1024/2013 that such provisions allow the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national competent authorities of participating Member States.

Relationship between the ECB and NCAs within the SSM – Distribution of competences – Involvement of the ECB in the supervision of LSIs – Conditions for take-over

Under Article 6(6) of Regulation No 1024/2013, the supervision of less significant institutions falls directly within the competence of the NCAs. In accordance with Article 80(1) and Article 81(1) of the SSM Framework Regulation, as regards withdrawal of authorisations from those institutions, the ECB is to act on a proposal from a national competent authority. Consequently, the ECB cannot legitimately be criticised for failing to intervene in the active supervision of a less significant institution prior to the procedure for withdrawing its authorisation.

While Article 6(5)(b) of Regulation No 1024/2013 give the ECB the opportunity to exercise directly all relevant powers in respect of a less significant credit institution, it does not however impose any obligation on it and limits its intervention to the need to avoid inconsistent application of high supervisory standards by the national competent authorities.

Decision withdrawing a credit institution's authorisation – Whether withdrawal depends on measures taken previously

Article 18 of Directive 2013/36, which provides for the cases in respect of which the competent authorities may withdraw authorisation, does not render that measure dependent on measures taken previously. Thus, contrary to what is claimed by the applicant, withdrawal of authorisation is not a measure which can be adopted only as a last resort, where other measures have failed. It is clear from that article that recourse to that measure is determined by the nature of the breaches of the applicable regulatory requirements.

Composite procedure for withdrawal of authorisation – No right to be heard at the national stage

Where the acts of the national authorities constitute a stage of a procedure in which an EU institution exercises alone the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities, it falls to the EU Courts, by virtue of their exclusive jurisdiction, to rule on the legality of a final decision adopted by the ECB and to examine any defects vitiating the preparatory acts or the proposals of the national authorities that could affect the validity of that final decision, in order to ensure effective judicial protection.

Article 31 of the SSM Framework Regulation, which governs the right to be heard of the entities subject to prudential supervision, does not provide for the possibility for those entities to comment before the competent national authority has sent the draft withdrawal decision to the ECB. Consequently, the fact that the applicant was not heard before that draft decision was sent cannot render the contested decision unlawful.

Composite procedure for withdrawal of authorisation – Independent assessment by the ECB of the conditions for withdrawal

According to Article 14 of Regulation No 1024/2013, the ECB is not required to follow the draft withdrawal decision submitted by the national competent authority concerned, and any decision to withdraw authorisation is taken by it independently, on the basis of its own assessment.

Right of defence – Right to be heard – Consequences of the violation

The rights of the defence, which include the right to be heard, are among the fundamental rights of the EU legal order and are enshrined in the Charter of Fundamental Rights of the European Union. The right to be heard is protected by not only Articles 47 and 48 of the Charter, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also by Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter thus provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure that would affect him/her adversely is taken.

That principle requires that the addressees of decisions, which significantly affect their interests, should be afforded the opportunity to make known their views on the facts alleged against them on which the decision at issue is based.

Nevertheless, an infringement of the right to be heard has no effect on the validity of the contested decision where it is not established that the outcome of the procedure might have been different without the alleged irregularity.

Right of defence – Right to be heard – Restrictions – Period granted to submit written observations

The fundamental rights, such as observance of the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, in the light of the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.

From a combined reading of the third subparagraph of Article 31(3) of the SSM Framework Regulation and Article 14(5) of Regulation No 1024/2013, to which the former provision refers, that the period granted to the credit institution for submitting its written observations on a draft withdrawal decision is three working days.

The EU legislature carried out an assessment as to the reasonableness of the period laid down by those provisions by weighing the relevant opposing interests: on the one hand, the private interests of the credit institutions in having as much time as possible to make their observations and, on the other, the public interest in having legality restored as quickly as possible.

Principle of the protection of legitimate expectations

The principle of the protection of legitimate expectations applies to any person in a situation where an EU authority has caused him or her to have justified expectations. Nevertheless, the right to rely on that principle requires three cumulative conditions. First, the EU authorities must have given to the person concerned precise, unconditional and consistent assurances originating from authorised and reliable sources, being not relevant the ones given by a national authority. Secondly, those assurances must be such as to give rise to a legitimate expectation of the person concerned. Thirdly, the assurances given must be consistent with the applicable rules.

While the possibility of relying on the protection of legitimate expectations is available to any economic operator whom an institution has caused to have justified expectations, where a prudent and circumspect economic operator is able to foresee the adoption of a measure likely to affect his interests, he cannot rely on that principle if the measure is adopted.

Duty to state reasons – Case-by-case assessment

The obligation to state reasons laid down in Article 296 TFEU is an essential procedural requirement, distinct from the question of whether the reasons given are correct, which goes to the substantive legality of the contested measure.

The statement of reasons must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review.

As regards the reasons given for individual decisions, the purpose of the obligation to state reasons is to permit review by the Courts and to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged.

Furthermore, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given, and the interest that the addressees of the measure, or other parties, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question of whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

PNB Banka AS v ECB [*]

1. Keywords and summary

PNB Banka AS v ECB

General Court – Case T-330/19 – Judgment of 7 December 2022 – ECLI:EU:T:2022:775

European Central Bank's decision to oppose the proposed acquisition of a qualifying holding in a credit institution

Procedure for assessing acquisitions of qualifying holdings – Time limits for authorising qualifying holdings

In accordance with Article 22(2) of Directive 2013/36, the period of 60 working days provided for the assessment of a proposed acquisition of a qualifying holding in a credit institution begins to run on the date of the written acknowledgement, by the competent Authority, of receipt of the notification of the proposed acquisition and all documents required by the Member State to be attached to the notification on the basis of the list referred to in Article 23(4) of the same directive.

Procedure for assessing acquisitions of qualifying holdings – ECB's role

In view of the particular mechanism for collaboration which the EU legislature intended to establish between the ECB and the NCA for the examination of applications concerning the acquisition or increase in qualifying holdings, the ECB may freely intervene in the procedure before the relevant NCA sends a proposal for a decision, even from the beginning of the procedure. Therefore, the ECB intervention during the national stage of the procedure does not amount to a procedural defect.

Procedure for assessing acquisitions of qualifying holdings – Criteria for the assessment of the qualifying holding – No need to examine individually each criterion

Article 23(2) of Directive 2013/36 does not require the competent Authority, when opposing the acquisition of a qualifying holding in a credit institution, to

[*] See the note to the following case T-230/20.

examine all the criteria set out in Article 23(1) of the same Directive. On the contrary, the competent authority may oppose the proposed acquisition if there are reasonable grounds for opposing the acquisition on the basis of one or more of those criteria. Therefore, by opposing the proposed acquisition in the light of the criteria of financial soundness and compliance with prudential requirements, without examining the other criteria referred to in Article 23(1) of Directive 2013/36, the ECB did not infringe any legal provision.

Procedure for assessing acquisitions of qualifying holdings – Criteria for the assessment of the qualifying holding – New fact

In assessing a proposed acquisition of a qualifying holding in a credit institution, the ECB may consider a fact subsequent to the notification, such as a higher regulatory capital requirements set by the NCA after the notification of the proposed acquisition. This conclusion is supported by Article 23(1)(d) of Directive 2013/36, which mandates the competent authoritis to carry out a prospective assessment of compliance with prudential requirements, *i.e.* with the view of assessing whether the credit institution will be able to comply, and continue to comply, with the prudential requirements.

Procedure for assessing acquisitions of qualifying holdings – Criteria for the assessment of the qualifying holding – Financial soundness criterion

Pursuant to the relevant EU legislation (Article 23(1) and (2) of Directive 2013/36), the ECB is not required to demonstrate that a proposed acquisition of a qualifying holding in a credit institution would have material adverse effect in order to oppose such an acquisition on the basis of the financial soundness criterion. Similarly, the ECB is not required to carry out a counterfactual analysis of the situation that would arise if that acquisition did not occur.

In assessing the financial soundness criterion, the ECB correctly considered that the proposed acquirers were not in a position to provide financial support to the target bank in a context in which, in view of the business plan submitted to the ECB, such support would probably be necessary. This does not mean that the ECB assumed the existence of a general and unlimited obligation of the proposed acquirers to finance the target bank. Indeed, the ECB did not impose an unlimited financing obligation on the proposed acquirers, but merely assessed whether the proposed acquirers had sufficient financial soundness in order to meet the capital needs of the new group.

Procedure for assessing acquisitions of qualifying holdings – Criteria for the assessment of the qualifying holding – Compliance with prudential requirements

The criterion of compliance with prudential requirements must be assessed not from the perspective of the proposed acquirer, but from the perspective of the target credit institution and the new banking group. Consequently, even if the proposed acquisition would have positive effect on the capital of the acquirer, this does not imply that the target bank or the new group would comply with prudential requirements.

PNB Banka AS v ECB

1. Keywords and summary

PNB Banka AS v ECB

General Court – Case T-230/20 – Judgment of 7 December 2022 – ECLI:EU:T:2022:782

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

Procedure for withdrawal of authorisation – Proposal by the NCA – Significant institution – SRB's competence and powers – Consultations with SRB – NRA's role

The power of the national competent authority to propose the withdrawal of the authorisation of a credit institution, including where that institution is under the direct prudential supervision of the ECB, is explained by the fact that the withdrawal may also be based on cases provided for by national law. In such a situation, the national competent authority is particularly well placed to propose to the ECB that the authorisation in question be withdrawn.

It does not follow either from Article 80(2) of the SSM Framework Regulation or from Article 83(2) of that regulation that the national competent authority can propose the withdrawal of authorisation only of less significant credit institutions. Therefore, the fact that the ECB was, in this case, responsible for the direct prudential supervision of the applicant did not preclude the decision to withdraw authorisation from being taken on a proposal from the relevant NCA.

In accordance with Article 14(6) of the SSM Regulation, as long as national authorities remain competent to resolve credit institutions, in cases where they consider that the withdrawal of the authorisation would prejudice the adequate implementation of or actions necessary for resolution or to maintain financial stability, they are duly to notify their objection to the ECB explaining in detail the prejudice that a withdrawal would cause. Accordingly, where the SRB is the competent resolution authority in respect of a credit institution, the national authorities are no longer entitled to make representations to the ECB in the context of a procedure for withdrawal of authorisation.

As long as a significant credit institution is concerned, it follows from Article 14(5) of the SSM Regulation, read in conjunction with Article 83(2)(c) of the SSM Framework Regulation, that the ECB is not required to consult the national resolution authority, where the SRB is the competent resolution authority. Indeed, during the procedure for withdrawal of the authorisation of a significant credit institution, the SRB takes the place of the national resolution

authority for the purposes of the SSM Framework Regulation and, therefore, the ECB may withdraw the authorisation on its own initiative or on a proposal from the national competent authority following consultations with the SRB.

PROCEDURE FOR WITHDRAWAL OF AUTHORISATION – Proposal by the NCA – ECB's exclusive competence – EU Courts jurisdiction – Right to complete and effective judicial protection

A national competent authority does not have the power to withdraw the authorisations of credit institutions, but only to propose that the ECB withdraw such authorisations. Neither the SSM Regulation nor the SSM Framework Regulation contain any indication as to the procedure governing the adoption, by the national competent authority, of a proposal to withdraw authorisation. Moreover, EU law does not require that proposal to be notified to the credit institution concerned. The proposal in question constitutes an act of a national authority and constitutes a stage of a procedure in which an EU institution exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities.

Pursuant to Article 83(2) of the SSM Framework Regulation, the draft withdrawal decision of the national competent authority is only one of the elements that the ECB is to take into account. No provision of that regulation prohibits the ECB, on the basis of its own assessment of the applicant's situation as the authority responsible for the direct prudential supervision of the applicant, from supplementing, where appropriate, the grounds already included in the NCA's proposal to withdraw authorisation.

In such a situation, it falls to the EU Courts, by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU, to rule on the legality of the final decision adopted by the EU institution at issue and to examine, in order to ensure effective judicial protection of the persons concerned, any defects of the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision.

RIGHT TO GOOD ADMINISTRATION – Reasonable time of administrative proceedings – Right of defence

The principle that an administrative procedure must be conducted within a reasonable time is enshrined in Article 41(1) of the Charter of Fundamental Rights of the European Union, under which every person has the right to have his affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the European Union.

The reasonableness of the length of proceedings is to be determined in the light of the circumstances specific to each case and, in particular, the importance of the

case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities. The infringement of the reasonable time principle may justify the annulment of an ECB's decision only where it could have had an impact on the outcome of the procedure. That is particularly the case where that infringement is capable of adversely affecting the rights of defence of the undertaking concerned.

In light of the circumstances of the case and taking into account the characteristics of the procedure for withdrawal of authorisation, it must be held that in the present case – where procedure lasted more than five months - the ECB did not infringe its obligation to take a decision without undue delay within the meaning of Article 83(1) of the SSM Framework Regulation.

ECB's competence and powers – Failing or likely to fail assessment – Interaction between the withdrawal decision and the FOLTF assessment

A FOLTF assessment by the ECB is not a challengeable act, but is a preparatory act in the context of a resolution procedure provided for in Article 18 of Regulation No 806/2014. That procedure ends with a decision of the SRB to adopt or not to adopt a resolution scheme, whereas the procedure for withdrawal of authorisation leads to the adoption by the ECB of a decision concerning the withdrawal of authorisation. The two procedures are thus distinct and have different legal effects.

Right of defence – Right to good administration – Right to be heard – Right to access – Duty to protect confidentiality and professional secrecy

The rights of defence, which include the right to be heard, are among the fundamental rights of the EU legal order. The right to be heard is protected not only in Articles 47 and 48 of the Charter of Fundamental Rights of the EU, which ensure respect for both the right to defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Pursuant to article 41(2) of the Charter, the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him or her adversely is taken and 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.

Article 31(1) of the SSM Framework Regulation constitutes a specific expression of the right to be heard. That provision provides, inter alia, that, before the ECB may adopt a supervisory decision addressed to a party which would adversely affect his or her rights, that party must be given the opportunity of commenting in writing to the ECB on facts, objections and legal grounds relevant to that decision.

As regards the right of every person to have access to his or her file, Article 32(1) of the SSM Framework Regulation provides that the rights of defence of

the parties concerned are to be fully respected in ECB supervisory procedures. For this purpose, after the opening of a supervisory procedure, the parties are to be entitled to have access to the ECB's file, subject to the legitimate interest of legal and natural persons other than the relevant party, in the protection of their business secrets. The right of access to the file is not to extend to confidential information.

Right of defence – Administrative proceeding – Credit institution under liquidation – Lawyer authorised by the board of directors – Irrelevance of the subsequent revocation of the power of attorney by the appointed liquidator

According to the judgment of 5 November 2019, *ECB and Others v Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17), the right to effective judicial protection enshrined in Article 47 of the Charter requires not to consider the revocation by the appointed liquidator of the power of attorney of the lawyer authorised by the board of directors to bring an action before the EU Courts.

In this case, where all the powers of the credit institution and its board of directors had been transferred to an insolvency administrator, the ECB complied with the requirements stemming from the above-mentioned judgments, given that the ECB: acknowledged that the applicant's board of directors was still representing the applicant for the purpose of bringing an action against the contested decision withdrawing the authorisation; called on the lawyer authorised by the applicant's board of directors to submit his observations on the draft decision; confirmed that the lawyer authorised by the applicant's board of directors could have access to the supervisory file.

Insolvency decision – NCA's competence and powers – EU Courts jurisdiction

Insolvency proceedings fall within the competence of the national authorities in cases where, in particular, there are no provisions conferring such a competence on the ECB. Thus, any errors vitiating the insolvency decision cannot be imputed to the ECB. Similarly, the EU courts does not have jurisdiction to decide whether there are any defects vitiating a decision of a national court declaring the applicant insolvent pursuant to the Latvian legislation.

Decision withdrawing a credit institution's authorisation – Principle of proportionality

The cessation of the applicant's banking activities because of the national insolvency decision does not alter the fact that the applicant was still an authorised

credit institution on the date of the contested decision. In that context, the ECB was entitled to decide to withdraw the applicant's authorisation, since the conditions laid down in Article 18(d) and (e) of Directive 2013/36 were satisfied, as well as to take the view that the withdrawal of authorisation was proportionate.

2. On the validity of the decisions taken by the ECB vis-à-vis PNB Banka concerning the acquisition of a qualifying holding in another credit institution and the withdrawal of the banking license

by Francescopaolo Chirico and Giuseppe Pala

Like the judgments issued in cases T-301/19 and T-275/19,[1] also the decisions of the General Court of 7 December 2022, in case T-330/19 and case T-230/20, concern PNB Banka, a former Latvian Bank. In the latter two cases, the Court was asked to rule on the validity of the ECB's decision of 21 March 2019 opposing the acquisition of a qualifying holding in another Latvian credit institution (T-330/19) and on the ECB's decision of 17 February 2020 withdrawing the PNB Banka's authorization as a credit institution (T-230/20). This note focuses on the main issues addressed by the Court in the two rulings.

As for the decision opposing the acquisition by PNB Banka of a qualifying holding in another credit institution, the ECB concluded that the financial soundness criterion of the proposed acquirer and the criterion of compliance with prudential requirements, provided for by Article 23(1) of Directive 2013/36/EU (CRD) as transposed into Latvian law, were not satisfied.

PNB Banka challenged such a decision on several grounds, one of which referred to the alleged violation of the assessment period provided for in Article 22(2) of the CRD. In this regard, the Court recalls that the sixty-day time limit runs from "*the date of the written acknowledgement of receipt of the notification and all documents required by the Member State to be attached to the notification*", as further specified by the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings (hereinafter "Joint Guidelines").[2] Therefore, the note by which the NCA states that it has begun to assess whether the notification is complete, as well as the note by which the NCA declares that the notification is incomplete – whose legitimacy is not

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[1] See *The ECB's decision to take over the prudential supervision of PNB Banka: the General Court confirms its validity* and *On-site inspections carried out by the ECB vis-à-vis LSIs: the GC confirms the validity of the ECB's decision to conduct an on-site inspection at the premises of PNB Banka*, both on Nomos Basileus no 23.

[2] Joint Guidelines of the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) on the prudential assessment of acquisitions and increases of qualifying holdings [in entities] in the financial sector, published on 20 December 2016.

contested by the applicant – do not constitute an acknowledgement of receipt and, as such, are incapable of triggering the sixty-day assessment period.

The Court also clarifies that neither Article 15 of Regulation No 1024/2013 (SSM Regulation) nor Articles 85 to 87 of Regulation No 468/2014 (SSM Framework Regulation) preclude the ECB from opposing the acquisition on the grounds of a fact subsequent to the notification, such as the regulatory capital requirements set by the NCA after the notification. Indeed, Article 23(1)(d) of the CRD refers to the ability of the credit institution to comply "*and continue to comply*" with the prudential requirements (see also Joint Guidelines, par. 13.4).

As regards the assessment carried out by the ECB, the Court highlights that:

(i) with regard to the financial soundness of the proposed acquirer, it does not follow from Article 23(1) and (2) of the CRD nor from the Joint Guidelines that, to oppose the acquisition, the ECB is required to demonstrate a material adverse effect compared with a situation in which that acquisition does not take place;

(ii) the prudential requirements criterion must be assessed not from the perspective of the proposed acquirer but from the perspective of the credit institution to which the acquisition relates, therefore it is not relevant that the operation would have a favorable effect on the capital of the proposed acquirer;

(iii) when opposing the acquisition of a credit institution, the competent authority does not have to examine all the criteria set out in Article 23(1) of the CRD, as the decision may be grounded on one or more of such criteria.

From a procedural perspective, the intervention of the ECB in the common procedure under Article 15 of the SSM Regulation prior to the sending of the proposal by the NCA does not determine the illegitimacy of the decision adopted by the ECB. Recalling the principles affirmed in the case *Berlusconi and Fininvest*,[3] the Court highlights that, under Article 15 of the SSM Regulation, the NCAs' role consists of registering applications for authorization and in assisting the ECB, which alone has the decision-making power. Indeed, the NCA proposal is not binding on the ECB, and the EU law does not require the proposal to be notified to the applicant. Given the particular mechanism for collaboration established by EU law in this matter, the ECB may intervene in the procedure before the national competent authority sends a proposal and even from the beginning of the procedure.[4] To that end, Article 85(1) of the SSM Framework Regulation requires the NCA to notify the ECB of the notification received no later than five working days following the acknowledgement of receipt.

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[3] CG, judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023.

[4] In this regard, the Court recalls the Opinion of Advocate General Campos Sánchez-Bordona in *Berlusconi and Fininvest*, C-219/17, EU:C:2018:502, points 91, 95, 98 and 101.

Regarding the decision revoking PNB Banka's authorization, according to the Court, the structure of the common procedure is not altered by the classification of the entity as a significant institution. Indeed, the ECB is exclusively competent to withdraw authorizations of credit institutions, regardless of their classification as significant entities or less significant ones. According to Article 14(5) of the SSM Regulation, for both types of institutions, the NCA is entitled to submit a proposal for withdrawal where it considers that the relevant conditions are met. According to the Court, such power is explained by the circumstance that, under Article 18(e) of the CRD, the withdrawal may also be based on one of the cases where national law provides for withdrawal. In such a situation, the NCA is particularly well placed to propose the adoption of such decision.[5]

Nevertheless, the draft withdrawal decision of the national competent authority is only one of the elements that the ECB must take into account in order to adopt its final decision. No provision prohibits the ECB, on the basis of its own assessment of the entity's situation, from supplementing, where appropriate, the grounds already included in the national proposal to withdraw authorization.

Moreover, the NCA's competence to propose the withdrawal may not be called into question by either Article 80(2) of the SSM Framework Regulation, according to which the NCA is to coordinate with the NRA with regard to any relevant draft withdrawal decision, or Article 83(2) of the same Regulation, which provides that the ECB is to take into account consultation with the NCA and the NRA in taking its decisions.

In the applicant's view, the reference made by such provisions to the NRA implied that the NCA may only propose the withdrawal of the authorization of a less significant institution, the NRA not being responsible for credit institutions classified as significant.

On the contrary, according to the Court, such provisions must be interpreted consistently with Article 5(1) of Regulation No 806/2014 (SRM Regulation), which provides that the SRB, in the performance of its tasks and powers, has to be considered as the relevant national resolution authority for the purpose of the SRM Regulation and Directive 2014/59 (BRRD). Even though the provision referred to above does not expressly refer to the SSM Regulation, during the procedure for withdrawal of the authorization of a credit institution classified as a significant entity, the SRB takes the place of the national resolution authority for the purposes of the SSM Framework Regulation. The ECB may therefore withdraw the authorization on its own initiative or on a proposal from

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[5] Although the Court confirms the applicability to the withdrawal procedure of the principles established in the *Berlusconi Fininvest* case, resulting in the jurisdiction of the Union judge as for *"any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of* [the] *final decision*", according to the Court the applicant has not specified the procedural rights allegedly breached by the FCMC and that leads to the rejection of the plea.

the national competent authority following consultations with the SRB, in a situation where the latter is the competent resolution authority in respect of the relevant credit institution. Accordingly, as it may be inferred from Article 14(6) of the SSM Regulation, the national authorities responsible for resolution are no longer entitled to make representations to the ECB in the context of a procedure for withdrawal of authorization of credit institutions that have fallen within the scope of the SRB's competence.[6]

[6] According to Article 14(6) of SSM Regulation, the NRA's power to notify its objection to the ECB in respect of the withdrawal procedure may be exercised "*as long as national authorities remain competent to resolve credit institutions*".

PNB Banka AS v ECB

1. Keywords and summary

PNB Banka AS v ECB

General Court – Case T-301/19 – Judgment of 7 December 2022 – ECLI:EU:T:2022:774

European Central Bank's decision to classify PNB Banka as a significant entity subject to its direct prudential supervision

ECB's TAKE-OVER DECISION – ECB's competence and powers – Less significant institution – Principle of equal treatment

The ECB's decision adopted on the basis of Article 6(5)(b) of Regulation No 1024/2013 is a decision on the allocation of powers between the ECB and the national competent authorities in relation to prudential supervision. Although neither Article 6(5)(b) of Regulation No 1024/2013, regulating the exercises of direct supervision powers on LSI, nor Article 47(4) of Regulation No 468/2014, providing for the contrary (i.e. the decision to put an end on the direct supervision vis-à-vis a LSI), require the ECB to adopt a classification decision, they do not rule that out explicitly.

It follows from the wording of Article 39(5) of Regulation No 468/2014, supported by the wording of Article 68(5) of that regulation, that, where the ECB decides to carry out direct prudential supervision of a less significant credit institution on the basis of Article 6(5)(b) of Regulation No 1024/2013, it must adopt a decision classifying that institution as significant.

The classification of an entity as significant is not contrary to the principle of equal treatment since it does not alter either the prudential rules applicable to that entity or the supervisor powers that can be applied by the competent authority.

ECB's TAKE-OVER DECISION – Duty to state reasons

The duty to state reasons for acts of the EU institutions is satisfied if the statement is appropriate to the measures at issue, discloses in a clear and unequivocal fashion the reasoning followed by the concerned institution and is referred to the circumstances of the case, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. In light of this, the contested decision correctly sets out the reasons why the ECB considered it necessary to take over the direct

prudential supervision of the applicant: it refers clearly and unambiguously to the legal basis for the decision, the facts on which it is based and the ECB's assessment.

ECB's TAKE-OVER DECISION – Right to access – Right to be heard

The NCA request that the ECB carry out direct prudential supervision of the applicant was the first step in the administrative procedure, so it was a separate act from the contested decision and did not bind the ECB, since the latter could decide to take over the direct prudential supervision of the applicant for reasons other than those set out in that request, or even on its own initiative.

The mentioned request is part of the administrative file and the applicant could have had access to it (if it had made a request) in accordance with Article 32 of Regulation No 468/2014, which provides that the national competent authorities have to forward to the ECB, without undue delay, any request received related to the access to files.

When sufficiently precise information has been disclosed, enabling the entity concerned properly to state its point of view on the planned measures, the respect of the rights of the defence does not entail that the ECB is obliged spontaneously to grant access to all the documents. It is only on the request of the entity concerned that the ECB is required to provide access to all non-confidential official documents concerning the measures at issue.

ECB's TAKE-OVER DECISION – Collaboration between ECB and NCA – Report to be attached to the request of ECB's direct prudential supervision

Pursuant to Article 68(3) of Regulation No 468/2014, the request of the national competent authority that the ECB carry out direct prudential supervision in respect of a less significant entity is to be accompanied by a report indicating the supervisory history and the risk profile of that entity. The purpose of that report is to ensure the proper transmission of information between the national competent authority and the ECB; therefore, that report is not a procedural guarantee intended to protect the interests of the credit institution concerned, or an essential procedural requirement.

Consequently, the absence of the report stipulated in Article 68(3) of Regulation No 468/2014 could not, in the present case, render the contested decision unlawful. In any case, even if the absence of the report constitutes a procedural irregularity, that irregularity can entail the annulment of the contested decision only if it is shown that, in the absence of such irregularity, the decision might have been substantively different.

ECB's TAKE-OVER DECISION – Nature and purpose

It is not apparent either from the wording of Article 6(5)(b) of Regulation No 1024/2013, or from the provisions of Regulation No 468/2014, that the ECB's decision to exercise directly itself all relevant powers with regard to one or more less significant credit institutions must be exceptional in nature. Consequently, by not referring to the existence of exceptional circumstances in the contested decision, the ECB did not infringe any legal provision.

Given that the purpose of a decision adopted on the basis of Article 6(5)(b) of Regulation No 1024/2013 is to ensure a consistent application of high supervisory standards, and not to remedy a supervised entity's alleged failure to comply with prudential rules, the ECB may decide to carry out direct prudential supervision of a less significant institution without relying on such a failure to comply. Consequently, the ECB was entitled to decide to carry out direct prudential supervision of the applicant in light of the relevant NCA's assessment as regards its total inability to carry out high-level supervision.

ECB's TAKE-OVER DECISION – Principle of proportionality – Legitimate expectations – Legal certainty

In the present case, the contested decision was appropriate for attaining the objective of ensuring a consistent application of high supervisory standards. Indeed, the decision was capable of addressing the NCA's prudential concerns, by ensuring that the applicant would from then onwards be directly supervised by an authority which was in a position to use all of its supervisory powers.

The alternative measures suggested by the applicant (e.g. that the ECB provides advice or issue regulations, guidelines or general instructions to the NCA) were not available measures and, in any case, cannot be regarded as less onerous. Indeed, the contested decision, which merely alters the respective powers of the ECB and the relevant NCA, did not alter either the applicable prudential rules or the supervisory powers enjoyed by the competent authority vis-à-vis the applicant for the purposes of the supervisory tasks conferred on the ECB by the SSM.

Contrary to what the applicant submits, the contested decision is unambiguous and does not infringe the principles of protection of legitimate expectations and legal certainty. In this regard, it should be noted that a decision adopted pursuant to Article 6(5)(b) of Regulation No 1024/2013 does not have to state how prudential requirements will change, given that that decision precisely does not, in itself, have any effect on the applicable prudential rules, nor it must provide an indication of the period of time during which the ECB will be responsible for direct prudential supervision.

2. The ECB's decision to take over the prudential supervision of PNB Banka: the General Court confirms its validity

by Giuseppe Calarco

The Judgment of the General Court of 7 December 2022, in Case T 301/19, *PNB Banka AS v European Central Bank*, is one of the several decisions issued by the EU Judges concerning PNB Banka, a former Latvian Bank.[1] In this case, the Court was asked to rule on the validity of the decision of the European Central Bank (ECB), notified by letter of 1 March 2019, to classify PNB Banka as a significant entity subject to its direct prudential supervision.

The measure adopted pursuant to Article 6(5)(b) of Regulation No 1024/2013, upon request of the *Finanšu un kapitāla tirgus komisija* (Financial and Capital Market Commission, Latvia; "the FCMC"), was deemed necessary by the ECB, considering that, since the beginning of the ICSID arbitration proceedings brought by the applicant against the Republic of Latvia, the applicant's reaction to almost all the FCMC's supervisory activities revealed the lack of any willingness to cooperate, so that the FCMC considered itself completely unable to exercise a high-level supervision over the credit institution in accordance with EU and SSM standards.

The Court confirms the validity of the decision, rejecting all the pleas raised by the applicant.

With the first plea in law, the applicant argued that the contested decision, insofar as it classified the applicant as a significant entity, contradicted Article 6(5)(b) of Regulation No 1024/2013, since, in the applicant's view, the abovementioned provision does not provide for a classification decision, but rather for a decision by which the ECB starts to exercise all the relevant powers of a competent national authority directly with regard to one or more less significant credit institutions.

In essence, the applicant challenged the idea that a decision adopted pursuant to Article 6(5)(b) of Regulation No 1024/2013, which shall be grounded on material concerns about the quality of the supervision carried out by the competent national authority and not on a concern regarding the level of compliance to EU prudential rules by the credit institution, might have the effect of modifying the status of the institution concerned: from LSI to SI. According to the applicant, an entity subject to a decision under Article 6(5)(b) of Regulation No 1024/2013, should "*retain the right to the same treatment as less significant institutions and should not be subject to supervision which is appropriate only for 'genuinely' significant establishments*".

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[1] For a more detailed illustration of the relevant facts of the case, please refer *infra* to the note regarding case T-275/19, *PNB Banka v ECB*.

The Court finds this argument unconvincing and clarifies that when the ECB decides to carry out direct prudential supervision of a less significant credit institution pursuant to Article 6(5)(b) of Regulation No 1024/2013, it must adopt a decision classifying that institution as significant.

The EU Judges reach such a conclusion by simply referring to the literal meaning of the relevant provisions regulating the ECB's take-over powers.[2] In particular, the Court notices that Article 68(5) of Regulation No 468/2014, provides that, when the ECB intends to exercise direct supervision on a LSI, it shall adopt a decision pursuant to Title 2 of Part IV of that Regulation, which, significantly, is titled "*Procedure for classifying supervised entities as significant supervised entities*".

Similarly, unconvincing is, in the Court's view, the argument that the second sentence of Article 39 should not be interpreted in a manner incompatible with Article 6(5)(b) of Regulation No 1024/2013 or that, alternatively, should be considered invalid given that it alters the nature of the decision provided for in Article 6(5)(b) of Regulation No 1024/2013.

In the first place, the Judges underline that, although neither Article 6(5)(b) of Regulation No 1024/2013, regulating the exercises of direct supervision powers on LSI, nor Article 47(4) of Regulation No 468/2014, providing for the so-called "*actus contrarius*" (i.e. the decision to put an end on the direct supervision vis-à-vis a LSI), require the ECB to adopt a classification decision, they do not rule that out explicitly.

More importantly, the Court points out that the second sentence of Article 39(5) of Regulation No 468/2014 providing for the classification of an entity as significant is not capable of altering the nature of the decision pursuant to Article 6(5)(b), which it is accepted as a decision on the allocation of powers between the ECB and the competent national authorities in relation to prudential supervision. Nor it can be considered to be contrary to the principle of equal treatment, as the applicant appears to claim. Indeed, such a decision, whose sole effect consists in the take-over of direct prudential supervision in respect of a less significant entity, does not alter either the prudential rules applicable to that entity or the supervisory powers which the competent authority has in respect of that entity for the purposes of the supervisory tasks conferred on the ECB by the SSM.

The applicant, in order to have the decision set aside, also alleged the infringement of several essential procedural requirements.

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[2] The Court refers primarily to Article 39(5) of Regulation No 468/2014, which provides that: "The ECB shall also directly supervise a less significant supervised entity or a less significant supervised group under an ECB decision adopted pursuant to Article 6(5)(b) of [Regulation No 1024/2013] to the effect that the ECB will exercise directly all relevant powers referred to in Article 6(4) of Regulation [No 1024/2013]. For the purposes of the SSM, such a less significant supervised entity or less significant supervised group shall be classified as significant".

In particular, it contended, *inter alia*, that the failure by the ECB to disclose to it the FCMC's request of 21 December 2018, by way of which the Latvian NCA – following the issuance of the interim measures by the ICSID tribunal – asked the ECB to take over the prudential supervision, and the consequent impossibility to submit its comments regarding such request, would have determined the infringement of its rights of defense (and, in particular, the right to be heard) as well as the right of access to the administrative files.

Since the said request, in the applicant's view, is an essential procedural step laid down in Article 68 of Regulation No 468/2014, which served as a basis for the adoption of the take-over decision, the draft decision which was communicated to it before the adoption of the final act was not complete, so it was, as a consequence, also the final measure.

The Court rejects this claim by relying on the fact that the Latvian NCA request "*was the first step in the administrative procedure, but that it was a separate act from the contested decision and did not bind the ECB, since the latter could decide to take over the direct prudential supervision of the applicant for reasons other than those set out in that request, or even on its own initiative*". In addition, the Court makes it clear that the ECB is under no obligation to disclose of its own motion the content of the NCA request, which, as part of the file, can be accessed by the applicant upon its request. Furthermore, the Court notes that the ECB detailed in the draft decision, which was sent to the applicant and in the contested decision itself, the considerations contained in the FMC request on which it relied in order to adopt the final decision.

In this regard, it is worth mentioning also the complaint concerning the alleged infringement of Article 68(3) of Regulation No 468/2014, which requires the request of the national competent authority to be accompanied by a report clearly indicating the supervisory history and the risk profile of the entity or the group to be subject to direct supervision, due to the failure by the FCMC to provide the ECB with the said report.

Contrary to what was submitted by the applicant, according to which the report mentioned in Article 68 is an essential element of the procedure, whose purpose is to protect the applicant's interests in a transparent process subject to judicial review, the Court rules that the report in question is, inter alia, directed "*to ensure the proper transmission of information between the national competent authority and the ECB*" and is not "*…an essential procedural requirement within the meaning of Article 263 TFEU*". The conclusion is further supported by the fact that, in case of activation of the take-over procedure of its own motion, the request for the production of such a report by the national competent authority is merely an option available to the ECB, in accordance with Article 69(1) of Regulation No 468/2014.

In addition, the Court notices that, even if the request by the Latvian NCA was not formally accompanied by the report stated in Article 68(3) of Regulation No 468/2014, the same must be considered as containing all the information to be

included in that report or, at the very least, as referring to that information, which was already in the ECB's possession.

The applicant was also unsuccessful when it contends that the ECB misinterpreted Article 6(5)(b) of Regulation No 1024/2013 as regards the conditions and purpose of that provision. Of the three arguments formulated in this regard, namely that: a) the ECB erred in law, by failing to take into account the fact that a decision adopted under Article 6(5)(b) of Regulation No 1024/2013 is a decision intended to deal with problems regarding the quality of the supervision, and not to remedy failures by the credit institution concerned to comply with prudential rules; b) that the ECB failed to take account of the fact that Article 6(5)(b) of Regulation No 1024/2013 refers specifically to the "consistent" application of high supervisory standards, and that c) the contested decision does not acknowledge the exceptional nature of a decision adopted under Article 6(5)(b), it is worth focusing on the first one.

As to the question concerning the purpose of a take-over decision, it is interesting to note that the Court, indeed, does not dispute the interpretation of the *rationale* of these kinds of decisions advanced by the applicant; in rejecting the plea, the Judges recognize that the main reason which led to the adoption of the decision under issue was not, as the applicant argues, the failure by the latter to show "high level of compliance" with prudential requirements, but rather, the impossibility on the part of the FCMC, following the initiation of the arbitration proceeding, to conduct high-level supervision on it, therefore, confirming the interpretation proposed by the applicant.[3]

The applicant also challenged the use of the discretion granted to the ECB by Article 6(5)(b) of Regulation No 1024/2013. In particular, it contended that the ECB had omitted to take into account the discretionary nature of its powers on the matter: in the applicant's view, the ECB could not claim that it had exercised its discretion if this does not appear in the contested decision and if, on the contrary, that decision is based on the assumption that it is a necessary consequence of the fact that the conditions laid down in Article 6(5)(b) of Regulation No 1024/2013 are met.

The Court, after recalling – consistently with previous judgments[4] – that the ECB enjoys broad discretion in adopting a decision on prudential matters, rules that neither the obligation to state reasons required by Article 296 TFEU nor any other rule of law obliges the ECB to refer to that discretion in the decision at issue. Moreover, the circumstance that, in the context of these types of decisions, the ECB refers to the fact that the conditions for the taking-over of direct supervision are satisfied does not mean that the ECB wrongly considered

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3 Indeed, the applicant contends that ECB interpreted its power under Article 6(5)(b) as a power intended to remedy the failures of the institution concerned to comply with the relevant prudential rules.

4 The Court refers in particular to the judgment of 8 May 2019, in Case C-450/17 P *Landeskreditbank Baden-Württemberg v ECB*, para 86.

itself to be in a situation of "*circumscribed powers*" and that it did not exercise its broad discretion to reach that conclusion or that it erred in law in the application of Article 6(5)(b) of Regulation No 1024/2013.

On a final note, the Court, in response to the ninth plea in law, alleging a breach of the principles of the protection of legitimate expectations and legal certainty, provides further clarification on the content of a decision adopted pursuant to Article 6(5)(b) of Regulation No 1024/2013.

In particular, the applicant contended that the take-over decision was unclear and that it created unjustified uncertainty since it did not indicate how prudential requirements would have changed and for how long the ECB would have been the supervisory authority. Indeed, since the contested decision did not describe the underlying problems to be addressed by the decision, it was impossible to predict what substantive changes there would have been to supervisory requirements. In addition, the fact that, as it emerged from the applicant's initial experience with the ECB at the time of the on-site inspection, the latter adopted a new approach and did not consider itself bound by an earlier assessment of the FCMC would have introduced excessive legal uncertainty for the applicant, which was not justified by any legitimate prudential objective.

In this regard, the Court clarifies that "*a decision adopted pursuant to Article 6(5)(b) of Regulation No 1024/2013 does not have to state how prudential requirements will change, given that that decision precisely does not, in itself, have any effect on the applicable prudential rules*" nor it must provide an indication of the period of time during which the ECB will be responsible for direct prudential supervision of the entity concerned, considering that, in accordance with Article 47(4) of Regulation No 468/2014, the ECB is to adopt a decision which ends up its direct supervision if, in its reasonable discretion, direct supervision is no longer necessary to ensure consistent application of high supervisory standards. Moreover – the Court concludes – the applicant's argument that its experience with the ECB "suggests" that the ECB will adopt a new approach is irrelevant, given that it appears unconnected to the question of the clarity of the contested decision itself.

PNB Banka AS v ECB

1. Keywords and summary

PNB Banka AS v ECB

General Court – Case T-275/19 – Judgment of 7 December 2022 – ECLI:EU:T:2022:781

European Central Bank's decision to conduct an on-site inspection at the premises of a less significant credit institution

On-site inspection decision – Action for annulment – Measures producing binding legal effects – Challengeable act

An act of an EU Institution may be challenged under Article 263 TFEU only if produces binding legal effects capable of bringing about a distinct change in the legal position of the addressee.

An on-site inspection decision adopted by the ECB on the basis of Article 12 of Regulation No 1024/2013, such as the contested decision, is an act open to challenge before the EU Courts. Indeed, that decision entails binding legal effects vis-à-vis the credit institution notified of it, by subjecting that institution to an inspection the subject matter and purpose of which are to be defined in the same decision.

While Article 13(2) of Regulation No 1024/2013 refers to the possibility of judicial review only when the ECB seeks authorisation from a judicial authority after having adopted an on-site inspection decision, there is no need to distinguish the system of judicial review of on-site inspection decisions according to whether or not an application for authorisation by a judicial authority is submitted by the ECB. A different solution would undermine the principle of legal certainty, given that the possibility of bringing an action before the EU Court against an ECB's on-site inspection decision would depend on the need for the ECB to seek, after the adoption of that decision, the authorisation of a national judicial authority.

ECB's competence and powers – On-site inspection decision – Less significant institution

As already stated in the *Landeskreditbank* case (judgment of 8 May 2019, Landeskreditbank Baden-Württemberg v ECB, C-450/17), while the ECB has exclusive competence to carry out the tasks stated in Article 4(1) of Regulation No 1024/2013 in relation to 'all' credit institutions established in the participating

Member States, the NCAs assist the ECB in carrying out those tasks in a decentralised manner in relation to less significant credit institutions.

It follws that the ECB has the power to exercise, with regard to a 'less significant' credit institution, the investigatory powers available to it and, in particular, the power to carry out an on-site inspection. This reading is supported by Article 6(5)(d) of Regulation No 1024/2013 which provides that, with regard to the institutions referred to in paragraph 4 of that article, that is to say, less significant credit institutions, the ECB may at any time make use of the investigatory powers referred to in Articles 10 to 13 of that regulation. The fact that, in accordance with the provisions of the first subparagraph of Article 6(6) of Regulation No 1024/2013, the NCAs are to carry out, in a decentralised manner and under the supervision of the ECB, certain tasks set out in Article 4(1) of that regulation with regard to less significant credit institutions has no bearing on ECB's competence to exercise its investigatory powers with respect to those institutions, since those provisions are, according to their very wording, 'without prejudice' to Article 6(5) of that regulation.

In addition, the ECB's power to conduct on-site inspections in less significant credit institutions is confirmed by Article 12 of Regulation No 1024/2013, in accordance with which the ECB may carry out on-site inspections at the premises of the legal persons referred to in Article 10(1) of that regulation, point (a) of which refers to credit institutions established in the participating Member States, without drawing a distinction between significant and less significant institutions.

Duty to state reasons – On-site inspection decision

The statement of reasons required by Article 296 TFEU must disclose in a clear and unequivocal fashion the reasoning followed by the concerned Institution, in such a way to enable the persons concerned to ascertain the reasons and the competent Court to exercise judicial review. It is not necessary for the reasoning to specify all the relevant facts and points of law, since the sufficiency of the statement of reasons must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

With regard to on-site inspections, the duty to state reasons is specified by Article 143(2) of Regulation No 468/2014, under which the related decision must indicate the subject matter and the purpose of the inspection and must state that any obstruction to the inspection will constitute a breach of an ECB decision punishable pursuant to Article 18(7) of the SSM Regulation.

Right to be heard – On-site inspection decision – Inapplicability – Procedural safeguards

Pursuant to relevant EU law (Article 31 of Regulation No 468/2014), legal persons who are subject to an investigatory measure referred to in Section 1

of Chapter III of the SSM Regulation, including the on-site inspection, are not entitled to be heard prior to the adoption of such a measure. This conclusion is consistent with the nature of investigatory measures, the purpose of which is to gather information.

It is after that decision and before the adoption of any subsequent decision, under, inter alia, its specific supervisory powers, that the ECB is required to give the persons concerned the opportunity to be heard.

Principle of proportionality – Purpose of the on-site inspection

The need for and proportionality of on-site inspections must be assessed in the light of the objective of prudential supervision of credit institutions, namely to ensure the safety and soundness of those institutions, the stability of financial system and the protection of depositors, also taking into account the ECB's broad discretion within the prudential supervision.

The purpose of the on-site inspections carried out by the ECB is to verify, in the context of ongoing supervision combining off-site and on-site checks, that credit institutions ensure sound management and coverage of their risks and that the information communicated is reliable, so that the implementation of those inspections is not subject to the existence of a suspicion of an infringement.

In the circumstances of the case, the ECB was fully entitled to take the view, in the exercise of its broad discretion, that an on-site inspection at the applicant's premises was necessary within the meaning of Article 12(1) of Regulation No 1024/2013, in order to carry out an examination of the credit risk to which the applicant was exposed, and, more broadly, to ensure the soundness of that institution, the stability of the financial system and the protection of depositors.

Implementation of on-site inspections – Information going beyond the scope of the inspection

The conditions for the implementation of an on-site inspection do not, as such, affect the lawfulness of the decision to conduct such an inspection, given that they concern facts subsequent to that decision. The legality of the on-site inspection decision cannot therefore depend on the manner in which the inspection staff implement the decision. However, where inspection staff request the disclosure of information going beyond the subject matter of the inspection, the entity concerned has the right to refuse to provide such information.

The entity concerned may also, without refusing a request to disclose information in the context of an inspection, raise objections to that disclosure and request the ECB not to use the information at issue on the ground that it does not fall within the scope of the subject matter of the inspection. A refusal by the

ECB to accede to such a legitimate request is capable of rendering the ECB liable and, where appropriate, of vitiating the acts subsequently adopted by the ECB.

2. On-site inspections carried out by the ECB vis-à-vis LSIs: the GC confirms the validity of the ECB's decision to conduct an on-site inspection at the premises of PNB Banka

by Giuseppe Calarco

1. The facts can be summed up as follows. PNB Banka AS ("PNB Banka" or "the applicant") was, at the time of the adoption of the contested decision, a less significant Latvian credit institution, operating as a universal bank mainly with non-resident clients. Over the years, the bank had been subject by the *Finanšu un kapitāla tirgus komisija* (Financial and Capital Market Commission, Latvia; "the FCMC") – the Latvian competent national authority – to several prudential measures, such as the imposition of additional capital requirements and restriction on the activities, with the aim of remedying to deficiencies concerning, *inter alia*, loan losses and infringements to large exposures limits.

According to the applicant, the supervisory measures taken by the Latvian NCA since 2015 were excessive and arbitrary and were the result of the illicit influence allegedly exerted over the FCMC by A., the former Governor of the Latvian Central Bank. In particular, the applicant alleged that A. tried to use his power to obtain bribes from it and C.R, its major shareholder.

In order to seek relief from the unfair treatment to which it was allegedly subject, PNB and the abovementioned shareholders, between the end of 2017 and 2018, took several steps, including denouncing to Latvian and U.K. authorities the alleged acts of corruption charged with A. In particular, on December 2017, they brought an arbitration proceeding before the International Centre for Settlement of Investment Disputes (ICSID) under the relevant Uk-Latvia Bilateral Investment Treaty, claiming that the acts of FCMC had resulted in an infringement of the rules concerning the protection of investment.

Following the indictment of the Governor of the Central Bank of Latvia in relation to similar cases of corruption involving Latvian banks other than the applicant, on 2018, the applicant addressed to the Chair of the Supervisory Board of the ECB two letters, requesting, in light of the situation, the launch of an investigation and the adoption of appropriate measures, such as changing the staff responsible for the prudential supervision.

On 30 September 2018, the ICSID arbitral tribunal issued interim measures recommending that the Republic of Latvia refrain from withdrawing the applicant's authorization, in relation to an alleged non-compliance with one of the regulatory requirements that was subject to the final deadline laid down in a decision of the FCMC of 27 February 2018.

On 8 October 2018, the Chair of the Supervisory Board of the ECB, in response to the abovementioned letters, informed the applicant not only that there was no indication that the supervisory measures imposed on it were excessive or disproportionate but also that the ECB shared the FCMC's opinion that the applicant's situation in terms of capital required specific supervision, and that it undertook to closely monitor the measures taken by the applicant to remedy the breaches of prudential requirements.

In light of the impossibility of exercising effectively high-level supervision on the institution determined by the issuance of the interim injunction by the arbitral tribunal, on 21 December 2018, the FCMC addressed to the ECB a request to take over the direct prudential supervision of the applicant.

On 10 January 2019, the Supervisory Board of the ECB approved the draft decision to conduct an on-site inspection at the applicant's premises, which was shortly after submitted to the Governing Council for adoption in the context of the non-objection procedure. As the Governing Council raised no objection, the draft decision was deemed adopted on 21 January 2019 ('the draft decision deemed adopted by the Governing Council' or 'the contested decision').

By letter of 14 February 2019, the Director-General of the Directorate-General for Micro-Prudential Supervision III ('the Director-General') informed the applicant that an on-site inspection would be conducted within the group with the objective of examining the credit risk, stating that the scope of that review could be extended in the course of the investigation, if necessary, and that, in that case, the applicant would be informed by the Head of Mission on behalf of the ECB.

By letter of 1 March 2019, the ECB notified the applicant that it had decided to classify it as a significant entity subject to its direct prudential supervision, pursuant to Article 6(5)(b) of Regulation No 1024/2013 and Article 39(5) of Regulation No 468/2014. That decision took effect on 4 April 2019.

By application lodged at the Registry of the General Court on 24 April 2019, the applicant and its major shareholders brought an action pursuant to Article 263 TFEU, seeking the annulment of the decision of ECB, notified by letter of 14 February 2019, to conduct an on-site inspection at its premises.

2. On a preliminary level, it is interesting to note that the Court rejects the plea of inadmissibility of the action raised by the Commission (intervened in the proceedings in support of the ECB), which was based on the argument that inspection decisions are to be considered only as intermediate acts, as such, incapable of affecting the legal situation of the person under investigation.[1]

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[1] As it is known, according to consolidated case law, any natural or legal person wishing to seek the annulment of an act of an EU Institution shall be able to demonstrate that the binding legal effects of that act are capable of affecting his or her interests by bringing about a distinct change in his or her legal position.

As far as inspection decisions are concerned, in the Court's view, it does not follow from any provision or principle of law that any inspection at the premises of an undertaking must, whatever its nature, be the subject of an administrative decision amenable to judicial review or, *a fortiori*, be authorized by a judicial authority.

However, the EU Legislator – the Judges note – has decided, with the adoption of Article 12(3) of Regulation No 1024/2013, to subordinate the possibility for the ECB to carry out on-site inspections to the adoption of a formal decision, the subject matter and the purpose of which are to be clearly defined in the decision pursuant to Article 143(2) of Regulation No 468/2014.

By providing that a legal person is to be subject to the inspection laid down in Article 12 of Regulation No 1024/2013 on the basis of a decision – the Court continues – "*the EU legislature attributed binding legal effects to the act providing for that inspection*".

In addition, while it is true that Regulation No 1024/2013 refers to the possibility of judicial review of the lawfulness of the ECB's inspection decisions only in the case, provided for under Article 13, of the application by the ECB for authorization to the use of coercive measure before national judicial Authorities, there is no need to distinguish the system of judicial review of those acts according to whether or not an application for authorization is submitted.

Indeed, the Court holds that the possibility to bring an action against a decision to carry out on-site inspection cannot be considered subject to the existence of an express reference to that effect in the legislation since a solution to the contrary would be liable to undermine the principle of legal certainty, given that the possibility of bringing an action before the General Court against an on-site inspection decision of the ECB would then depend on that institution's decision whether or not to seek, after the adoption of that decision, the authorization of a national judicial authority laid down in Article 13 of Regulation No 1024/2013.

Finally, the Court concludes that the ECB decision to conduct an on-site inspection cannot be regarded as an intermediate act, paving the way for the final decision, as those acts usually serve the function of expressing a provisional opinion of the institution, but should be, more correctly, considered as a binding legal act capable of bringing about a distinct change in its legal position of the person notified with the decision.

With the first plea in law, it has been contested the competence of the ECB to adopt a decision to carry out an on-site inspection in respect of a less significant institution. The applicant argued that Article 12 of Regulation No 1024/2013 limits the ability of the ECB to carry out on-site inspections only to significant credit institutions, while the less significant ones – unless the ECB decides to take over direct supervision – are subject, pursuant to Article 6(5) of the same Regulation, to direct supervision by the National Competent Authorities.

The Court, in rejecting the applicant's arguments, refers, in the first place, to the interpretation of Articles 4(1) and 6(1) of Regulation No 1024/2013 given in Case C-450/17 P, EU:C:2019:372. (*Landeskreditbank Baden-Württemberg v ECB*). The Court, in particular, reiterates that Article 4(1) entrusts to the ECB exclusive competence to carry out all the tasks stated in that provision, irrespective of the characterization of the institution as "significant" or "less significant". National Competent Authorities are called to provide assistance to the ECB in the context of what has been defined as "*a decentralized implementation*" of the tasks entrusted to it by Article 4(1) in relation to less significant credit institutions.

To support their conclusions, the EU Judges also resort to other arguments, which are worth mentioning briefly: firstly, it has been noticed that Article 6(5)(d) of Regulation No 1024/2013 allows the ECB to make use at any time of all the investigatory powers referred to in Articles 10 to 13 of that Regulation in respect to less significant institutions, which consist in the possibility to send requests for information, conduct general investigations and, more importantly, conduct on-site inspections.[2] Furthermore, Article 12, in identifying the institutions in respect of which the power to conduct on-site inspection may be exercised by the ECB, refers to the legal persons indicated in Article 10(1) of that Regulation, whose point (a) does not distinguish between significant and less significant institutions.

The possibility to conduct on-site inspections with regard to less significant institutions is confirmed, in the Court's view, also by the provisions contained in Regulation No 468/2014 and, in particular, by Article 138 thereof and is not invalidated, contrary to what argued by the applicant, by the soft law instruments adopted to provide guidance in the exercise of supervisory powers.

The EU Judges dismiss all the other pleas raised by the applicant seeking to invalidate the contested decision.

With regard to the claim that the EU Institution had failed to clearly state the reasons which led to the adoption of the decision to conduct the on-site inspection, the Court holds that the requirements laid down in Article 142 of Regulation No 468/2014 were respected, considering that the letter of 14 February 2019, by way of which the ECB's decision had been notified to the applicant, contained a clear indication of both the subject matter of the inspection (i.e. credit risk) and its purpose, namely the ECB's analysis of that risk.[3]

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[2] The circumstance that the first subparagraph of Article 6(6) of Regulation No 1024/2013 delegates to the NCAs the performance of certain supervisory tasks has no impact, according to the Court, on the ability of the ECB, under whose responsibility those tasks are to be performed, given that those provisions are, according to their very wording, "without prejudice" to para 5 of Article 6 of Regulation 1024/2013.

[3] With specific regard to the content of the decision to carry out on-site inspections, it has been noted that Article 142 of Regulation No 468/2014 requires the decision to specify: a) the subject matter and the purpose of the on-site inspection, b) the fact that any obstruction to the on-site inspection by the legal person subject thereto shall constitute a breach of an ECB decision within the meaning of Article 18(7) of Regulation No 1024/2013, without prejudice to national law as laid down in Article 11(2) of Regulation No 1024/2013.

In addition, the Court maintains that the applicant, even though it was not formally notified – for confidentiality reasons – with the text of the draft decision, was sufficiently familiar with the grounds of the said decision for the purposes of assessing its merits, considering all the previous interactions with supervisory authorities concerning its risk profile and the measures already adopted in this regard by the latter, the unambiguous nature of the subject-matter of the inspection, and the additional information provided by the head of the mission prior to the start of the mission.

Of particular interest are also the conclusions reached by the Court in relation to the applicant's claim that its right to be heard had been infringed since it was not given the opportunity to comment on the planned on-site inspection before the adoption of the contested decision.

In this regard, the Court highlights that the right to be heard, which is a fundamental right guaranteed by the EU Charter, is binding on the ECB without the need that another text expressly provides for it.

However, it is noticed that the relevant regulatory framework expressly carves out decisions involving the exercise of investigatory powers from those in relation to which the right to be heard is to be granted. This exclusion appears coherent, in the Court's view, with the nature of these measures, whose main objective is simply to gather information. Moreover, the respect for the fundamental rights of the entity affected by the inspection is guaranteed by the circumstance that in the event the ECB decides to impose prudential measures based on the information obtained during the course of the inspection, the procedure leading to the adoption of these shall necessarily provide, in accordance with Article 4 and Section 2 of Chapter III of Regulation No 1024/2013, the persons concerned with the right to be heard.

Finally, it is worth mentioning the fact that, as in the case at hand, an investigative procedure has been protracted for several months, involved the performance of on-the-spot checks and a hearing of the undertaking concerned, the declarations of which are placed on the file, may serve as evidence of the fact that the undertaking concerned was heard, with full knowledge of the facts, during the inspection.

Indeed, the Court underlines that the applicant had been granted the possibility to make its view known during the inspection, as several meetings had been arranged between the members of the inspection team and the applicant's executives and that the sending of a draft inspection report and an "exit" meeting were planned before the sending of a final report and the "closing" meeting.[4]

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[4] On this point, it can be noted that sub-section 3.3.1, titled "*Rights of the inspected legal entities*" of the ECB "*Guide to on-site inspections and internal model investigations*", which provides that "*the senior management of the inspected legal entity may ask the HoM* [Head of Mission] *to have one or several status meetings on the progress of the inspection or on any related topic. At these meetings, the inspected legal entity may communicate its observations concerning the inspection investigations in order to highlight any useful information…*" In addition, it is stipulated that "*After the investigation has been completed, a report is prepared. The draft report includes the facts and findings, which are discussed by the HoM with the inspected legal entity during the exit meeting*".

The Court similarly rejects as unfunded the arguments put forward by the applicant to back up its claim that the ECB decision to conduct an on-site inspection infringed the necessity requirement set out under Art. 12 Regulation No 1024/2013, and that it was disproportionate. Significantly, the Court takes the chance to clarify the rationale underlying the power conferred upon ECB to conduct on-site inspections by stating that "*the purpose of the on-site inspections carried out by the ECB is to verify, in the context of ongoing supervision combining off-site and on-site checks, that credit institutions ensure sound management and coverage of their risks and that the information communicated is reliable, so that the implementation of those inspections is not subject to the existence of a suspicion of an infringement*".

Finally, in relation to the eighth plea in law, alleging a breach of the principles of the protection of legitimate expectations and legal certainty, it is interesting to note that, in response to the argument that the inspection staff requested the disclosure of information unrelated to the stated purpose of the inspection (i.e. credit risk), the Court, in line with its previous case law, holds that the legality of a decision to conduct an on-site inspection does not depend on the manner in which the inspection staff implements the decision. Indeed, even if a request for information goes beyond the scope of the inspection or it is disproportionate in view of the amount of information requested, it does not demonstrate that the contested decision itself infringes the principles of the protection of legitimate expectations and legal certainty.[5]

[5] Anyway, the Judges clarify that the entity concerned with the request has the right to refuse to provide such information unless the ECB, by using coercive measures, enforces the decision concerned. In this case, the decision imposing a sanction on a legal person for obstructing an inspection could be challenged before the General Court. In addition, the institution, without refusing a request to disclose information, may raise objections to that disclosure and request the ECB not to use the information at issue on the ground that it does not fall within the scope of the subject matter of the inspection. A refusal by the ECB to accede to the legitimate requests of the legal person concerned is capable of rendering the ECB liable and, where appropriate, of vitiating the acts subsequently adopted by the ECB.

The case-law of the EU administrative review bodies

C v EBA

1. Keywords and summary

C v EBA

Joint Board of Appeal of the European Supervisory Authorities – BoA-D-2022-01 – Judgment of 21 July 2022

EBA's decision not to initiate an investigation into alleged non-application of EU law

Investigation into breach of Union law – Standing to request an investigation – EBA's own-initiative jurisdiction – Discretion

Article 17(2) of the EBA Regulation allows interested parties to request the EBA to open investigations where an NCA is alleged to have breached or not to have applied EU law. Article 17(2) is a critical element of the governance of the European System of Financial Supervision ("ESFS"), empowering the EBA to initiate investigations of potential breaches or non-application of EU law by NCAs and confers upon it the power to take specified actions where it finds such a breach.

The entities who can request the EBA to initiate an investigation are explicitly (and exhaustively) listed in Article 17(2): one or more NCAs, the European Parliament, the Council, the Commission, and the Banking Stakeholder Group. Only these entities have standing to request an investigation. Natural and legal persons are not included in that list.

The EBA has a "own-initiative jurisdiction" under Article 17(2) to initiate an investigation. Thus, even though natural and legal persons do not have standing to request the EBA to initiate an investigation, such persons can bring potential breaches or non- applications of EU law by NCAs to EBA's attention, to request that it exercises its own-initiative jurisdiction. Article 17(2) endows the EBA with discretionary powers to initiate (or refuse to initiate) an investigation under its "own initiative jurisdiction".

In any case, even when a request is made by the entities explicitly identified in Article 17(2), the EBA is not obliged to initiate an investigation, being required only to outline how it intends to proceed with the case. Even though the drafting of Article 17(2) is not totally clear on this, the EBA's obligation to "outline how it intends to proceed with the case" also applies where "well substantiated information" by natural and legal persons has been received.

Decision not to initiate an investigation into breach of Union law – Not challengeable – Discretion – Factual interest

The SV Capital ruling of the General Court (9 September 2015, in case T-660/14), confirmed by the CJEU (C-577/15), clarified that the powers of the EBA under Article 17(2), as it stood before its amendment by Regulation (EU) No 2019/2175, are discretionary. The judgment also confirmed that a natural or legal person not explicitly specified therein as having standing to request the opening of an investigation thereunder does not have standing to seek the annulment of a determination by the EBA not to initiate an 'Article 17 investigation'.

Whether an appeal can lie or not to the Board of Appeal depends on the scope of its jurisdiction, as set out in Article 60 of the EBA Regulation. Accordingly, even when the Board recognises the factual interest of an appellant in the EBA opening an investigation, critical is whether or not this determination comes within the scope of Article 60.

According to the SV Capital rulings, the Board's jurisdiction under Article 60 as regards 'Article 17 decisions' is limited to decisions: (i) regarding the opening of an investigation following a request by an NCA, the European Parliament, the Council, the Commission and the Banking Stakeholder Group and addressed to these entities; (ii) on the basis of any subsequent action by EBA in the event an investigation is taken, leading to either recommendations to NCAs or the Commission, or decisions addressed to financial institutions. The Contested Decision is not such a decision adopted on the basis of Article 17 and, hence, cannot be challenged in accordance with Article 60.

The amendments introduced to Article 17(2) of the EBA Regulation by Regulation (EU) 2019/2175 has somehow blurred the distinction between entities with standing to request the opening of an 'Article 17 investigation' and other persons who may only bring relevant matters to the EBA's attention. In the Board of Appeal's view, it seems that it cannot be fully excluded that the narrowing of the difference between the Requesters brought about by the 2019 amendments may be conducive to the CJEU finding that any Requester could have locus standi in challenging a determination of the EBA to close the request without opening an investigation.

Notwithstanding the above, the Board of Appeal is also mindful that the position of the ECJ has not changed on the issue of the admissibility of an appeal against a discretionary decision before the courts, even after the text of Article 17(2) was amended by Regulation (EU) 2019/2175 (see judgment of 10 August, Case T-760/20).

It should also be considered that the imperatives of good administrative governance demand that discretion of the EBA be protected to avoid having it dealing with an excessive volume of appeals. In fact, the EBA is not in a position, as a small body, to investigate every admissible complaint. Therefore, by

exercising its discretion, the EBA is empowered not to initiate an investigation even where the request is formally admissible.

The grounds developed above lead to the conclusion that the appeal is inadmissible because it is directed against a decision which is not challengeable.

2. The Joint Board of Appeal of the ESAs recognizes that the EBA's decision not to initiate an investigation into alleged non-application of EU law is not challengeable

by Francesca Chiarelli

1. The facts of the case can be summarised as follows. In 2021, the Appellant filed a complaint with the EBA concerning a breach or non-application of Union law, requesting to investigate an alleged breach of Directive (EU) 2015/2366 of 25 November 2015 "*on payment services in the internal market*" (PSD II) and Directive 2014/92/EU of 23 July 2014 "*on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features*" (PAD) by the competent national authority (NCA) of a Member State.

The complaint was filed under Article 17 of the EBA Regulation, which empowers the EBA to investigate potential breaches or non-application of EU law by an NCA. The Appellant complained about the closure of his bank account and raised concerns that the NCA failed to take into consideration his right to have a "basic payment account", as provided for in Article 16 of the PAD.

In response to the complaint, the EBA stated that the contract was a "*standard account*" and therefore did not fall under the category of "*payment account with basic features*", the opening and use of which is a consumer right guaranteed by the PAD.[1] The EBA also emphasized the possibility for the complainant to have recourse to alternative forms of redress, including lodging a complaint against the decision to the European Ombudsman, in accordance with Article 228 of the TFEU.

On April 15, 2022, the complainant filed an appeal against the EBA's Decision under Article 60 of the EBA Regulation.

In the opinion of the Appellant, the contested decision is capable of appeal under Article 60 of the EBA Regulation because the Appellant is a natural person directly and individually concerned by the appealed decision. Article 60 of the

[1] Article 16 (1) of the PAD provides for that "*Member States shall ensure that payment accounts with basic features are offered to consumers by all credit institutions or a sufficient number of credit institutions to guarantee access thereto for all consumers in their territory, and to prevent distortions of competition. Member States shall ensure that payment accounts with basic features are not only offered by credit institutions that provide payment accounts with solely online facilities*".

EBA Regulations states that: "*Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person*".

2. In the decision at stake, the Board of Appeal declared that, although it was sympathetic to the appellant's complaint, the decision of the EBA was not challengeable.

The Board addressed the following closely related issues:

i) admissibility of the appellant's complaint;

ii) admissibility of an appeal to the Board of Appeal, in accordance with Article 60 of the EBA Regulation, against a determination by the EBA not to initiate an investigation under Article 17(2) on foot of a request from an entity not explicitly specified in that Article.

As regards the first question, the decision recognizes that the Appellant has a clear and understandable factual interest in the initiation of an investigation by the EBA, as well as in the appeal against the EBA's decision not to pursue the investigation. The request to the EBA was therefore admissible under the applicable procedural rules. The request set out "*a clear grievance explaining how a competent authority has not applied the acts referred to in Article 1(2) of the EBA Regulation or has applied them in a way which appears to be a breach of Union law, including the technical standards established in accordance with Articles 10 to 15 of the EBA Regulation*", as required by Article 3(2)(i) of the Decision of 22 January 2020 "concerning Rules of Procedure for investigation of breach of Union law" adopted by the EBA's Board of Supervisors.[2]

Once recognized the existence of a factual interest on the part of the Appellant, the Board addressed the second question and examined whether this factual interest translates into a right of the appellant to challenge the EBA's decision not to initiate an investigation before the Board of Appeal.

The answer of the Board of Appeal is negative: the appeal is inadmissible because it is directed against a decision which is not challengeable.

The Board of Appeal's decision is based on Articles 17 and 60 of the EBA Regulation, as interpreted by the CJEU case law. Article 17(2) of the EBA Regulation – in force after the amendments introduced in 2019 by Article 1 of Regulation (EU) No. 2019/2175 – allows interested parties to request the EBA to open investigations when an NCA is alleged to have breached or not to have applied EU law. It states that "*Upon request from one or more competent authorities, the European Parliament, the Council, the Commission, the Banking*

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[2] EBA/DC/2020/312, in force, as amended on 3 December 2021 (EBA/DC/2021/419).

Stakeholder Group, or on its own initiative, including when this is based on well substantiated information from natural or legal persons, and after having informed the competent authority concerned, the Authority shall outline how it intends to proceed with the case and, where appropriate, investigate the alleged breach or non-application of Union law".

Therefore, entities that can request the EBA to initiate an investigation are explicitly (and exhaustively) listed in Article 17(2): one or more NCAs, the European Parliament, the Council, the Commission, and the Banking Stakeholder Group. Only these entities have standing to request an investigation. Natural and legal persons are not included in the list.

The Board of appeal pointed out that the EBA has an "own-initiative jurisdiction" under Article 17(2) to initiate an investigation. Thus, entities not specified in Article 17, such as natural and legal persons, do not have the right to request the EBA to initiate an investigation. Said entities can bring to the EBA's attention potential breaches or non-applications of EU law by NCAs and request EBA to exercise its own-initiative jurisdiction. Indeed, under the amended Article 17(2), the EBA can open an investigation on its own initiative "*including when this is based on well substantiated information from natural or legal persons*".

However, the EBA's powers under Article 17(2) are discretionary, and the admissibility of a complaint does not in itself imply that an investigation will follow.

In light of these considerations, according to the Board, outside the request made by the entities listed in Article 17(2), EBA has a discretion to initiate a procedure. This means that individuals – while having an interest in the complaint – have no right to request the adoption of a specific position and, therefore, cannot appeal the EBA's decision.

In this regard, Article 60 of the Regulation limits the cases of appeal against an EBA's decision adopted under Article 17 to decisions: (i) regarding the opening of an investigation following a request by an NCA, the European Parliament, the Council, the Commission and the Banking Stakeholder Group; (ii) on the foot of any subsequent action by the EBA where an investigation is taken (recommendations to NCAs or the Commission, or decisions addressed to financial institutions).

Any natural or legal person who requests the EBA to initiate an investigation, but who is not entitled to make such a request, cannot therefore be the recipient of an "Article 17 decision"; consequently, the Board of Appeal has no jurisdiction to review an EBA's decision not to initiate an investigation.

3. Finally, the Board of Appeal wonders whether the amendments to the text of Article 17 allow for a different solution. The initial text of Article 17(2) provided that the EBA "*may investigate the alleged breach or non-application of Union law*". The new text, which came into force as of 1.1.2020, after the reform brought about by said Regulation (EU) No. 2019/2175, now stipulates

that the EBA "*shall outline how it intends to proceed with the case and, where appropriate, investigate the alleged breach or non-application of Union law*". The amendment more specifically outlines the exercise of the EBA's discretion regarding the initiation of an investigation. The investigation is to be initiated "*where appropriate*". Furthermore, the EBA is required to explain how it intends to proceed.

In the Board's view, from the new wording of Article 17 it does not follow that the EBA is required to initiate an investigation and therefore the decision not to initiate an investigation does not constitute a challengeable act.

4. The decision of the Board is in accordance with the CJEU's case law. The General Court, in ruling on an appeal for annulment of an EBA's decision rejecting the plaintiff's request to initiate an investigation, stated that natural or legal persons who are not explicitly specified as entitled to request the opening of an investigation cannot appeal a EBA's decision not to initiate an investigation under Article 17 ("*where an EU institution or body is not bound to initiate a procedure, but has a discretion which excludes the right for individuals to require it to adopt a specific position, it is not open to persons who have lodged a complaint to bring an action before the EU judicature against a decision to take no further action on their complaint*").[3]

[3] See judgment of General Court of 9 September 2015 in *SV Capital OU v EBA*, T-660/14, ECR, EU:T:2015:608, paragraph 48 and judgment of CJEU of 14 December 2016, in *SV Capital OU v EBA*, C-577/15 P, EU:C:2016:9477, paragraphs 35-42. In the same terms, *Kluge v EBA*, Decision of 7 January 2016 (BoA/2016/001); *B v ESMA,* Decision of 10 September 2018 (BoA D 2018 02); *Howerton v ESMA,* Decision of 9 October 2020 (BoA D 2020 01); *A v ESMA*, Decision of 12 March 2021 (BoA D 2021 02).

The case-law of the European Court of Human Rights

Korporativna Targovska Banka AD v Bulgaria

1. Keywords and summary

Korporativna Targovska Banka AD v Bulgaria

European Court of Human Rights – Case 46564/15 and Case 68140/16 – Judgment of 30 August 2022 – ECLI:CE:ECHR:2022:0830JUD004656415

Bank's legal standing to challenge the withdrawal of its licence

Decision withdrawing a credit institution's authorisation – Right to complete and effective judicial protection – Article 6 ECHR – Credit institution under special administration

A bank whose licence has been withdrawn must be able to challenge that decision before a court capable of examining all points of fact and law pertaining to the lawfulness of that decision. For the right of access to a court to be effective, the persons concerned must have a clear, practical opportunity to challenge an act interfering with their civil rights or obligations before the courts directly and independently.

In the circumstances of the case, where only the special administrators could apply on thebank's behalf for judicial review of the withdrawal decision, it is clear that the relevant national legislation did not offer the bank a clear and practical possibility of seeking and obtaining proper judicial review of the withdrawal of its licence. Indeed, considering that the special administrators were dependent on and accountable to the NCA that had withdrawn the licence, and therefore had little if any incentive to challenge its decision, the bank was left in a situation in which there was no one with both standing and an interest in seeking judicial review of the withdrawal of its licence. Therefore, in such circumstances, there has been a violation of Article 6 § 1 of the European Convention of Human Rights.

Winding-up of a credit institution – Right to complete and effective judicial protection – Article 6 ECHR

A bank facing an application by the relevant NCA to be declared insolvent and wound up must have the chance to be represented in those proceedings, both at first instance and on appeal, in a way which enables it to properly state its case and protect its interests, as it sees them. If a bank is represented in those proceedings by special administrators and liquidators, who are all dependent to varying degrees on the NCA, the bank cannot properly state its case and protect its interests in breach of the rights of access to a court and of adversarial proceedings enshrined by Article 6 § 1 of the Convention.

Decision withdrawing a credit institution's authorisation – Article 6 ECHR – Article 1 of Protocol 1 ECHR – Right to property – Procedural safeguards

There is a difference in the nature of the interests protected by Article 6 § 1 of the Convention and Article 1 of Protocol 1: the former affords an explicit procedural safeguard (to have any dispute relating to one's civil rights or obligations determined by a court), whereas the procedural requirements inherent in the latter are ancillary to the purpose of ensuring respect for the right peacefully to enjoy one's possessions.

The withdrawal of the bank's licence, which was almost automatically followed by the Sofia City Court's decision to declare the bank insolvent and order that it be wound up, amounted to an interference with its possessions. In accordance with the relevant national law, the bank was not informed that the NCA would adopt the withdrawal decision, nor an opportunity to object to it was given, either before the decision was made or afterwards. In these circumstances, the interference with bank's possessions was not lawful within the meaning of Article 1 of Protocol 1.

Article 6 ECHR – Breach – Reopening of proceedings – *Res judicata*

When someone has been the victim of proceedings entailing a breach of Article 6 of the Convention, a reopening of those proceedings is in principle an appropriate way of redressing the breach. This is particularly so when the breach has consisted in an inability to obtain effective access to a court. At the same time, the execution of the Court's judgments should not unduly upset the principles of res judicata and legal certainty in civil litigation, in particular where such litigation concerns legitimate interests of third parties. The lapse of time since the domestic decisions complained of is also a material consideration in that regard.

There is no doubt that the decision to withdraw the bank's licence and the ensuing judicial declaration of insolvency and order that it be wound up, all made more than seven years ago, have affected many other persons, such as the bank's clients and creditors, as well as Bulgaria's financial system as a whole. Thus, although the only way to remedy the breach of Article 6 para. 1 of the Convention relating to the absence of a clear and practical possibility for the bank itself to obtain proper judicial review of the withdrawal of its licence is to give it such a possibility, it does not necessarily follow that the redress following a finding that the NCA's decision to withdraw the bank's licence was unlawful should consist in the annulment of that decision and a reversal of its effects rather than in an award of compensation.

2. The ECtHR clarifies the minimum conventional standards in terms of the bank's legal standing and representation in judicial proceedings against the withdrawal of licence

by Alessandro Morelli

The background of the case can be summed up as follows. KTB was a Bulgarian less significant credit institution. On 20 June 2014 the Bulgarian National Bank (BNB) placed KTB under special administration removing all the members of its management and supervisory boards from office and appointing special administrators under the relevant provisions of national law.

After that, on 6 November 2014 the BNB withdrew KTB's licence and extended the special administrators' mandate. Meanwhile, on 7 November 2014 the BNB applied to the Sofia City Court claiming KTB's declaration of insolvency and its consequent winding-up. On 22 April 2015 the Sofia City Court allowed the BNB's application opening the winding-up proceeding and terminating the powers of KTB's bodies.[1]

Bromak (KTB's majority shareholder) lodged a claim for judicial review of the BNB's decision to withdraw KTB's licence before the national Supreme Administrative Court and the proceeding was then joined by other shareholders. On 13 January 2015 the Court refused to examine the claims on the ground that only KTB had been directly affected by the BNB's decision to withdraw its licence, and that the effects of that decision on its shareholders were only indirect (§ 31 of the commented decision).

On 18 November 2014, also KTB's (then former) executive directors sought judicial review of the BNB's decision to withdraw KTB's licence before the Supreme Administrative Court explaining that, although they had been removed from office, they were entitled to represent the company in such proceeding. Nevertheless, the panel dismissed the former executive directors' claim on the ground that they had no standing to seek judicial review of the BNB's decision due to the fact that they had been removed from their office and that, as a consequence, their exercise was taken over by the special administrators.

Moreover, Bromak with another shareholder and (in a separate proceeding) the former executive directors appealed against the Sofia City Court's judgment to the Sofia Court of Appeal seeking the review of the declaration of insolvency and the subsequent order of winding-up. On 3 July 2015 the Sofia Court of Appeal found the first appeal inadmissible, on the ground that shareholders were not among the persons entitled to appeal under section 16 (1) of the national Bank

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[1] The Bulgarian legislation on bank's insolvency as set forth in the Bank Insolvency Act of 2002 provides that only the BNB may apply before the competent court to open insolvency proceedings against a bank (section 8 (3)). Moreover, the section 8 (1) states that such proceedings shall be opened if the BNB has withdrawn a bank's licence pursuant to section 36 (2) of the Credit Institutions Act of 2006 (§ 95 of the commented decision).

Insolvency Act of 2002. On the same basis, the appeal lodged by Bromak and KTB's former executive directors on behalf of KTB was declared inadmissible.

Since for all of the above proceedings the courts of all instances have upheld the judgments on the basis of the same reasoning, the former directors of KTB, on behalf of the bank, appealed to the ECtHR claiming a violation of Article 6 § 1 (right to a fair trial) of the European Convention of Human Rights, Article 1 of Protocol No 1 (protection of property) and Article 13 (right to an effective remedy) of the Convention itself due to its inability to seek a judicial review of the BNB's withdrawal decision and to the way in which the bank had been represented in the winding-up proceedings.

Against this background, the Court ruled in favour of the applicants.

KTB disputed that under Bulgarian legislation, as applied by the national courts, its former executive directors and its shareholders could not have acted on its behalf in order to seek judicial review of the withdrawal of its licence, resulting in a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.[2] In particular, the Supreme Administrative Court recognized only the special administrators appointed by BNB to have the legal standing to challenge such decision.

The Court's case law is clear in stating that a bank whose licence has been withdrawn must be able to challenge that decision. In fact, such a decision has a disruptive effect on the bank's ability to manage its affairs, especially since, according to the Bulgarian legal framework, it almost automatically triggers the opening of insolvency proceedings against the bank.

Nevertheless, as the Bulgarian law set forth the possibility of seeking judicial review of a decision by the BNB to withdraw a bank's licence, the issue in this case was whether the relevant provisions grant such possibility with a sufficient degree of certainty.

The Court noted that Bulgarian law does not specify who can practically seek the judicial review with the consequence that it was unclear "*whether, even though with the withdrawal of a bank's licence all powers of its management were immediately conferred on the bank's special administrators, the management could retain a residual power to seek judicial review of the BNB's decision to withdraw the bank's licence. Nor was it clear whether such a review could be*

[2] Article 6 § 1 of the European Convention on Human Rights provides for that "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*".

sought by others, such as the bank's shareholders" (§ 132 of the commented decision).

Indeed, the Bulgarian Supreme Administrative Court stated that both KTB's shareholders and former executive directors had no standing to appeal the BNB's decision to withdraw KTB's licence since the former had not been directly affected by the BNB's decision and the latter had no residual power to do so. Instead, the special administrators could represent KTB in order to seek the judicial review of the BNB's decision. Nevertheless, as claimed by KTB, the ECtHR noted that the special administrators "*were dependent on and accountable to the BNB, and had little if any incentive to challenge its decision*" (§ 141 of the commented decision).[3]

As a consequence, there is no one left who had both legal representation of KTB and a concrete interest in challenging the BNB's decision to withdraw the bank's licence. Nor the Court was persuaded that this state of affairs could have been overcome by appointing a special representative ad litem for KTB in the proceedings brought by its shareholders, since KTB was a mere interested party in those proceedings.

In light of the above, the Court stated that Bulgarian law, as interpreted by the national courts, did not grant to KTB a clear and practical possibility of seeking and obtaining proper judicial review of the withdrawal of its licence. Therefore, the Court found a breach of Article 6 § 1 of the Convention.

Through another plea KTB submitted that the BNB's decision to withdraw its licence "*had been based on unreliable reports (which, moreover, had been kept secret from it), and on arbitrary findings which KTB had been unable to contest*" (§ 178 of the commented decision) entailing a breach of Article 1 of Protocol No 1 of the Convention[4] (protection of property).

The Court, noted that even though the two complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No 1 regard the lack of guarantees against the BNB's decision, while the former is about the possibility of seeking

[3] In regard of this issue, it must be highlighted that the applications before the European Court of Human Rights were lodged by the former executive directors of KTB and that consequently the Bulgarian Government contested their standing which according to it belonged only to the appointed liquidators. Nevertheless, the Court noted that in this case the liquidators had a potential conflict of interests in acting on behalf of KTB, particularly because their ability to continue in office was fully dependent on the BNB. Therefore, The Court stated that in this situation "*KTB's former executive directors were, exceptionally, entitled to apply to the Court on its behalf, even though when they did so they no longer represented the bank under Bulgarian law*" (§ 111 of the commented decision).

[4] Article 1 of Protocol No 1 of the European Convention on Human Rights provides for that "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*".

a judicial review of it, the latter is broader in scope regarding more generally the possibility of contesting it.

Thus, since KTB was not informed that the BNB would adopt the decision or given an opportunity to object to it, either before the decision was made or afterward, the Court stated that there was an unlawful interference with KTB's possessions causing a breach of Article 1 of Protocol No 1.[5]

As for the individual measures to be taken in its domestic legal order to end the violations and make all feasible reparation (Article 46 of the Convention), the Court tried to strike a balance between the reopening of the proceeding and the respect for the principles of res judicata and legal certainty (including protection of third parties). Thus, the Court has not imposed the annulment of that decision and a reversal of its effects, stating that restitution is the rule under Article 46 § 1 of the Convention, save for the cases when it is materially impossible or would involve a burden out of all proportion to the benefit deriving from it. In such cases, compensation could be granted.

However, albeit demanded by the claimant, the Court refused to grant said compensation, on the assumption that it was not possible to speculate what the outcome of the judicial proceedings would have been, had the infringements of the Charter not occurred. Finally, the Court pointed out also the general measures required to prevent the same breaches, in inviting Bulgaria to amend the national provision in order to grant a bank, facing an application by the BNB to declare the bank itself insolvent and wound up, to be represented in those proceedings.

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[5] The Court applied the principles drawn in its case-law, and namely in two basically identical cases: *Capital Bank AD v. Bulgaria (No 49429/99)* and *International Bank for Commerce and Development AD and Others v. Bulgaria (No 7031/05).*

Silvio Berlusconi and Finanziaria d'investimento Fininvest S.p.A. v Italy

1. Keywords and summary

Silvio Berlusconi and Finanziaria d'investimento Fininvest S.p.A. v Italy

European Court of Human Rights – Case 59012/19 – Judgment of 8 November 2022 – ECLI:CE:ECHR:2022:1108DEC005901219

Application of EU law on qualifying holdings in credit institutions by a State party to the European Convention on Human Rights

Liability of a State party to the ECHR – Application of EU Law – Lack of discretion – Review mechanism – Presumption of compliance

Even when applying EU law, the States party to the European Convention on Human Rights remain subject to the obligations they freely entered into by signing the Convention. However, if national authorities have no discretion in applying EU law and if the review mechanism provided for by EU law has been fully implemented, then the actions of national authorities are presumed to be compliant with the Convention.

Common procedures – Acquisition of a qualifying holding – ECB's exclusive competence – EU Court's exclusive jurisdiction – Presumption of compliance

The arrangement on jurisdiction resulting from the CJEU's jurisprudence – according to which the EU courts have exclusive jurisdiction to review the legality of the decision adopted by the ECB at the end of the procedure to authorize the acquisition of a qualifying holding, irrespective of the NCA's power of proposal – does not grant the national authorities a discretionary power. On the contrary, the latter authorities may only recognise the exclusive competence of the EU courts in this matter. Given the absence of any manifest inadequacy in the protection of Convention rights, the presumption of conformity applies, and the State's actions fall outside the Court's jurisdiction, leading to the inadmissibility of the action proposed before the Court.

2. The principles of the Court of Justice's Fininvest ruling to the test of the European Court of Human Rights

by Michele Cossa

The European Court of Human Rights (ECHR), by judgment of 1 December last, declared inadmissible, since manifestly ill-founded, the appeal brought by Silvio Berlusconi and Fininvest S.p.A. for alleged violation of Article 6(1) of the Convention (right to a fair trial).

The judicial proceeding at hand formed part of the applicants' articulated reaction[6] to the measure refusing the acquisition of a qualifying holding in Banca Mediolanum, issued by the ECB in October 2016, in conformity with the proposal of Banca d'Italia and according to Article 15 of the SSM Regulation. Against this measure, Mr. Berlusconi and Fininvest have challenged both the ECB's final decision and the internal acts adopted by the Bank of Italy within the common procedure. These latter legal actions were based, inter alia, on the assumption that the initiation of a new authorisation procedure had violated the judgment of the Council of State (*Consiglio di Stato*) of March 2016, in which the national administrative court annulled the first refusal of authorisation, adopted jointly by the Bank of Italy and IVASS in 2014.[7]

The 'national' tranche of the judicial proceedings was shaped by the crucial interpretative judgment of 19 December 2018 (C-219/17) by the Court of Justice of the European Union.[8] The Court maintained the exclusive competence of the European Judge over all the acts of a common procedure, including non-binding prodromal acts adopted by the national competent authority in the stages falling within its jurisdiction. In the wake of that judgment, the Council of State, by decision No 2890 of 3 May 2019, had declared its lack of jurisdiction over the actions brought by Berlusconi and Fininvest against the Bank of Italy's acts preparatory to the ECB decision. The joint chambers of the Italian higher court (*Sezioni Unite della Corte di Cassazione*), by ruling No 10355 of 20 April 2021, had confirmed that ruling.[9]

It was precisely in these decisions declining the competence of the Italian courts that, in the appellants' view, the infringement of the right to a fair trial under Article 6 ECHR had occurred, in the form of the denial of access to a court to enforce the Council of State's 2016 ruling. According to the claimants,

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[6] See No 17 of Nomos Basileus, in the note concerning the judgment of the General Court of 11 May 2022 (T-913/16), *Berlusconi and Fininvest vs ECB*.

[7] The new procedure was initiated on the premise that, pending the judgment before the Italian administrative court, a reverse merger between Mediolanum S.p.A. (mixed financial holding company) and Banca Mediolanum (the target institution) was carried out. Such reverse merger triggered the acquisition of a direct qualifying holding in the credit institution (Banca Mediolanum) by Fininvest and, indirectly, by Mr Silvio Berlusconi.

[8] Judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023.

[9] See No 4 of this Nomos Basileus.

Banca d'Italia, in starting a new authorisation procedure, violated the *res judicata* of the 2016 judgment; nor the allocation of competences stemming from the interpretative judgment of ECJ allowed the possibility of a judicial review of such alleged infringement.

The European Court of Human Rights (ECHR) categorically refuted the appellants' pleas and declared the action manifestly ungrounded and therefore inadmissible (pursuant to Article 35 of the Convention). In its judgment, the Court recalled its case law, instated by the *Bosphorus* judgment,[1] according to which, in the case a legislation does not leave one Contracting Party any discretionary power, such as the European Union legislation at issue vis-à-vis the Member States, there cannot be any liability for violation of the Convention by the States themselves. Such a conclusion, however, is subject to the existence of the so-called 'equivalent protection', according to which the supranational framework to which the States have transferred sovereignty over certain issues, must guarantee a level of protection of human rights equivalent to that of the Convention framework. Moreover, as a second stage of the assessment, the Court must examine whether in the concrete case the level of protection has been – notwithstanding general rules – "manifestly deficient".

In the *Bosphorus* case, and in its following case law, the ECHR has constantly considered the human rights protection afforded by the European Union to be equivalent to that of the Convention. Furthermore, in the case at hand, no evidence of a tangible "manifest deficiency" in such protection was provided, so that the Court found that the presumption of equivalence could not be rebutted. It follows that the application of European law – as interpreted by the CJEU in 2018, stating the exclusive and all-embracing competence of the EU courts over national acts of common procedures, whatever the alleged defect is – is supposed to be compliant with the Convention as well. Thus, the ECHR dismissed the appeal as manifestly unfounded.

This judgment definitively close any issue concerning a possible review, before the Italian courts, of the "internal" stage of the proceeding which resulted in the refusal for the acquisition by Mr Berlusconi, through Fininvest, of a qualifying holding in Banca Mediolanum. At the EU level, the General Court already upheld the ECB negative decision, by judgment 11 May 2022 (T-913/16). The interested parties have appealed; the case is pending (Case C-512/22 P).

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1 *Bosphorus Hava Yollar Turizm ve Ticaret Anonim Sirketi v. Ireland*, (dec.), [GC], no. 45036/1998, 30 June 2005.

The judgments of the national apical Courts

Austria

by Vanessa Aichstill[*] and Paul Weismann[**]

[*] GmbH v Republic of Austria, P[*] GmbH v Republic of Austria, P[*] GmbH v Republic of Austria

1. Keywords and summary

Oberster Gerichtshof, Judgment of 14 July 2022, 1 Ob 91/22x;[1] Judgment of 12 October 2022, 1 Ob 104/22h;[2] Judgment of 12 October 2022, 1 Ob 140/22b[3]

Public liability for deficient banking supervision

Public liability for deficient banking supervision – Protective purpose of relevant § 3(1) (2nd sentence) of the Financial Market Authority Act

The Republic of Austria cannot be held liable for pecuniary losses of damaged bank customers on grounds of deficient banking supervision by the

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1 Available at https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=0797c6ca-a8de-43e6-b54d-30341e7eb0ba&Position=1&SkipToDocumentPage=True&Abfrage=Justiz&Fachgebi-et=&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&Spruch=&Rechtsgebiet=Unde-fined&AenderungenSeit=Undefined&JustizEntscheidungsart=&SucheNachRechtssatz=True&-SucheNachText=True&GZ=1+Ob+91%2f22x&VonDatum=&BisDatum=31.03.2023&Norm=&Im-RisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Such-worte=&Dokumentnummer=JJT_20220714_OGH0002_0010OB00091_22X0000_000.

2 Available at https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=e5fae75b-2192-4b8f-aa6d-550abb0ca277&Position=1&SkipToDocumentPage=True&Abfrage=Justiz&Fachgebi-et=&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&Spruch=&Rechtsgebiet=Un-defined&AenderungenSeit=Undefined&JustizEntscheidungsart=&SucheNachRechtssatz-=True&SucheNachText=True&GZ=1+Ob+104%2f22h&VonDatum=&BisDatum=31.03.2-023&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&Result-PageSize=100&Suchworte=&Dokumentnummer=JJT_20221012_OGH0002_0010OB00104_22H0000_000.

3 Available at https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=265047d2-4892-4c92-a53d-89898bd6c905&Position=1&SkipToDocumentPage=True&Abfrage=Justiz&Fachgebi-et=&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&Spruch=&Rechtsgebiet=Un-defined&AenderungenSeit=Undefined&JustizEntscheidungsart=&SucheNachRechtssatz-=True&SucheNachText=True&GZ=1+Ob+140%2f22b&VonDatum=&BisDatum=31.03.2-023&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&Result-PageSize=100&Suchworte=&Dokumentnummer=JJT_20221012_OGH0002_0010OB00140_22B0000_000.

Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*), because pursuant to § 3(1) (2nd sentence) of the Financial Market Authority Act (*Finanzmarktaufsichtsbehördengesetz – FMABG*) such damages do not fall within the protective purpose (Schutzzweck) of banking supervisory law. The OGH does not have doubts as to the conformity of this provision with EU law.

Public liability for deficient banking supervision – Activities of the Austrian National Bank within the framework of banking supervision – Attribution to the FMA

The legal exclusion of a liability for pecuniary losses of damaged bank customers on grounds of deficient banking supervision pursuant to § 3(1) (2nd sentence) of the FMABG also applies to losses which are deduced from the activity of the Austrian National Bank within the framework of banking supervision. Although the Austrian National Bank conducts all on-site inspections, expert opinions and analyses, the administrative procedure and the decision-making authority remain with FMA. The activities of the Austrian National Bank within the framework of banking supervision, from a legal perspective, are to be attributed to the FMA.

Criminal investigations – Protection of bank customers from pecuniary losses – Reflex effect – No public liability claim

The legal provisions on the initiation of a criminal investigation are not intended to protect bank customers from pecuniary losses caused by future criminal offences of the bodies of this bank due to the omitted initiation of a criminal investigation. That such losses could possibly have been prevented by an earlier initiation of criminal investigations is a mere reflex effect of dutiful action and thus cannot establish a public liability claim.

[*] GmbH v Republic of Austria

1. Keywords and summary

Oberster Gerichtshof, Judgment of 14 July 2022, 1 Ob 91/22x

Public liability for deficient banking supervision

Public liability – Norm specifically intended to protect damaged party – Special legal relationship – Group of persons concerned

Whether, in the context of public liability, a norm is specifically intended (also) to protect the damaged party (protective purpose) is strongly dependent on whether a special legal relationship exists between the damaged party and the legal entity whose actors violate an official duty and on whether the fulfilment of public functions concerns such a large and unspecified number of persons that it can be equated with the general public.

P* GmbH v Republic of Austria

1. Keywords and summary

Oberster Gerichtshof, Judgment of 12 October 2022, 1 Ob 104/22h

Public liability for deficient banking supervision

LEGAL SITUATION PRIOR TO REFORM – Pursuance of serious leads – Concrete suspicious facts

§ 3(1) of the FMABG (in its version of Federal Law Gazette I 2008/136) is not to be applied to circumstances having occurred prior to its entry into force. According to the legal situation prior to its entry into force, the FMA was obliged, in order to prevent losses of investors, to pursue serious leads and take the required measures if these leads disclosed concrete suspicious facts regarding business activities which are unlawful and (potentially) harmful to investors.

R*/E* v Einlagensicherung Austria Ges.m.b.H. (Deposit Guarantee Scheme Austria ltd)

Directive 2014/49/EU on (national) deposit guarantee schemes, provides for a harmonised coverage level for the aggregate deposits of each depositor of EUR 100 000. Austria transposed this Directive by adopting a statute on deposit guarantee and investor compensation (*Einlagensicherungs- und Anlegerentschädigungsgesetz* – ESAEG). Pursuant to Article 6(2) of the Directive, certain deposits are protected above this amount for at least three months and no longer than 12 months after the amount has been credited or from the moment when such deposits become legally transferable, e.g. deposits resulting from real estate transactions relating to private residential properties. In the ESAEG, this latter provision is contained in § 12.

1. Keywords and summary

Oberster Gerichtshof, Judgment of 6 October 2022, 1 Ob 241/21d;[4] Judgment of 18 November 2022, 6 Ob 58/22f[5]

Coverage of national deposit guarantee scheme

National Deposit Guarantee Scheme – Switches and reswitches – Different coverage levels

If an investor has several accounts with a credit institution, transfers between these accounts (switches and reswitches) do not result in an investment decision and therefore are still covered by § 12 ESAEG. The main purpose of a deposit guarantee scheme is the protection of depositors. Thus, the coverage level applies per depositor, not per deposit. The type and the number of accounts with one and

[4] Available at https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=b26c9b75-6a1a-43c4-a1a5-2b587af3657e&Position=1&SkipToDocumentPage=True&Abfrage=Justiz&Fachgebiet=&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&Spruch=&Rechtsgebiet=Undefined&AenderungenSeit=Undefined&JustizEntscheidungsart=&SucheNachRechtssatz=True&SucheNachText=True&GZ=1+Ob+241%2f21d&VonDatum=&BisDatum=31.03.2023&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JJT_20221006_OGH0002_0010OB00241_21D0000_000.

[5] Available at https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=c3d6d31c-3e0c-4d12-926f-f24122f59da0&Position=1&SkipToDocumentPage=True&Abfrage=Justiz&Fachgebiet=&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&Spruch=&Rechtsgebiet=Undefined&AenderungenSeit=Undefined&JustizEntscheidungsart=&SucheNachRechtssatz=True&SucheNachText=True&GZ=6+Ob+58%2f22f&VonDatum=&BisDatum=31.03.2023&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JJT_20221118_OGH0002_0060OB00058_22F0000_000.

the same credit institution and transfers between these accounts are irrelevant. What is relevant is the balance (if any) resulting from a payment covered by § 12 ESAEG. If a customer has several accounts and has made transfers between these accounts, they have to be considered in finding out what the pertinent balance is. It is not sufficient, in this case, to have any credit balance on any account in order to be granted protection under § 12 ESAEG. In this respect, the OGH has no doubts as to the correct interpretation of the underlying EU law.

R* v Einlagensicherung Austria Ges.m.b.H. (Deposit Guarantee Scheme Austria ltd)

1. Keywords and summary

Oberster Gerichtshof, Judgment of 6 October 2022, 1Ob241/21d

Coverage of national deposit guarantee scheme

National Deposit Guarantee Scheme – Real estate transactions relating to private residential properties

Deposits also result from '*real estate transactions relating to private residential properties*' if they are based on the sale of property acquired upon death which the deceased (and not the vendor) had used for residential purposes. For this conclusion, the OGH relied on the definition laid down in Article 4 no 75 of Regulation 575/2013 and referred to in Directives 2014/49/EU and 2014/17/EU, according to which '*residential property*' describes '*a residence which is occupied by the owner or the lessee of the residence […]*'. In the interest of consumer protection, § 12 ESAEG is to be interpreted extensively, so as to cover rather more than fewer deposits. The OGH considers this an *acte clair* and thus does not make a preliminary reference.

National Deposit Guarantee Scheme – Interest on arrears

Pursuant to the right to defer payment under § 14(2) no 5 ESAEG, interest on arrears on compensation claims for temporarily covered deposits (§ 12 ESAEG) is due only if the amount is not paid within the period provided for in the final judgement. In this case, interest is to be paid from the date of the judgement's legal force.

Appeal against Decision of Federal Administrative Court

1. Keywords and summary

Verwaltungsgerichtshof, Decision of 17 January 2022, Ra 2021/02/023[6]

Decision on the ex-ante contributions to the resolution financing arrangements

Decision on the *ex-ante* Contributions to the Resolution Financing Arrangements – Implementation of EU law – Protection of business secrets

The Austrian Federal Law on Bank Recovery and Resolution (*Sanierungs- und Abwicklungsgesetz* – BaSAG), according to its 'implementation information', also serves the 'effectiveness' of Regulation (EU) 806/2014. It is thus to be interpreted in conformity with EU law. Its application by the Federal Administrative Court constitutes implementation of EU law and thus the Charter of Fundamental Rights, notably its Article 47, is applicable.

The duty to protect business secrets cannot be interpreted so extensively as to undermine the requirement to state reasons (with reference to VwGH, Decision of 6 April 2021, Ra2021/02/0018).

Decision on the *ex-ante* Contributions to the Resolution Financing Arrangements – Inspection of the files as a question of law – Oral proceedings

The extent to which a party may inspect the files and to which it needs to comprehend the prescribed contributions is an important question of law which is not only of a highly technical nature (with reference to VwGH, Decision of 6 April 2021, Ra2021/02/0018). Thus, the Federal Administrative Court may not repeal the decision of the Financial Market Authority and refer the matter back to this authority, but the Court shall decide the matter itself.

Where the Federal Administrative Court violates its duty to conduct oral proceedings (i.e. where the requirements for refraining from an oral hearing are not met), within the material scope of Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights the annullability of the resulting Court decision does not depend on

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[6] Available at https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=0f142b34-4fab-4e89-9d81-daffc4b88d4b&Position=1&SkipToDocumentPage=True&Abfrage=Vwgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=Ra+2021%2f02%2f0236&VonDatum=&BisDatum=31.03.2023&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JWT_2021020236_20220117L00.

whether the outcome would be different, had an oral hearing been conducted. In other words, the relevance of the procedural deficiency in the concrete case is not to be examined.

Appeals against Decision of Federal Administrative Court

The background to these cases was an action for annulment against Decision SRB/ES/SRF/2017/05, with which the Single Resolution Board (SRB) determined the *ex-ante* contributions to be paid by each institution for the year 2017, on the basis of which the Financial Market Authority (FMA) had requested the claimant to pay its contribution, accordingly. In the proceedings before the General Court, the SRB decision was annulled (T-414/17 *Hypo Vorarlberg Bank v SRB*). In the appeal proceedings before the Court of Justice (C-663/20P *SRB v Hypo Vorarlberg Bank AG*) the decision was annulled to the extent it concerned the claimant. However, the Court upheld its effects, until, within a reasonable period of time not exceeding six months, the SRB would have adopted a new decision. The claimant also challenged the request of the FMA which the Federal Administrative Court annulled, thereby explicitly referring to the above judgement of the General Court which was meanwhile adopted (with the appeal pending before the Court of Justice), and closed the proceedings. The FMA challenged this decision before the VwGH. The VwGH repealed the decision of the Federal Administrative Court in consideration of the appeal judgement the Court of Justice has rendered by then. Thus, the Federal Administrative Court had to decide anew. In the meantime, the SRB has adopted a new decision replacing the annulled decision. The Federal Administrative Court again annulled the FMA's request. Against this decision, the FMA went to the VwGH once more. The VwGH confirmed the lawfulness of the FMA's request and thus set aside the decision of the Federal Administrative Court. It is the two decisions of the VwGH which are addressed below.

1. Keywords and summary

Verwaltungsgerichtshof, Decision of 2 June 2022, Ra 2022/02/0051;[7] Decision of 23 November 2022, Ra 2022/02/0186[8]

Effect on request by NRA of annulment and replacement of SRB decision

[7] Available at: https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=aafda01a-c031-454c-950e-8223809ed358&Position=1&SkipToDocumentPage=True&Abfrage=Vwgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=Ra+2022%2f02%2f0051&VonDatum=&BisDatum=31.03.2023&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JWT_2022020051_20220602L00.

[8] Available at: https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=1937f472-3693-4c7d-af88-03004bcc4e7c&Position=1&SkipToDocumentPage=True&Abfrage=Vwgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=Ra+2022%2f02%2f0186&VonDatum=&BisDatum=31.03.2023&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JWT_2022020186_20221123L00.

Action for annulment of a SRB decision – Request of the FMA – (No) suspensive effect – Legal effects of annulled SRB decisions

The Federal Administrative Court was not obliged to suspend the proceedings until there would be an appeal judgement of the Court of Justice in the above case, (1) because it had discretion in this regard (§ 38 of the General Law on Administrative Proceedings in conjunction with § 17 of the Law on Proceedings before Administrative Courts) and (2) because the legal effects of the appeal did not require it. The decision of the General Court became effective with the date of its announcement (Article 12(1) of the Rules of Procedure of the General Court). The annulment took effect *ex tunc*, as the General Court did not provide for a temporary suspension of these effects. Also the appeal before the Court of Justice in this case did not unfold suspensive effects (Article 60(1) of the Statute of the Court of Justice of the European Union).

The VwGH had to decide on the basis of the meanwhile adopted appeal judgement of the Court of Justice which replaced the judgement of the General Court. The Court of Justice enunciated the annulment of the SRB decision, but temporarily suspended the effects of this annulment. Thus, the decision of the Federal Administrative Court was now based on a revoked and, in retrospect, non-existent judgement of the General Court. Consequently, the VwGH in case Ra2022/02/0051 had to revoke the decision of the Federal Administrative Court as unlawful.

New SRB decision – Request of the FMA – Order for payment

For the VwGH, the new SRB decision was a seamless replacement of its earlier decision (which the Court of Justice had annulled, but whose effects it temporarily upheld). Thus, the obligations emanating from these decisions were unfolded continuously and the request of the FMA never lost its legal basis. A replacement of this request by a new request was therefore dispensable. While the FMA (or the Federal Administrative Court) may not change the SRB's calculation of the contributions, only the FMA request contains an order for payment *vis-à-vis* the respective institution. Hence the annulment of the FMA's request without the adoption of a new (lawful) request by the Federal Administrative Court itself was substantively unlawful, which lead the VwGH to repeal the decision of the Federal Administrative Court in case Ra2022/02/0186. Consequently, the original FMA request was maintained.

Germany

ESM-ÄndÜG

1. Keywords and summary

ESM-ÄndÜG

Bundesverfassungsgericht, Zweiten Senats, Order of 13 Octber 2022[4]

Reform of the European Stability Mechanism: constitutional complaint dismissed

ESM reform – Constitutional complaint – Right to democratic self-determination – Transfer of sovereign powers

Under Germa law, the domestic act of approval of an international treaty may be challenged via constitutional complaint – in certain cases even before the treaty comes into force – if the treaty contains provisions that directly affect the legal sphere of the individual complainant.

More precisely, applicants may have standing to lodge a constitutional complaint against an act of approval on the grounds of a possible violation of the right to democratic self-determination following from Article 38(1) first sentence of the Basic Law (*Grundgesetz – GG*). However, the Federal Constitutional Court only reviews an act of approval of an international treaty on the basis of Article 23(1) second and third sentence GG if a transfer of sovereign powers to the European Union or to an intergovernmental institution that supplements or is otherwise closely aligned with the European Union is at stake. This is the case when the European Union or an intergovernmental institution is authorised to implement measures with direct consequences for legal subjects in Germany. By contrast, mere de facto changes of the EU integration agenda or its legal framework brought about by the conclusion of international treaties that do not involve changes of primary law generally do not amount to a transfer of sovereign powers.

In light of the foregoing, in the case at hand the applicants have failed to sufficiently demonstrate and substantiate a violation of Article 38(1) first sentence GG. They did not demonstrate that the Agreement Amending the ESM Treaty might lead to a transfer of sovereign powers to the ESM or to the EU or that a (de facto) change in the framework of the EU integration agenda that might violate

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[4] English version available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-105.html.

their rights under Article 38(1) first sentence GG is at issue. The same applies to the Agreement Amending the Intergovernmental Agreement.

ESM REFORM – Financial assistance – Decision-making process – No transfer of sovereign powers

The decision-making process in the ESM's bodies regarding the granting of financial assistance does not, as such, constitute an exercise of sovereign powers. Rather, it only concerns payment transactions between the ESM, the Single Resolution Board and individual members of the ESM, which do not directly affect the legal sphere of citizens.

Therefore, a procedural provision concerning such decision-making and relating to the ESM's tasks, such as Article 18a(6) of the Agreement Amending the ESM Treaty (concerning the emergency voting procedure applicable to the common backstop), does not amount to an authorisation to exercise sovereign powers.

ESM REFORM – ECB and Commission's functions – Preparatory and supporting activities – No transfer of decision-making powers

Insofar as the complainants contend that the Agreement Amending the ESM Treaty increases the scope of functions to be carried out by the European Commission and the European Central Bank on the part of the ESM as 'commissioned administrative agents', it has to be noted that this extension of functions does not transfer decision-making powers. The functions conferred on the European Commission and on the European Central Bank as 'commissioned administrative agents' are limited to preparatory and supporting activities. Since the ESM is not authorised to exercise sovereign powers, it is, in principle, irrelevant whether it performs its functions through its own institutions or through the institutions of other intergovernmental or international organisations as agents.

ESM REFORM – Precautionary conditioned credit lines – Conditionality – Common backstop – No bail out clause – Prohibition of monetary financing

As regards the the reorganisation of precautionary conditioned credit lines (PCCL), it is not ascertainable that the design of such credit lines, especially as regards conditionality, is no longer in keeping with Article 136(3) of the TFEU.

The revisions to the PCCL and the introduction of a common backstop also do not lead to de facto changes of Article 125 TFEU (no bail out clause). The common backstop does not constitute financial assistance to a contracting party,

but financial assistance to an agency of the European Union, in order to bolster the resolution mechanisms and powers of the Single Resolution Board. This eases pressures on national public finances only in an indirect manner; thus, the principle of national budget autonomy is not affected.

The common backstop also does not affect the prohibition of monetary financing of Member State budgets. Following the adoption of the Agreement Amending the ESM Treaty, the ESM will still fall within the category of institutions set out in Article 123(1) TFEU as to which lending by the European Central Bank is prohibited.

2. In the last chapter (so far) of its "European journey", the German Federal Constitutional Court dismisses as inadmissible a constitutional complaint against the amendments to the ESM Treaty (2 BvR 1111/21)

by Elisa Ruberti and Donato Messineo

1. On October 13th, 2022 the Second Senate of the Federal Constitutional Court (henceforth also "Bundesverfassungsgericht" or "BVerfg") dismissed as inadmissible a constitutional complaint raised by six members of the German Bundestag against the national acts of approval of the Agreement of 27 January 2021 amending the Treaty on the European Stability Mechanism ("ESM") and the Intergovernmental Agreement ("IGA") on the Transfer and Pooling of Contributions to the Single Resolution Fund ("SRF").

2. The SRF is a common fund, financed by the contributions of the banking sector, with the purpose of financing the resolution of failing banks, after other options – such as the bail-in tool – have been exhausted, involving the use of shareholders' and creditors' resources; the SRF may be used only to the extent necessary to ensure the effective application of the resolution tools, as envisaged in the EU legal framework on banking crises; the banks' contributions are calculated by the Single Resolution Board ("SRB"), then levied by the national resolution authorities, and finally transferred to the SRF. Such transfer is regulated by the IGA. In the Agreement of 27 January 2021 Amending the IGA – indirectly submitted to the review of the BVerfG – the contracting Parties agreed to modify the rules for the mutualisation of *ex post* contributions. Under the proposed changes, *ex post* contributions from all contracting Parties will only be transferred to the Fund if other means are not sufficient; and a cap is set on the maximum amount to be transferred.

The challenged amendments aim to improve the effectiveness of the precautionary financial assistance instruments available to the ESM in order to support Members threatened by severe financing problems, and to enhance the role of the ESM through newly introduced cooperation arrangements with the European Commission. On the one hand, the reform establishes a common backstop to the SRF; on the other hand, it modifies the emergency procedure

already contained in the ESM Treaty, which is to be extended to the common backstop.

The plaintiffs alleged non-compliance with their right to democratic self-determination arising from Article 38(1) of the Basic Law (henceforth also "Grundgesetz" or "GG"). Namely, they claimed that the amendments recalled above would entail a new transfer of sovereign powers to the ESM and a structurally significant change in the European integration agenda: therefore, the simple majority by which they were approved would not have been sufficient, but rather a two-thirds majority would have been required as per Article 20(1) and (2) in conjunction with Article 79(3) GG.

3. On this regard, it is worth recalling that, according to the settled case-law of the BVerfG, insofar as Article 38 of the German GG grants German citizens the right to elect Parliament, not only are the German citizens entitled to a generic claim to elect any organ whatsoever, but they have the constitutional right to elect a "Parliament" with a capital "P"; that is, a Parliament characterised by the ownership of functions of substantial weight. Correspondingly, the German Constitution does not tolerate such functions being eroded by unsupervised encroachments of the European institutions beyond the competences transferred to them. Since its landmark judgment on the Maastricht Treaty of 1993 (2 BvR 2134/92, 2 BvR 2159/92), the BVerfG has arrogated to itself to review the compliance of the acts of the German authorities concerning the participation of the German State in the EC (later, in the EU) with such requirement – and the possible failure of the German Authorities to react against significant overstepping of their competences by EU institutions is also included among the "acts" subject to the review of the BVerfG.

In other words, since the Maastricht-Urteil the BVerfG has taken it upon itself to prevent the German authorities, and especially the Government and Parliament, from cooperating in the withdrawal of a hard core of essential sovereign powers, which need to remain in the hands of the German People and their elected representatives. In the said judgment of 1993, the BVerfG emphasised, among others, the responsibility of Parliament for the development of the so-called "integration programme". In its judgment on the Treaty of Lisbon of 2009 (2 BvE 2/08), the BVerfG even drew up a list of matters that cannot be transferred to non-state institutions: according to the BVerfG, legislation on these matters shapes in a crucial manner the basic living conditions of German citizens. In this context, the Lissabon-Urteil also underlines the indispensable role of Parliament in budgetary decisions: Parliament, being the institution directly elected by the German People, is regarded by the BVerfG as the exclusive master of the financial commitments that the German State can undertake on the international arena. Later on, these statements proved to have far-reaching implications in other decisions, including in the 2012 ruling on the ratification of the ESM Treaty (2 BvR 1390/12): through such judgment, the Court of Karlsruhe required the Government to make sure, in the ratification procedure, that the express limitation of the liability of the ESM Members to their respective portions of the authorised

capital stock, which is provided for in Article 8(5), sentence, of the ESM Treaty, bindingly limits the budget commitments of the Federal Republic of Germany in connection with the activities of the ESM to that original amount; and that no payment obligations going beyond that liability ceiling can be established for it without the consent of the Bundestag. Eventually, such statement lead to the formulation of an express reservation by the Federal Republic of Germany in the ratification of the Treaty.

4. Against this background, it is easier to understand the dismissal by the BVerfG of the constitutional complaint at hand as inadmissible.

The arguments used by the appellants were not able to pass the filter of admissibility, thereby allowing the Court to enter into the merits of the case and review the act of approval of an international Treaty. To this end, the claimants needed – in first place – to demonstrate the realization of the transfer of sovereign powers to the European Union or to an intergovernmental institution that is in a complementary or special proximity relationship with it.

In general, one such transfer is found to occur whenever a supranational organization – such as the European Union – is authorized to implement measures bearing direct effects on individuals or legal entities in Germany. In the case at stake, according to the BVerfG, the appellants failed to show the reasons why the amendments to the ESM Treaty might result in a transfer of sovereign powers to the ESM or the EU, capable – as such – of infringing their right to democratic self-determination.

And indeed, in the mentioned judgment of 2012, the BVerfG had already ruled out that one such transfer had been effected by the ESM Treaty, based on the provisions on the involvement of the German Bundestag in the decision-making processes of the ESM and on the presence of the German representatives in the bodies of the ESM; moreover, the ESM does not exercise sovereign powers and does not adopt legal acts with direct binding effect on the German (more generally: European) citizens. Likewise, none of the new provisions significantly impinge on national legal interests or limit Germany's sovereignty.

According to the Court, the ESM merely grants financial assistance to its contracting States, while it does not take measures which may – in any way – affect the legal sphere of individuals. This applies insofar as a "memorandum of understanding" ("MoU") is agreed between the ESM and a State party, with conditions imposing upon that State party the obligation to carry out certain reforms. As a matter of fact, only the subsequent implementation of the said MoU by the contracting State might hypothetically lead to an interference with fundamental rights. In turn, the mere commitments undertaken by the contracting State in the memorandum do not amount *per se* to such an interference, as long as they are not implemented into domestic law, through a further exercise of national sovereign rights (see § 100 of the judgement).

5. The complainants also argued that the ESM Treaty Amendment Agreement expands the scope of the functions which are to be exercised by the

European Commission and the European Central Bank on the part of the ESM as "commissioned administrative agents": however, the Court noticed on this regard that the new tasks of the European Commission are consistent with the role of such institution under the EU framework for the coordination of economic policy.

With regard to the reform of the emergency voting procedure applicable to the common backstop, the complainants alleged that the new procedure shifts political ownership of the activation of the backstop to the European Commission and the European Central Bank.

However, in the opinion of the BVerfG, the decision-making process of the ESM bodies regarding the granting of financial assistance does not amount to an exercise of sovereign powers, as it only concerns payment transactions between the ESM, the SRB and individual ESM member States, which do not directly affect the legal position of individual citizens.

Indeed, the new functions of the European Commission seem necessary to ensure that the measures taken by the ESM comply with EU law, and the complainants failed to demonstrate that this could amount to a transfer of powers. At the end of the day, the assignment of specific tasks to the European Commission and the ECB in the context of the ESM does not involve any conferral of sovereign rights, since – on the one hand – it is not for the ESM to exercise such tasks, and – on the other hand – the said tasks link back to already existing competences of the ECB and the Commission in the context of the established EU institutional architecture.

Finally, with regard to the reorganization of the precautionary conditional credit lines ("PCCLs") brought about by the ESM Amendment Agreement, the Court concluded that the design of conditionality for the PCCLs instrument does not depart from the provisions of Articles 136(3) and 125 TFEU, since the amended provisions specify more clearly that access to a PCCL may only be granted insofar as the (now even stricter) eligibility criteria applicable to the respective type of financial assistance have been met; and the provision of the backstop is not a form of financial assistance provided to a State Party but to an EU agency (the Single Resolution Board), so that the principle of autonomy of national budget is not affected.

6. Compared to previous cases in similar matters, this ruling is characterized by the return of the German Court to a stricter assessment of the procedural requirements for the *Verfassungsbeschwerde*: despite the apparent linearity of the judgment, this is a remarkable change of direction as opposed, for example, to the 2016 decision on the Outright Monetary Transactions (2 BvR 2728/13), in which the BVerfG had found the risk of a present and direct infringement of the fundamental rights of German citizens in the mere publication of a press release by the ECB.

Italy

[.] and others v Banca d'Italia[*]

1. Keywords and summary

[.] and others v Banca d'Italia

[.] and others v Banca d'Italia

Consiglio di Stato, sez. VI, Judgment of 19 July 2022 No 6254

Collective removal of the management body and the internal control body of a credit institution

Early intervention measures – Purposes of early intervention measures – Collective removal measure

Early intervention measures aim to prevent banking crises by actions that anticipate the irreparable deterioration of a bank's business situation to enable, where possible, the rapid recovery of the concerned credit institution and, in any event, to reduce the impact of the crisis on economy and public finance.

The collective removal measure of members of a credit institution's bodies is an early intervention measure, because its purpose is to prevent rather than to sanction. Such a measure can be adopted when the banking crisis is in an embryonic state and, therefore, it is still possible to restore the sound and prudent management of the concerned bank. In this context, the collective removal measure is not intended to punish members of bank's bodies for any unlawful conduct, but to mark a managerial discontinuity that concurs to limit the deterioration of business situation and to facilitate the recovery of the intermediary.

Collective removal measure – Duty to state reasons – Principle of proportionality

In stating the reasons for the collective removal measure, the supervisory authority may recall the less incisive measures previously taken and found to be insufficient to resolve the issues of the concerned bank, in order to demonstrate the necessity and proportionality of the collective removal measure.

[*] Italian version available at https://www.dirittodelrisparmio.it/wp-content/uploads/2022/07/Cons.-Stato-Sez.-VI-19-luglio-2022-n.-6254.pdf.

Early intervention measures – Cumulative application

Since no legal provision establishes the exclusively alternative applicability of the early intervention measures, such measures may also be taken cumulatively, if the combination of different measures may be justified by the specific critical situation they are intended to remedy.

Collective removal measure – Purposes of early intervention measures – Procedural safeguards – Inapplicability

The preventive and non-punitive purpose of the collective removal measure is confirmed by the fact that the conditions for such a measure take into account the objective situation of the concerned bank, while the conduct of the persons removed remains in the background. The purpose of removal is not to afflict the officers, but to preserve the stability and sound management of the bank.

According to Article 24 of Law No 265/2000, only the general principles on administrative proceedings apply to its adoption, if compatible with its specificities. As the measure is issued in the context of a banking crisis with potential systemic effects, the urgency justifying the omission of the notice of initiation of the proceeding must be considered fulfilled. This omission is in line with Article 97 of the Italian Constitution and Article 41 of the Charter of Fundamental Rights of the European Union, as it is justified by the need to ensure the effectiveness of supervisory action, in order to provide an actual protection of stability of the financial system.

Technically complex assessment – Judicial review

In banking supervision, assessments made by the supervisory authority are complex and technical, as they involve the appreciation of factual elements in relation to rules that do not have the features of scientific laws, which are exact and unquestionable, but are the result of inexact sciences, of a prevalent economic nature. Consequently, these assessments cannot be based on parameters pre-established and usable in all situations, but must be related to their concrete context, so that the supervisory authority can take the more appropriate measures to stem the degeneration of the concerned credit institution and restore, if possible, its sound and prudent management.

Therefore, the administrative judge, in addition to the power to acknowledge all the facts, can also verify the soundness, congruity, reasonableness, and adequacy of the measures adopted by the supervisory authority, the regularity of the procedure and the completeness of investigation, also in terms of the correctness of the technical criterion used and its practical application, but cannot go so far as to express its own independent assessments in place of the authority.

The judge must carry out his ascertaining on the basis of factual situation and evidence available at the time of the intervention of the authority concerned, taking into account that this intervention is aimed to safeguard not only the relevant credit institution, but the whole banking system.

2. The Consiglio di Stato on the nature of the collective removal of the members of a bank's management body: is removal a punitive measure?

by Flavia Sforza and Michele Cossa

In 2016, Banca d'Italia issued a decision containing early intervention measures against an LSI subject to its direct supervision, due to the detection of serious violations and irregularities and the rapid deterioration of its financial situation. The measures included the collective removal of the members of the bank's management board and internal control body, pursuant to Article 69-*vicies-semel* of the Consolidated Banking Law, transposing Article 28 BRRD.

The removed persons and some shareholders challenged the decision before the competent administrative court (TAR Lazio), which in 2017 dismissed the appeals finding the Bank of Italy's intervention to be correct and well-founded. Against these decisions, the interested parties appealed to the administrative court of last instance, the Consiglio di Stato.

With its judgment No. 6254/2022, published on 19 July 2022, the Consiglio di Stato, sixth Chamber, dismissed the (two) appeals lodged by the former representatives and shareholders, conclusively confirming the lawfulness of the challenged decision.

The judgment rejected the complaints about the legitimacy of the supervisory authority's procedure and about the merits of the case, concerning both the factual prerequisites of the decision and the reasonableness and proportionality of the adopted measures. To this end, the Court also ordered a technical advice, which corroborated the reliability of the supervisory authority's assessment.

The case regards the first – and, so far, only – application of the collective removal measure, extensively discussing its nature and purpose.[1] It also reiterates the judicial review's limits in relation to supervisory decisions in light of administrative case law.

Amongst the various issues addressed by the Court, the ones listed below may be of particular interest.

[1] On the website "Giustizia amministrativa" the judgment was published in the front page, with the title "*The removal of the Bank of Italy does not have a sanctioning nature".* In this publication is provided an unofficial translation of some parts of the judgment.

The appeal provided an opportunity for the Consiglio di Stato to carry out a systematic analysis of the collective removal measure. In doing so, the administrative judge accurately placed himself in the wake of the European framework, implemented by the national provisions under scrutiny.

Thus, the ruling recognises that removal is placed within the early intervention measures (EIM) that are adopted by the supervisory authority for the fulfilment of its tasks.

In this light, the measure in question was found to be consistent with the national constitutional provisions stipulating the protection of private property and freedom of economic initiative. In the Consiglio di Stato's view, these interests must be reconciled with the need to ensure the proper functioning of the financial markets (as inferable from Article 47 of the Constitution), which can also be seriously jeopardised by the crisis of a single credit institution.

Such crisis may well have systemic effects with consequent harm to the real economy and savers. Early intervention measures therefore aim to avoid even more radical measures (e.g. resolution), that have far more intrusive effects on the rights and freedoms of those affected by the bank's fate.

Besides, among the early intervention measures, the Italian legal system has always envisaged (even before the BRRD) the special administration. Such measure is more incisive than removal, since it entails not only the dismissal of the members of the management body, but also the impossibility for shareholders to provide for their replacement.

From the consideration of the purpose of the EIMs, namely to prevent the definitive deterioration of the situation, the judgment under examination draws two postulates.

Firstly, EIMs can be cumulated (as it was the case in this instance). The combination of different measures may be justified by the specific critical situation they are intended to remedy.

Moreover, including the removal within the scope of the EIMs allows the administrative judge to exclude any punitive nature of the measure towards the individuals concerned.

The judgment states that (point 9 ff.): "*in compliance with the TAR's decision, it shall be reiterated that the collective removal of the members of the administrative and control bodies and of one or several members of the senior management does not represent a sanctioning measure, but is part of the early intervention measures, which belong to the wider category of the Bank of Italy's supervisory powers. The purpose of removal is not to afflict the officer, but to preserve the stability and sound management of the bank. In this sense, the effects that, unquestionably, are produced on the physical person of the officer, who is removed from his position, do not seem sufficient to link the measure in question to the sanctions framework in the strict sense. The reason behind the Authority's*

intervention is of a totally different nature from the punitive intent of the sanction, being included, as mentioned, within the framework of supervisory measures, meant to prevent the supervised institution's total failure and, therefore, aimed at a completely different purpose than the punishment of a specific individual, whose conduct remains in the background. Indeed, the prerequisites for the measure affecting the corporate officer do not specifically concern the conduct of the individual, nor the investigation into the subjective imputability of said conduct is particularly relevant. (….) *the prerequisite does not relate to a sanctioning measure, which is necessarily applied in case of violation of a specific rule of conduct without the possibility of discretionary assessment on the opportunity of the intervention. The context of the rule also shows that the legislator considers it to be a regulatory tool and not a sanctioning measure, as it is included in Chapter I 'Supervision on banks', Title III 'Supervision', after article 53 (Regulatory supervision)*".

With respect to the limits of the administrative court's judicial review over supervisory measures, the Consiglio di Stato confirms its established principles. According to those, the administrative judge's review in cases characterized by "complex technical assessments" – such as those concerning discretionary supervisory measures – is limited to checking the "greater reliability" of the assessment by the supervisory authority. The judgment recognizes an "assessment power upon the authority", without prejudice to the judge's possibility to have full access to the facts on which the appealed measures are based. Indeed, in the case at stake, said access took place and resulted in a two-stage technical advice to the Court, which substantially confirmed the conditions for collective removal and for other measures adopted against the bank.

In the words of the ruling (point 10 ff): "*In banking supervision, the appreciation of indeterminate legal concepts is relevant (the legal concept of 'sound and prudent management' envisaged by the legislator as one of the purposes of supervision, under Article 5, of the Consolidated Law on Banking, is a cornerstone of the system). This appreciation can be included in the category of complex technical assessments, i.e. that particular type of assessments involving the appreciation of a series of factual elements (defined in their historical or naturalistic essence) in relation to each other and as rules that do not have the features of scientific laws, which are exact and unquestionable, but are the result of inexact and questionable sciences, of a prevalent economic nature. (…) According to the traditional approach, this results in the recognition of the power upon the authority and the exclusion of a judicial review power to replace the authority's assessment with the one of the judge. (…). With specific regard to the removal measure, (….) (t)he discretionary nature of the measure is evident, so that the supervisory authority, after verifying the existence of the objective conditions laid out in Article 69-octiesdecies, paragraph 1, lett. b), of the Consolidated Law on Banking, is called upon to establish, on the basis of the appropriateness assessment, whether to order the collective removal of the corporate bodies or to adopt measures that are more or less severe. Taking into account the nature and characteristics of the Bank of Italy's power, the administrative judge, without*

prejudice to its power to acknowledge all the facts, can also verify the soundness, congruity, reasonableness and adequacy of the measure and its justification, the regularity of the procedure and the completeness of the investigation, the existence and accuracy of the factual assumptions underlying the decision, but cannot go so far as to express its own independent assessments in place of the Authority".

Moreover, the judgment includes interesting passages on the need for the proceeding authority to respect some procedural safeguards for those affected by the decision (i.e., the bank and its managers), prior to its adoption. The Consiglio di Stato acknowledges that the decision was lawfully adopted *inaudita altera parte*. The judge takes into account the context in which the measure took place and its aim (preventing the crisis of a bank). Such circumstances imposed particular celerity on the authority's action, so that the case falls within the exception to the due process principles provided for by the general law on administrative procedure (Law 241/1990) for the case of urgency. While not clearly stated in the ruling, from this justification, it could be argued that in removal cases, such as those of special administration, urgency is *in re ipsa* and the exception to the right to be heard principle applies automatically.

3. Reference to "notes de doctrine"

Leonardo Lippolis, *Il removal della Banca d'Italia e il sindacato del giudice amministrativo*, Giornale di diritto amministrativo, 1/2023.

[.] v Banca d'Italia*

1. Keywords and summary

[.] v Banca d'Italia

Corte di Cassazione, sez. II, Judgment of 4 August 2022 No 24170

Bank of Italy's administrative pecuniary sanctions against members of the Board of Statutory Auditors

Administrative pecuniary sanctions – Auditors' supervisory powers and duties – Burden of proof

The Board of Statutory Auditors of credit institutions is vested with wide oversight powers whose exercise is mandatory and cannot result in a purely formal control. In exercising their functions, statutory auditors have a duty to be proactive in order to control the sound management of the entity.

In the event of omissive conduct, it is the offender that has to prove to have exercised its powers in an effective manner. Therefore, in order to be exempted from liability, statutory auditors should have proved that they had diligently exercised their powers of control.

Administrative pecuniary sanctions – Quantification – Discretion

In the context of judicial proceedings against administrative pecuniary sanctions imposed by the Bank of Italy for violation of prudential rules, the trial court has the discretionary power to review the amount of the contested sanction, within the limits of the law, in order to ensure its proportionality considering all the subjective and objective elements and the gravity of the infringement. The trial court evaluation cannot be questioned before the Corte di Cassazione.

* Italian version available at https://i2.res.24o.it/pdf2010/Editrice/ILSOLE24ORE/QUOTIDIANI_VERTICALI/Online/_Oggetti_Embedded/Documenti/2022/08/05/24170.pdf.

[.] v Banca d'Italia

1. Keywords and summary

[.] v Banca d'Italia

Corte di Cassazione, Judgment of 9 August 2022 No 24491

Bank of Italy's administrative pecuniary sanctions against a non-executive member of the management body of a credit institution

Administrative pecuniary sanctions – Prudential supervision – Not criminal in nature

Administrative pecuniary sanctions imposed by the Bank of Italy on natural persons, in the field of prudential supervision, pursuant to Article 144 of the Italian consolidated law on banking (Legislative Decree No 385/1993), in its version in force before the transposition of the CRD IV in 2015, are not criminal in nature taking into consideration the Engel criteria, since they are not comparable, in terms of severity and economic and personal consequences for the sanctioned party, to administrative pecuniary sanctions imposed by CONSOB pursuant to Articles 187-*bis* (regarding insider trading) and 187-*ter* (regarding market abuse) of the Italian consolidated law on finance (Legislative Decree No 58/1998).

Administrative pecuniary sanctions – Not criminal in nature – Principle of *lex mitior* – Rules entered into force during the proceedings – Inapplicability

In the absence of an explicit legal provision, the criminal law principle of *lex mitior* does not extend to administrative pecuniary sanctions, to which the different principle of *tempus regit actum* applies, except when such administrative sanctions are criminal in nature according to the Engel criteria. As a consequence, when after the adoption of a decision imposing an administrative sanction not criminal in nature, a new rule enters into force which would provide for a more favourable treatment of the sanctioned party, such a new rule does not apply.

Non-executive members of the management body – Duty to act in an informed manner – Liability of members of the management body of a credit institution

Pursuant to Articles 2381(3) and (6) and 2392 of the Italian civil code, the duty of non-executive members of the management body of a credit institution to act in an informed manner implies that they cannot simply rely on the reports by

the executive members, but must always maintain an adequate knowledge of the banking business and contribute to the governance of the bank's risks, also acting on their own initiative to oversee the choices of executive members. It follows that, pursuant to Article 2392(2) of the Italian civil code, non-executive members of the management body of a credit institution shall be jointly liable for any infringement committed by the management body, if they have not intervened to prevent it or to eliminate or mitigate the harmful consequences thereof.

Administrative pecuniary sanctions – Not criminal in nature – Presumption that the infringement was culpable – No violation of Article 6 ECHR

The presumption that the infringement was culpable laid down in Article 3 of Law No 689/1981, which applies to administrative sanctions imposed by the Bank of Italy on natural persons, in the field of prudential supervision, pursuant to Article 144 of the Italian consolidated law on banking (Legislative Decree No 385/1993), in its version in force before the transposition of the CRD-IV in 2015, does not conflict with the safeguards stemming from Article 6 of the European Convention on Human Rights, from Article 48 of the Charter of Fundamental Rights of the European Union and from Article 27 of the Italian Constitution, because such administrative sanctions are not criminal in nature according to the Engel criteria and, therefore, the mentioned legal safeguards are not applicable.

[.] and others v Banca d'Italia*

1. Keywords and summary

[.] and others v Banca d'Italia

Corte di Cassazione, Judgment of 14 September 2022 No 26983

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

Administrative pecuniary sanctions – Prudential supervision – Not criminal in nature

Administrative pecuniary sanctions imposed by the Bank of Italy on natural persons, in the field of prudential supervision, pursuant to Article 144 of the Italian consolidated law on banking (Legislative Decree No 385/1993), in its version in force before the transposition of the CRD IV in 2015, are not criminal in nature taking into consideration the Engel criteria, because they are not comparable, in terms of severity and economic and personal consequences for the sanctioned party, to administrative pecuniary sanctions imposed by CONSOB pursuant to Articles 187-*bis* (regarding insider trading) and 187-*ter* (regarding market abuse) of the Italian consolidated law on finance (Legislative Decree No 58/1998).

Administrative pecuniary sanctions – Not criminal in nature – Principle of *lex mitior* – Rules entered into force during the proceedings – Inapplicability

In the absence of an explicit legal provision, the criminal law principle of *lex mitior* does not extend to administrative pecuniary sanctions, to which the different principle of *tempus regit actum* applies, except when such administrative sanctions are criminal in nature according to the Engel criteria. As a consequence, when after the adoption of a decision imposing an administrative sanction not criminal in nature, a new rule enters into force which would provide for a more favourable treatment of the sanctioned party, such a new rule does not apply.

As regards the Legislative Decree No 72/2015, which amended (among others) the provisions in point of administrative sanctions of the Italian consolidated law on banking (Legislative Decree No 385/1993), the delegated

* Italian version available at https://i2.res.24o.it/pdf2010/Editrice/ILSOLE24ORE/QUOTIDIANI_VERTICALI/Online/_Oggetti_Embedded/Documenti/2022/09/15/26983.pdf.

legislator was not compelled to extend the applicability of the principle of *lex mitior* to administrative sanctions that are not criminal in nature, such as the ones foreseen in Article 144 of the Italian consolidated law on banking, in its version in force before the recalled Legislative Decree No 72/2015. Indeed, on the one hand, the Delegation Law No 154/2014 expressly conferred upon the delegated legislator the power to assess and decide whether to provide for such an extension; on the other hand, such an extension was not obligatory in light of the European Convention on Human Rights or of the Union law, since the safeguards of criminal law must be necessarily applied only to administrative sanctions that are criminal in nature according to the Engel criteria.

Administrative pecuniary sanctions – Time limit for the conclusion of a sanctioning procedure – Starting moment

The time limit of 240 days for the conclusion of the sanctioning proceeding, stipulated by a regulation of the Bank of Italy, starts to run on the day the term for the submission of written defenses by the person concerned expires.

In order to assess the compliance of the Bank of Italy with the said time limit, the date to be considered is the date of the adoption of the decision imposing the sanction rather than that of the notification of such a decision to the person concerned.

Administrative pecuniary sanctions – Error of fact – Burden of proof

The error of fact regarding the existence of an excuse, that may exclude the punishability of the person responsible for the infringement, occurs when said person acted in the wrong but reasonable belief that his or her conduct, albeit prohibited, was nonetheless excused by specific circumstances. In such a case, it is for said person to provide the court with evidence on said circumstances.

Administrative pecuniary sanctions – Quantification – Scope of the assessment of the Court – Discretion

When the sanctioned party challenges before the Court the quantification of the administrative pecuniary sanction imposed on him or her by the administrative authority, the Court assesses autonomously whether such an amount complies with the applicable law. Indeed, such an assessment is not limited by prefixed parameters of proportionality correlated to the number and relevance of the infringements. As a consequence, when an administrative pecuniary sanction was imposed for a multiplicity of infringements, the Court may consider that

the amount of such a sanction is overall appropriate even if it has ruled out the existence of one or more of those infringements.

Furthermore, the decision of the trial court to reject the request of the sanctioned party to set a lower amount for the administrative pecuniary sanction cannot be challenged before the Corte di Cassazione, if such a decision was motivated.

Spain

by Lucía Piazza Dobarganes[*] *and Darío Gómez de Tojeiro*[**]

Lack of responsibility of Banco de España for the resolution of Banco Popular Español: judgments of the Audiencia Nacional and opinions of the Consejo de Estado

1. Keywords and summary

The resolution of Banco Popular Español, S.A. (BPE) gave rise to different legal proceedings before a wide range of Spanish and European bodies. Among them, at the national level there were numerous claims for damages filed by investors against Banco de España.

Absence of pecuniary responsibility of Banco de España for the supervision of BPE (as national competent authority in the context of the SSM)

Judgments of the Audiencia Nacional – Absence of pecuniary responsibility of Banco de España for the supervision of BPE (as national competent authority in the context of the SSM)

Banco de España dismissed *in limine* some of these claims for manifest lack of merit, since they referred exclusively to the supervision of BPE at the time of the resolution. Four claimants appealed the dismissal before the Spanish Courts (Audiencia Nacional), which upheld Banco de España's decisions.

In its judgments, the Audiencia Nacional concluded that after the entry into force of the SSM, Banco de España is no longer the prudential supervisor of significant institutions. Moreover, Banco de España is not the guarantor of the proper functioning of individual credit institutions, but of the system as a whole, under the terms provided for by law.

Absence of pecuniary responsibility of Banco de España (i) for the supervision of BPE (before and after the SSM), (ii) for the provision of ELA, and (iii) for the actions of the FROB

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Opinions of the Consejo de Estado – Absence of pecuniary responsibility of Banco de España for the supervision of BPE (before and after the SSM) – Diligence in the provision of ELA – No responsibility of Banco de España for the actions of the FROB

As regards claims for damages against Banco de España as supervisor of BPE before the start of the SSM, the Consejo de Estado considered that the uncertainties projected for the future development of BPE at the end of 2014 were not attributable to Banco de España but to the decisions taken by its management body. In addition, as national competent authority within the SSM, Banco de España is not responsible for the supervisory actions carried out by the ECB, even with the assistance of Banco de España. Also, the implementation actions of the FROB, as national executive resolution authority, are not imputable to Banco de España merely because the latter appoints some of the members of the FROB's governing body. Finally, the Consejo de Estado considered that Banco de España acted diligently in response to the institution's requests for ELA.

2. Claims for damages against Banco de España for the resolution of BPE

On 7 June 2017, the Single Resolution Board placed BPE under resolution and adopted its resolution scheme, which was implemented by the FROB. The resolution of BPE gave rise to diverse legal proceedings before different Spanish and European bodies. Among them, there were numerous claims for damages filed against Banco de España. In the context of those proceedings, several opinions of the Consejo de Estado and four judgments of the Audiencia Nacional were issued.

The judgments of the Audiencia Nacional

46 claimants claimed damages from Banco de España based exclusively on Banco de España's role as supervisor of BPE at the time of resolution (2017). Banco de España dismissed these claims *in limine* for manifest lack of merit, given that Banco de España was no longer the supervisor of BPE at the time. 4 of these claimants appealed the dismissal decisions before the Audiencia Nacional. The subsequent judgments of the Audiencia Nacional of 29 May 2019 (SAN 2273/2019),[4] 26 February 2020 (SAN 27/2020),[5] 10 June 2020 and 9 September

[4] Spanish version available at https://www.poderjudicial.es/search/AN/openDocument/0696656ef481e90c/20190628.

[5] Spanish version available at https://www.poderjudicial.es/search/AN/openDocument/47dcab536db7e563/20200312.

2020 (SAN 2397/2020)[6] upheld Banco de España's decisions. These judgments are final.

The Audiencia Nacional ruled that Banco de España lacked prudential supervisory competence over BPE after the start of the SSM. The collaboration and assistance of Banco de España with the ECB in supervisory tasks in relation to Spanish significant institutions does not prevent the ECB from being directly responsible for supervision.

To reach this conclusion, the Court interprets the Spanish legislation conferring supervisory functions on Banco de España in the light of the transfer of powers from the national to the ECB level effected by the SSM Regulation and taking into account the judgments of the CJEU of 2 October 2019 (Cases C-152/18 P and C-153/18 P) and 8 May 2019 (Case C-450/17 P). In this vein, the supervisory function conferred on Banco de España by national legislation is exercised only over those institutions that are not subject to direct supervision by the ECB, i.e. less significant institutions, and without prejudice to the fact that Banco de España's prudential supervision of these institutions is conditional in various aspects on Union law and the ECB's indirect supervision.

In addition, the judgments also referred to the general responsibility of Banco de España in relation to the financial system. Although this question was not expressly raised in the appeals filed before the Audiencia Nacional, the above-mentioned judgments, following the settled doctrine of the Tribunal Supremo, explained incidentally that the existence of the supervisory body does not *per se* imply the existence of responsibility in the event of a dysfunction, but that the plaintiff must specify the controls omitted or the insufficiency or defects of the measures adopted in relation to the case in question. Moreover, Banco de España is not the guarantor of the proper functioning of individual credit institutions, but of the system as a whole, in the terms provided for by law.

The opinions of the Consejo de Estado

603 other claimants claimed damages from Banco de España on other grounds (in addition or as an alternative to its alleged supervision after 2014). The claimants mainly alleged that Banco de España had improperly exercised its legal functions (i) in relation to the prudential supervision of BPE, both before and after the start of the SSM, and (ii) in relation to the provision of emergency liquidity assistance (ELA). Some claimants also argued that Banco de España's responsibility would arise from the fact that some members of the FROB's governing body are appointed by or belong to Banco de España.

From a procedural point of view, it should be noted that, under Spanish law, claims for damages brought against Banco de España are resolved by Banco

[6] Spanish version available at https://www.poderjudicial.es/search/AN/openDocument/8b27a4469b51ec9a/20201021.

de España itself. Besides the claims dismissed *in limine* for manifest lack of merit, Banco de España must obtain[1] the opinion of the Consejo de Estado[2] on whether there is a causal link or not between the operation of the public service and the damage caused. Where appropriate, this opinion also elaborates on the assessment of the damage caused and the amount and method of compensation in accordance with the criteria established by law. Banco de España's decision may be judicially appealed before the Audiencia Nacional.

In accordance with this legal procedure, in 2020 and 2021, the Consejo de Estado issued several opinions on the claims for damages against Banco de España. Banco de España, in line with the opinions of the Consejo de Estado, rejected all the claims received. None of the claimants appealed so the decisions are now final.

The main issues analysed by the opinions of the Consejo de Estado are the following:

a) Banco de España's actions after the start of the SSM: the Consejo de Estado pointed out that the uncertainties projected for the future development of BPE at the end of 2014 were not attributable to Banco de España but to the decisions taken by the management body of BPE.

b) Banco de España's actions after the start of the SSM: the Consejo de Estado considered that Banco de España is not responsible for the supervisory actions carried out by the ECB and that the assistance provided to the ECB does not make Banco de España responsible or jointly liable. The Consejo de Estado considered that the ECB is the only institution with decision-making powers in the supervision of significant institutions and, therefore, the only institution that can be held liable. The assistance that Banco de España provides to the ECB in the supervision of Spanish significant institutions does not alter this conclusion.

c) Banco de España's provision of ELA: the Consejo de Estado highlighted that Banco de España acted diligently before and after BPE's request for ELA and recognized that ELA is a discretionary power. The Consejo de Estado concluded that the damages were not imputable to Banco de España, which responded to BPE's requests for ELA in accordance with the applicable legal framework.

d) Banco de España's participation in the governing body of the FROB: the Consejo de Estado stressed that the decision to resolve BPE was not imputable to the Spanish authorities (neither to Banco de España nor to the FROB) because they lacked supervisory and resolution powers

[1] When the amount claimed equals or exceeds €50,000.

[2] The Consejo de Estado is the supreme consultative body of the Government. It exercises this consultative function with organic and functional autonomy to guarantee its objectivity and independence in accordance with the Constitution and the law. Its opinions are accessible here.

over BPE. It also considered that the fact that Banco de España appoints four members of the governing body of the FROB does not entail that Banco de España is a member of that governing body, nor that such members act on behalf of Banco de España. It also concluded that Banco de España's appointing these members does not hold Banco de España accountable for the decisions adopted by the governing body of the FROB.

Appendix[*]

Corte di Cassazione, [.] v Banca d'Italia, 09/08/2022, No 24491

Svolgimento del processo

Con la sentenza n. 66/19, la Corte d'appello di Roma respingeva l'opposizione, ex art. 145 TUB, di …. contro la sanzione amministrativa pecuniaria a lui irrogata dalla Banca d'Italia, nella qualità di ex componente del C.d.A. della Banca....

In esito al giudizio, rilevava la Corte distrettuale che il L. non aveva rimediato "alle pur riscontrate criticità, attivandosi, anche di propria iniziativa, per porre in essere le misure necessarie a garantire la capacità della banca di rispettare nel continuo i requisiti patrimoniali e la copertura al fabbisogno di liquidità". La responsabilità era pertanto a lui imputata per l'omessa predisposizione degli strumenti di pianificazione della liquidità e delle misure di contenimento del rischio di credito. Aggiungeva il giudice di merito che l'istruttoria della Banca d'Italia era stata completa e rispondente ai dati di fatto anche in linea previsionale, sicchè dovevano condividersi gli addebiti mossi, tra cui quello dell'insufficienza delle verifiche condotte dalla funzione di compliance, con particolare riferimento agli obblighi di trasparenza ed antiriciclaggio e la gestione dei crediti incagliati. Erano infine con varia motivazione respinte le questioni di legittimità costituzionale del D.Lgs. n. 72 del 2005.

Per la cassazione della predetta sentenza ha proposto ricorso L.M.L., affidandosi a sei motivi.

La Banca d'Italia si è costituita con controricorso, concludendo per il rigetto del ricorso avversario.

In prossimità dell'udienza, il ricorrente ha depositato memoria ex art. 380 bis c.p.c..

Il Procuratore Generale ha concluso per l'inammissibilità o, in subordine, per il rigetto del ricorso.

Motivi della decisione

1) Attraverso la prima censura, il ricorrente assume l'illegittimità costituzionale del D.Lgs. n. 385 del 1993, art. 145 in relazione all'art. 76 Cost. per difetto di delega, con conseguente nullità radicale del rito applicato dalla Corte d'appello al giudizio di opposizione. Afferma che la delega avrebbe imposto al Governo di rivedere la disciplina sostanziale dei presupposti di emanazione delle sanzioni e non la materia della tutela giurisdizionale avverso le sanzioni medesime.

Il rilievo è infondato.

1.2) Occorre doverosamente premettere che, secondo la consolidata opinione di questa Suprema Corte, non può costituire motivo di ricorso per cassazione la valutazione del giudice di merito circa la rilevanza o la manifesta infondatezza di una questione di legittimità costituzionale, giacchè il relativo provvedimento ha carattere ordinatorio e la questione può essere riproposta in ogni grado di giudizio (Sez. 2, n. 9284 del 16 aprile 2018).

[*] We reproduce here the text of the judgment not otherwise freely available online.

1.3) Ad ogni modo, in tema di sanzioni amministrative irrogate dalla Banca d'Italia ai sensi del D.Lgs. n. 385 del 1993, artt. 144 ss. è manifestamente infondata la questione di legittimità costituzionale del D.Lgs. n. 385, art. 145 cit. come modificato dal D.Lgs. n. 72 del 2015, in relazione all'art. 76 Cost., per eccesso di delega contenuta nella L. n. 154 del 2014, nella parte in cui ha introdotto, per il giudizio di opposizione, la trattazione in pubblica udienza in luogo della trattazione camerale, atteso che il potere di intervenire sul rito dell'opposizione era espressamente conferito al Governo dalla L. n. 154, art. 3, comma 1, lett. i), nel punto in cui consentiva l'adozione di modifiche alla procedura sanzionatoria, ivi incluse le norme processuali (Sez. 2, n. 16517 del 31 luglio 2020).

2) Con il secondo mezzo d'impugnazione, il ricorrente deduce la violazione e falsa applicazione del D.Lgs. n. 72 del 2015, art. 2, comma 5 e D.Lgs. n. 385 del 1993, art. 145, commi 4, 5, 6, 7, 7 bis ed 8, ex art. 360 c.p.c., n. 3, giacché il giudice di merito avrebbe erroneamente ritenuto di poter applicare nel giudizio a quo la formulazione previgente del D.Lgs. n. 385 del 1993, art. 145 mentre, in conseguenza della declinatoria di giurisdizione del TAR, avrebbe dovuto configurarsi un nuovo processo, distinto ed autonomo, con il conseguente assoggettamento alla disciplina processuale di cui all'art. 145 cit., nel testo modificato.

2.1) Mediante il terzo mezzo d'impugnazione, il L. denuncia l'illegittimità costituzionale del D.Lgs. n. 72 del 2015, art. 2, comma 5 per disparità di trattamento, nonché per violazione dell'art. 6 Convenzione EDU, in caso di applicabilità del regime transitorio: il rito previsto dalla norma transitoria sarebbe estremamente penalizzante, mancando qualsivoglia predeterminazione legale delle forme e dei termini, nonché dei corrispondenti poteri, doveri e facoltà processuali delle parti, soprattutto con riguardo al diritto alla prova.

Il secondo ed il terzo motivo – che possono essere scrutinati unitariamente, considerata la loro connessione logica – sono immeritevoli di accoglimento.

2.2) La Corte d'Appello ha applicato alla fattispecie ratione temporis il disposto dell'art. 145 TUB nella formulazione antecedente alla novella di cui al D.Lgs. 12 maggio 2015, n. 72.

Orbene, per costante giurisprudenza, la denuncia di un vizio correlato alla pretesa violazione di norme processuali non è volta alla salvaguardia dell'interesse all'astratta regolarità dell'attività giudiziaria, ma propriamente all'eliminazione del concreto pregiudizio che la parte in conseguenza della denunciata violazione abbia sofferto; ne consegue che è inammissibile l'impugnazione con la quale si lamenti la menomazione del diritto di difesa senza specificazione del concreto pregiudizio che alla parte sia derivato (Sez. 2, n. 21553 del 3 settembre 2018; Sez. 1, n. 19759 del 9 agosto 2017).

Nella fattispecie, il L. ha omesso di sviluppare il denunziato vizio processuale nel senso di indicare specificamente se ed in qual modo la scelta del collegio abbia potuto influire sul contenuto o sulle determinazioni della decisione di merito. In particolare, non ha dedotto quali mezzi di prova avrebbe potuto addurre, ove la procedura lo avesse consentito.

2.3) Qualora poi le questioni sollevate con i due motivi in esame sottendessero in realtà – come afferma il controricorso – il problema circa la natura giuridica delle sanzioni, non è fuori luogo ricordare che questa Corte ha già avuto modo di chiarire come le sanzioni amministrative pecuniarie irrogate dalla Banca d'Italia ai sensi dell'art. 144 TUB per carenze nell'organizzazione e nei controlli interni non abbiano natura punitiva, non essendo equiparabili, quanto a tipologia,

severità, incidenza patrimoniale e personale a quelle irrogate dalla CONSOB ai sensi del D.Lgs. n. 58 del 1998, art. 187-ter (TUF) per manipolazione del mercato (Sez. 2, n. 17209 del 18 agosto 2020, Sez. 2, n. 24850 del 4 ottobre 2019), ovvero ai sensi dell'art. 187-bis TUF per abuso di informazioni privilegiate (Sez. 2, n. 12031 del 13 aprile 2022; Sez. 2, n. 4524 del 19 febbraio 2021), precetti entrambi ritenuti sostanzialmente penali.

Ed è proprio con riferimento all'illecito previsto dall'art. 187 bis TUF, la cui sanzione è ritenuta sostanzialmente penale che la sentenza della Corte costituzionale n. 63 del 2019 ha dichiarato l'illegittimità costituzionale del D.Lgs. n. 72 del 2015, art. 6, comma 2, – norma transitoria analoga a quella oggetto dell'eccezione formulata nel ricorso in esame – nella parte in cui esclude l'applicazione retroattiva delle modifiche apportate dallo stesso art. 6, comma 3 alle sanzioni amministrative previste per l'illecito disciplinato dall'art. 187-bis TUF nonchè, in via consequenziale, l'illegittimità costituzionale del D.Lgs. n. 72 del 2015, medesimo art. 6, comma 2, nella parte in cui esclude l'applicazione retroattiva delle modifiche apportate dallo stesso art. 6, comma 3 alle sanzioni amministrative previste per l'illecito di cui all'art. 187-ter TUF. Dopo aver ribadito che le sanzioni previste per l'abuso di informazioni e la manipolazione del mercato hanno natura e finalità "punitiva", la Corte costituzionale ha ritenuto doversi applicare a tali sanzioni l'intero complesso dei principi enucleati dalla Corte di Strasburgo a proposito della "materia penale", ivi compreso il principio di retroattività della lex mitior (nei limiti precisati al punto 6.1. del considerato), e ciò ha fatto anche in assenza di precedenti specifici nella giurisprudenza della Corte di giustizia stessa.

Quanto alla diversa questione dell'applicabilità del principio di retroattività della lex mitior alle sanzioni amministrative in via generalizzata, la Corte costituzionale ha richiamato il precedente costituito dalla sentenza n. 193 del 2016, che ha giudicato non fondata una questione di legittimità costituzionale della L. n. 689 del 1981, art. 1 per contrasto con l'art. 3 Cost. e art. 117 Cost., comma 1, anche in relazione agli artt. 6 e 7 CEDU, nella parte in cui non prevede una regola generale di applicazione della legge successiva più favorevole agli autori degli illeciti amministrativi.

Resta dunque confermato che, a fronte di un illecito amministrativo che non abbia natura sostanzialmente penale quale è l'illecito previsto dall'art. 144 TUB non è invocabile il principio del favor rei e, tramite esso, l'applicazione della normativa in assunto più favorevole introdotta con il D.Lgs. n. 72 del 2015, con conseguente manifesta infondatezza dell'eccezione di illegittimità costituzionale della norma transitoria contenuta nel medesimo decreto.

Le superiori considerazioni consentono quindi di affermare che, proprio in virtù dell'esclusione della natura penale della sanzione in esame, non si profila nemmeno un ipotetico vizio di eccesso di delega (tenuto conto che la legge in questione affidava al legislatore delegato una valutazione autonoma in merito all'opportunità di estendere il principio del favor rei a seguito della novella, valutazione che però, in assenza di una sanzione qualificabile come penale, non imponeva necessariamente la sua attuazione), nè appare configurabile – sotto il suddetto profilo – la dedotta violazione degli artt. 117 e 3 Cost., dovendosi quindi disattendere la richiesta di sollevare la questione di legittimità costituzionale, da ritenere peraltro manifestamente infondata proprio alla luce della motivazione del precedente della Consulta sopra indicato (Sez. 2, n. 23814 del 24 settembre 2019).

3) La quarta doglianza si appunta sulla violazione e falsa applicazione dell'art. 2381 c.c., comma 6, in combinato disposto con l'art. 2392 c.c., comma 2, in relazione all'art. 360 c.p.c., n. 3. La

Corte d'Appello non avrebbe motivato in alcun modo l'imputazione di responsabilità a carico del L. nella sua qualità di consigliere non esecutivo, essendo invece necessario dimostrare l'esistenza di "indici di allarme" che avrebbero dovuto eccitare il potere/dovere di richiedere ulteriori informazioni. In altri termini, come era emerso dalle difese svolte, il ricorrente aveva rispettato i doveri previsti dalle disposizioni di vigilanza e l'obbligo di fare quanto possibile per impedire il compimento di atti pregiudizievoli conosciuti ed attenuarne le conseguenze dannose.

Il motivo è infondato.

3.1) La Corte d'appello ha chiarito che "la nota di contestazione individua espressamente ed in modo dettagliato i fatti e le condotte integranti la violazione delle disposizioni prima richiamate; ne consegue che dalla lettura congiunta delle contestazioni alcun dubbio può insorgere circa l'individuazione dei fatti imputati e delle norme violate". "Ciò che è stato contestato è quindi il mancato esame, da parte del CdA, del rapido deterioramento dei profili tecnici derivante dall'effetto congiunto dell'emergere della vera rischiosità del portafoglio, e della contestuale forte espansione degli impieghi, rivelatisi poi col tempo non in linea con quanto affermato con riguardo all'elevato merito creditizio della nuova clientela affidata, che hanno messo a serio rischio la stabilità della banca e determinato il mancato rispetto dei requisiti prudenziali. In tale contesto di grave anomalia, come emergente con chiarezza ed analiticamente dai rilievi ispettivi, lo sforzo dell'opponente di focalizzare le censure ispettive sull'operato del DG si traduce di fatto in un'ampia ammissione degli addebiti e non può quindi essere considerato quale elemento di esclusione o di mitigazione di precise responsabilità discendenti dalle violazioni accertate in sede ispettiva" In particolare, la sentenza impugnata ha aggiunto "Il non aver rimediato alle pur riscontrate criticità, attivandosi, anche di propria iniziativa, per porre in essere le misure necessarie a garantire la capacità della banca di rispettare nel continuo i requisiti patrimoniali e le coperture al fabbisogno di liquidità fonda un addebito di colpa che, valutata alla stregua della qualificata diligenza professionale richiesta a chi riveste un ruolo di gestione di una banca, costituisce elemento soggettivo sufficiente ai fini dell'integrazione dell'illecito amministrativo".

Sotto diverso profilo, "L'opponente non può andare esente da responsabilità per l'omessa predisposizione degli strumenti di pianificazione della liquidità e delle misure di contenimento del rischio di credito. Tali omissioni sono ancora più gravi ove si consideri che il L. era pienamente a conoscenza del fabbisogno di liquidità, della repentina crescita degli impieghi e delle altre carenze riscontrate in sede ispettiva, tanto da aver contestato alcune delle imprudenti iniziative del DG, contegno, quest'ultimo, ampiamente considerato nella motivazione del provvedimento sanzionatorio ed ai fini della quantificazione della sanzione".

3.2) In definitiva, i giudici di merito si sono attenuti ai consolidati principi di questa Corte, secondo i quali, in tema di sanzioni amministrative previste dal D.Lgs. n. 385 del 1993, art. 144 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. Infatti, anche i consiglieri devono possedere ed esprimere costante e adeguata conoscenza del "business" bancario e, 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 nonché 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. Ne consegue che il consigliere di amministrazione non esecutivo di società per azioni, in conformità al disposto dell'art. 2392 c.c., comma 2, che concorre a connotare le funzioni gestorie tanto dei consiglieri non esecutivi, quanto di quelli esecutivi, è solidalmente responsabile della violazione commessa quanto non intervenga al fine di impedirne il compimento o eliminarne o attenuarne le conseguenze dannose (Sez. 2, n. 2620 del 4 febbraio 2021; Sez. 2, n. 19556 del 18 settembre 2020; Sez. 2, n. 24851 del 4 ottobre 2019).

3.3) Con riguardo altresì alla valutazione in concreto della responsabilità del L., la Corte d'Appello ha formulato un giudizio di fatto, insindacabile in sede di legittimità, giacché sorretto da esauriente motivazione e ispirato ad esatti criteri giuridici. Invero, nel contesto sopra delineato, ed a fronte di una pronuncia sostenuta da una argomentazione stringente, congrua e puntualmente articolata, il ricorrente, anche là dove denuncia il vizio di violazione e falsa applicazione di norme di legge, non evidenzia alcun vizio logico nel percorso seguito dalla Corte d'appello, ma si limita a contrapporre una propria lettura delle risultanze di causa, diversa da quella fatta propria dal giudice del merito (Sez. 2, n. 25289 del 16 dicembre 2015).

In ogni caso, giova osservare che l'afflittività della sanzione va parametrata alla platea dei possibili destinatari: il carattere normativo di un atto non può essere disconosciuto solo perché esso si applica esclusivamente agli operatori di un settore dovendosi, al contrario, verificare se, in quel settore, l'atto è comunque dotato dei requisiti della generalità e astrattezza (Ad. Plen. 9 del 4 maggio 2012).

4) La quinta censura si focalizza sulla violazione del D.Lgs. n. 72 del 2015, art. 2, comma 3 in relazione ai principi generali del diritto Europeo ed all'art. 2, comma 2 del Reg. n. 2988/98/CE, ai sensi dell'art. 360 c.p.c., n. 3. Rileva il ricorrente che la riforma del sistema sanzionatorio, prevista dal D.Lgs. n. 72 del 2015, avrebbe dovuto essere coerente con gli artt. 65 e 70 della Direttiva 2013/36/UE e dunque la Corte d'Appello avrebbe dovuto assicurare al L., in quanto persona fisica, l'applicazione della sopravvenuta disciplina più favorevole, in forza della quale gli esponenti aziendali dei soggetti abilitati non possono più essere destinatari di sanzioni amministrative ex art. 144 ter TUB. Il ricorrente sollecita, all'uopo, il rinvio pregiudiziale alla Corte di Giustizia dell'Unione Europea, al fine di verificare la compatibilità della normativa italiana con la disciplina unionale.

Il motivo è infondato.

4.1) In materia di illeciti amministrativi, non è possibile ritenere l'applicazione immediata della legge più favorevole, atteso che il principio cd. del "favor rei", di matrice penalistica, non si estende secondo i noti criteri Engel, in assenza di una specifica disposizione normativa, alla materia delle sanzioni amministrative, che risponde, invece, al distinto principio del "tempus regit actum". Né tale impostazione viola i principi convenzionali enunciati dalla Corte EDU nella sentenza 4 marzo 2014 (Grande Stevens ed altri c/o Italia), secondo la quale l'avvio di un procedimento penale a seguito delle sanzioni amministrative comminate dalla Consob sui medesimi fatti violerebbe il principio del "ne bis in idem", atteso che tali principi vanno considerati nell'ottica del giusto processo, che costituisce l'ambito di specifico intervento della Corte, ma non possono portare a ritenere sempre sostanzialmente penale una disposizione qualificata come amministrativa dal diritto interno, con conseguente irrilevanza di un'eventuale questione di costituzionalità ai sensi dell'art. 117 Cost. (Sez. 2, n. 20689 del 9 agosto 2018).

4.2) A tale proposito, giova considerare che, secondo la giurisprudenza della Corte EDU, per stabilire la natura penale di una norma, occorre impiegare (in via alternativa e non cumulativa) tre criteri: la qualificazione giuridica della misura in causa nel diritto nazionale, la natura giuridica ex se e la natura ed il grado di severità della sanzione. E, una volta acclarata la natura di sanzione amministrativa secondo il diritto nazionale, occorre ribadire l'impossibilità di assimilare le fattispecie di cui agli artt. 144 e ss. TUB a quelle (187-ter TUF) su cui si era espressa la Corte EDU nella pronunzia 4.03.2014 poc'anzi citata (Grande Stevens + altri Italia). Nel predetto caso, le sanzioni di cui si discuteva, appunto previste dall'art. 187-ter T.U.F., risultavano incommensurabilmente più gravose da un punto di vista economico rispetto a quelle di cui si discute qui, determinando altresì l'applicazione dell'art. 187-quater TUF, così da incidere su diritti e libertà fondamentali relativi alle concrete possibilità professionali, imprenditoriali e manageriali della persona.

4.3) Non vi è materia per proporre il richiesto rinvio pregiudiziale ex art. 267 TFUE, né sulla qualificazione delle sanzioni dettate dall'art. 144 TUB in rapporto ai cd. criteri Engels, né sulla compatibilità con l'art. 48 CDFUE delle norme processuali che disciplinano il giudizio di opposizione alle sanzioni irrogate dalla Banca d'Italia. La richiesta del ricorrente muove, infatti, da un'errata qualificazione delle sanzioni e dall'infondato presupposto che la suddetta opposizione sia strutturata come giudizio sull'atto e non invece sull'accertamento della responsabilità a cognizione piena, estesa a qualunque profilo di merito, con una completa garanzia del contraddittorio, del diritto di difesa e del diritto alla prova (Sez. 2, n. 16517 del 31 luglio 2020).

Si ricorda, all'uopo, che il rinvio pregiudiziale alla Corte di Giustizia Europea ai sensi dell'art. 267 del Trattato sul funzionamento dell'Unione Europea non costituisce un rimedio giuridico esperibile automaticamente a richiesta delle parti (Sez. U, n. 20701 del 10 settembre 2013). Detto rinvio ha la funzione di verificare la legittimità di una legge nazionale rispetto al diritto dell'Unione Europea e se la normativa interna sia pienamente rispettosa dei diritti fondamentali della persona, quali risultanti dalla Carta dei diritti fondamentali dell'Unione Europea. La valutazione in proposito è rimessa al giudice nazionale, che non è obbligato a sollevare la pregiudiziale per il fatto che la parte lo abbia richiesto (Sez. L. n. 14828 del 7 giugno 2018), occorrendo che la questione di interpretazione della norma comunitaria appaia rilevante e non si sia in presenza di "acte clair", in ragione dell'esistenza di precedenti pronunce della Corte o dell'evidenza dell'interpretazione (Corte di giustizia, sent. 6 ottobre 1982, Cilfit; Cass. S.U. 12067/2007, Cass. 22103/2007; Cass. 4776/2012; Cass. 26924/2013; Cass. 6862/2014).

4.4) Per quanto concerne il regolamento 2988/95/CE richiamato dal ricorrente – è sufficiente considerare che tale regolamento disciplina il trattamento sanzionatorio delle irregolarità, contemplate dal diritto comunitario, derivanti da un'azione o un'omissione di un operatore economico che abbia o possa avere come conseguenza un pregiudizio al bilancio generale delle Comunità o ai bilanci da queste gestite, attraverso la diminuzione o la soppressione di entrate provenienti da risorse proprie percepite direttamente per conto delle Comunità, ovvero una spesa indebita (cfr. 1, comma 2). A tale parametro di diritto dell'Unione Europea non può quindi essere riconosciuta alcuna attinenza alle sanzioni che qui ci occupano (Sez. 2, n. 16517 del 31 luglio 2020).

4.5) Del resto, a ben vedere, il principio della lex mitior costituisce una prerogativa della Corte EDU, giacché avanti la CGUE viene piuttosto in considerazione l'inefficacia di una sanzione e

non il suo meccanismo applicativo. E la “comunitarizzazione” della Carta di Nizza non comporta che la materia prerogativa della CEDU sia divenuta Eurounitaria.

5) Con la sesta doglianza, viene denunciata l’incompatibilità della L. n. 689 del 1981, art. 3 con l’art. 48 della Carta Europea sui diritti fondamentali, giacché il principio di presunzione di colpa non sarebbe conforme alle garanzie convenzionali, fissate nel medesimo art. 48.

Anche tale censura è immeritevole di accoglimento.

5.1) Essa intanto presuppone l’assimilazione delle sanzioni irrogate dalla Banca d’Italia a quelle di natura penale, il che, secondo l’orientamento unanime della Suprema Corte, a cui anche questo collegio intende dare continuità, resta escluso. Giova rammentare che, per sua natura, una sanzione contiene in sè sia il carattere afflittivo, sia il carattere sanzionatorio, senza essere necessariamente riconducibile al campo penale: basti pensare alle sanzioni del codice della strada per sosta vietata, che hanno sicuramente una connotazione afflittiva (di ordine pecuniario) ma anche dissuasiva, al di fuori però dell’ambito penale.

5.2) In ogni caso, ai sensi dell’art. 3 cit., l’onere di provare i fatti costitutivi della pretesa sanzionatoria è posto a carico dell’Amministrazione, la quale è pertanto tenuta a fornire la prova della condotta illecita. Tuttavia, nel caso dell’illecito omissivo di pura condotta, essendo il giudizio di colpevolezza ancorato a parametri normativi estranei al dato meramente psicologico, è sufficiente la prova dell’elemento oggettivo dell’illecito comprensivo della riconducibilità della condotta inosservante, in assenza di elementi tali da rendere inesigibile la condotta o imprevedibile l’evento. Intesa in tal modo, la “presunzione di colpa” non si pone in contrasto con l’art. 6 CEDU e art. 27 Cost., anche ove la sanzione avesse natura sostanzialmente penale in quanto afflittiva (Sez. 2, n. 1529 del 22 gennaio 2018; Sez. 2, n. 6625 del 9 marzo 2020).

E la Corte d’appello ha in concreto accertato la violazione da parte del L. del particolare livello di diligenza imposto all’amministratore di società bancaria dalla normativa di settore, pur a fronte di interventi correttivi suggeriti dalla vigilanza (pp. 1520), di segnali provenienti dagli organi di controllo e di evidenti indizi di disfunzioni e carenze già sicuramente manifestatesi (pp. 14-29).

La memoria depositata dal ricorrente in prossimità dell’udienza non ha apportato significativi elementi idonei a modificare il quadro testè delineato.

In definitiva il ricorso è respinto, con aggravio di spese come da liquidazione in dispositivo.

… OMISSISS…

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Compensation for damage	Case C-45/21
Compliance with prudential requirements	Case T-330/19
Composite procedure for withdrawal of authorisation	Case T-698/16 (x2)
Concept of change of status	Case C-202/21 P
Conditions for resolution	Case T-280/18
Conditions for take-over	Case T-698/16
Conditions of admissibility under Article 70 of the Italian Consolidated Law on Banking	Case T-502/19
Conferral of national tasks upon Eurosystem National Central Banks	Case C-45/21
Consequences of the violation	Case T-698/16
Consultations with SRB	Case T-230/20
Courtesy letter	Case C-326/21 P
Credit institution under liquidation	Case T-230/20
Criteria for the assessment of the qualifying holding	Case T-330/19 (x4)
Criteria for the assessment of the request to access	Case T-552/19 OP (x2)
Decentralised framework	Case T-698/16
Decision adopted by the ECB following the opinion issued by the Administrative Board of Review	Case T-698/16
Decision not to adopt a resolution scheme	Case T-280/18
Decision placing a credit institution under temporary administration	Case T-502/19 (x3)
Decision withdrawing a credit institution's authorisation	Case C-202/21 P // Case T-698/16 (x3) // Case T-230/20
Degree of judicial review	Case T-280/18
Deterioration of the situation of the bank	Case T-502/19
Direct and individual concern	Case T-502/19
Direct concern	Case T-280/18
Disclosure of confidential information	Case C-45/21
Distribution of competences	Case T-698/16 (x2)
Duty to interpret national law in light of the interpretation given to it by national courts	Case T-502/19 (x2)

Duty to protect confidentiality and professional secrecy	Case C-45/21 // Case T-552/19 OP (x3) // Case T-230/20
Duty to state reasons	Case T-280/18 // Case T-552/19 OP // Case T-698/16 // Case T-301/19 // Case T-275/19
ECB's competence and powers	Case T-280/18 // Case C-326/21 P // Case T-301/19 // Case T-275/19 // Case T-230/20
ECB's direct application of directive imposing an obligation to an individual contrary to Article 288 TFEU	Case T-502/19
ECB's duty to apply only national law transposing those directive	Case T-502/19
ECB's exclusive competence	Case T-230/20
ECB's role	Case T-330/19
ECB's take-over decision	Case T-301/19 (x6)
Effective judicial protection in complex procedures	Case T-280/18
Ensuring compliance of a credit institution with governance requirements	Case C-326/21 P
EU Courts jurisdiction	Case T-230/20 (x2)
Ex ante contributions to the single resolution fund	Case C-202/21 P (x2)
Failing or likely to fail assessment	Case T-280/18 (x2) // Case T-230/20
Financial soundness criterion	Case T-330/19
General reserves of the national central bank	Case C-45/21
Implementation of on-site inspections	Case T-275/19
Implementation of reorganisation measures for credit institutions pursuant to Directive 2001/24/EC	Case C-45/21
Impossibility to remedy the failure to state reasons during the proceedings before the Court	Case T-552/19 OP
Inadmissibility	Case T-280/18 // Case C-326/21 P // Case T-698/16 // Case T-275/19
Incompatibility with the prohibition on monetary financing	Case C-45/21 (x2)
Independence of ECB and national central banks	Case C-45/21
Independent assessment by the ECB of the conditions for withdrawal	Case T-698/16
Information and consultation procedures between competent authorities	Case C-45/21
Information going beyond the scope of the inspection	Case T-275/19
Infringement of national law on anti-money laundering and countering the financing of terrorism	Case T-698/16
Insolvency decision	Case T-230/20
Interaction between the withdrawal decision and the FOLTF assessment	Case T-230/20
Interest in bringing proceedings	Case T-280/18
Interpretation of national law	Case T-502/19
Involvement of the ECB in the supervision of LSIs	Case T-698/16
Irrelevance of the subsequent revocation of the power of attorney by the appointed liquidator	Case T-230/20
Lack of direct concern	Case T-280/18 // Case T-698/16
Lawyer authorised by the board of directors	Case T-230/20
Legal certainty	Case T-301/19
Legal interest in bringing the proceeding	Case T-502/19
Legitimate expectations	Case T-301/19
Less significant institution	Case T-301/19 // Case T-275/19
Liability of national central banks	Case C-45/21 (x4)
Liability regime under national law	Case C-45/21
Limit of the literal content of the national law	Case T-502/19
Measures producing binding legal effects	Case T-275/19
Nature and purpose	Case T-301/19
NCA's competence and powers	Case T-230/20
New fact	Case T-330/19

No general presumption of confidentiality in Article 4(1)(c) of the ECB Decision No 2004/258	Case T-552/19 OP
No need to examine individually each criterion	Case T-330/19
No right to be heard at the national stage	Case T-698/16
Non-reimbursement rule	Case C-202/21 P
Not included	Case T-502/19
NRA’s role	Case T-230/20
Obligation to compensate damaged parties in absence of a breach of the duty to due care	Case C-45/21 (x2)
On-site inspection decision	Case T-275/19 (x4)
Overriding public interest in disclosure	Case T-552/19 OP
Period granted to submit written observations	Case T-698/16
Phases of complex administrative procedures	Case T-280/18
Principle of equal treatment	Case T-301/19
Principle of proportionality	Case T-230/20 // Case T-301/19 // Case T-275/19
Principle of the protection of legitimate expectations	Case T-698/16
Procedural safeguards	Case T-275/19
Procedure for assessing acquisitions of qualifying holdings	Case T-330/19 (x6)
Procedure for withdrawal of authorisation	Case T-230/20 (x2)
Proposal by the NCA	Case T-230/20 (x2)
Protection of commercial interests	Case T-552/19 OP
Purpose of the on-site inspection	Case T-275/19
Reasonable time of administrative proceedings	Case T-230/20
Relationship between the ECB and NCAs within the SSM	Case T-698/16 (x2)
Reorganisation measures of credit institutions	Case C-45/21 (x5)
Report to be attached to the request of ECB’s direct prudential supervision	Case T-301/19
Resolution procedure	Case T-280/18
Restrictions	Case T-698/16
Right of defence	Case T-698/16 (x2) // Case T-230/20 (x3)
Right to access	Case T-552/19 OP (x3) // Case T-230/20 // Case T-301/19
Right to be heard	Case T-280/18 // Case T-698/16 (x2) // Case T-230/20 // Case T-301/19 // Case T-275/19
Right to complete and effective judicial protection	Case T-230/20
Right to good administration	Case T-280/18 // Case T-230/20 (x2)
Serious breach of the duty to exercise due care	Case C-45/21
Significant institution	Case T-230/20
SRB’s competence and powers	Case T-280/18 // Case T-230/20
SRB’s decision not to adopt a resolution scheme	Case T-280/18 (x4)
SRB’s decision whether or not to adopt a resolution scheme	Case T-280/18
Time limits for authorising qualifying holdings	Case T-330/19
Union law composed of directives	Case T-502/19
Whether withdrawal depends on measures taken previously	Case T-698/16

3. Series of legal provisions

ARTICLE	CASES
TFEU, Article 123(1)	C-45/21 (x5)
TFEU, Article 127(2)	C-45/21
TFEU, Article 130	C-45/21 (x2)
TFEU, Article 131	C-45/21

TFEU, Article 263	T-280/18 // C-326/21 P // T-275/19 // T-230/20
TFEU, Article 263(4)	T-502/19
TFEU, Article 282(3)	C-45/21
TFEU, Article 288	T-502/19
TFEU, Article 296	T-698/16 (x2) // T-275/19
Protocol on the statute of the ESCB and of the ECB, Article 7	C-45/21 (x2)
Protocol on the statute of the ESCB and of the ECB, Article 14.1	C-45/21
Protocol on the statute of the ESCB and of the ECB, Article 14.4	C-45/21 (x4)
Protocol on the statute of the ESCB and of the ECB, Article 18	C-45/21
Protocol on the statute of the ESCB and of the ECB, Article 21(1)	C-45/21 (x2)
Protocol on the statute of the ESCB and of the ECB, Article 35.3	C-45/21 (x2)
CFREU, Article 20	T-698/16
CFREU, Article 21	T-698/16
CFREU, Article 41	T-698/16 // T-280/18
CFREU, Article 41(1)	T-230/20
CFREU, Article 41(2)	T-698/16 // T-230/20
CFREU, Article 41(2)(a)	T-280/18
CFREU, Article 41(2)(c)	T-280/18
CFREU, Article 47	T-280/18 // T-698/16 // T-230/20
CFREU, Article 48	T-698/16 // T-230/20
Council Regulation (EC) 3603/1993, Article 1(1)(a)	C-45/21
Council Regulation (EC) 3603/1993, Article 1(1)(b)	C-45/21 (x4)
Council Regulation (EU) 1024/2013, Article 4	T-275/19
Council Regulation (EU) 1024/2013, Article 4(1)	T-698/16 // T-275/19 (x2)
Council Regulation (EU) 1024/2013, Article 4(1)(a)	T-698/16
Council Regulation (EU) 1024/2013, Article 4(1)(e)	C-326/21 P
Council Regulation (EU) 1024/2013, Article 4(3)	T-502/19 // C-326/21 P
Council Regulation (EU) 1024/2013, Article 6	T-698/16
Council Regulation (EU) 1024/2013, Article 6(5)	T-275/19
Council Regulation (EU) 1024/2013, Article 6(5)(b)	T-698/16 // T-301/19 (x6)
Council Regulation (EU) 1024/2013, Article 6(5)(d)	T-275/19
Council Regulation (EU) 1024/2013, Article 6(6)	T-698/16 // T-275/19
Council Regulation (EU) 1024/2013, Article 10 to 13	T-275/19
Council Regulation (EU) 1024/2013, Article 10(1)	T-275/19
Council Regulation (EU) 1024/2013, Article 12	T-275/19 (x3)
Council Regulation (EU) 1024/2013, Article 13(2)	T-275/19
Council Regulation (EU) 1024/2013, Article 14	T-698/16 (x2)
Council Regulation (EU) 1024/2013, Article 14(5)	T-698/16 // T-230/20
Council Regulation (EU) 1024/2013, Article 14(6)	T-230/20
Council Regulation (EU) 1024/2013, Recitals 28 and 29	T-698/16
Regulation (EU) 806/2014, Article 18	T-230/20
Regulation (EU) 806/2014, Article 18(1)	T-280/18
Regulation (EU) 806/2014, Article 18(6)	T-280/18
Regulation (EU) 806/2014, Article 70(4)	C-202/21 P
Regulation (EU) 806/2014, Article 86(2)	T-280/18
Directive 2000/12/EU, Article 30	C-45/21
Directive 2001/24/EC, Article 33	C-45/21
Directive 2013/36/EU, Article 18	T-698/16
Directive 2013/36/EU, Article 18 (1)(d) and (e)	T-230/20
Directive 2013/36/EU, Article 22 (2)	T-330/19
Directive 2013/36/EU, Article 23(1)	T-330/19 (x3)
Directive 2013/36/EU, Article 23(1)(d)	T-330/19

Directive 2013/36/EU, Article 23(2)	T-330/19 (x2)
Directive 2013/36/EU, Article 23(4)	T-330/19
Directive 2013/36/EU, Article 67(2)(b)	C-326/21 P
Directive 2013/36/EU, Article 67(1)(d)	C-326/21 P
Directive 2013/36/EU, Article 74(1)	C-326/21 P (x3)
Directive 2014/59/EU, Article 28	T-502/19
Directive 2014/59/EU, Article 29	T-502/19 (x2)
Commission Delegated Regulation (EU) 2015/63, Article 12(1)	C-202/21 P
Commission Delegated Regulation (EU) 2015/63, Article 12(2)	C-202/21 P (x4)
Regulation (EU) 468/2014 of the ECB, Article 31	T-698/16 // T-275/19
Regulation (EU) 468/2014 of the ECB, Article 31(1)	T-230/20
Regulation (EU) 468/2014 of the ECB, Article 31(3)	T-698/16
Regulation (EU) 468/2014 of the ECB, Article 32	T-301/19
Regulation (EU) 468/2014 of the ECB, Article 39(5)	T-301/19
Regulation (EU) 468/2014 of the ECB, Article 47(4)	T-301/19
Regulation (EU) 468/2014 of the ECB, Article 68(3)	T-301/19 (x2)
Regulation (EU) 468/2014 of the ECB, Article 68(5)	T-301/19
Regulation (EU) 468/2014 of the ECB, Article 80 (1)	T-698/16
Regulation (EU) 468/2014 of the ECB, Article 81 (1)	T-698/16
Regulation (EU) 468/2014 of the ECB, Article 83(2)	T-230/20 (x2)
Regulation (EU) 468/2014 of the ECB, Article 83(2)(c)	T-230/20
Regulation (EU) 468/2014 of the ECB, Article 143(2)	T-275/19
Rules of Procedure of the General Court, Article 123	T-552/19 OP
Decision 2004/258/EC of the ECB of 4.3.2004, Article 4(1)(c)	T-552/19 OP (x4)
Decision 2004/258/EC of the ECB of 4.3.2004, Article 4(2)	T-552/19 OP (x2)
Italian Legislative Decree 385/1993, Article 69 octiesdecies(1)(b)	T-502/19 (x4)
Italian Legislative Decree 385/1993, Article 70	T-552/19 OP // T-502/19 (x5)

II – The case-law of the EU administrative review bodies

1. Synthesis

EBA's decision not to initiate an investigation into alleged non-application of EU law

BoA-D-2022-01

2. Series of keywords

KEYWORDS
Decision not to initiate an investigation into breach of Union law
Discretion (x2)
EBA's own-initiative jurisdiction
Factual interest
Investigation into breach of Union law
Not challengeable
Standing to request an investigation

3. Series of legal provisions

ARTICLE
Regulation (EU) 1093/2010, Article 17(2) (x10)
Regulation (EU) 1093/2010, Article 60 (x3)

III – The case-law of the European Court of Human Rights

1. Synthesis

Bank's legal standing to challenge the withdrawal of its licence

Case 46564/15 and Case 68140/16

Application of EU law on qualifying holdings in credit institutions by a State party to the European Convention on Human Rights

Case 59012/19

2. Series of keywords

KEYWORDS	CASES
Acquisition of a qualifying holding	Case 59012/19
Application of EU Law	Case 59012/19
Article 1 of Protocol 1 ECHR	Case 46564/15 and Case 68140/16
Article 6 ECHR	Case 46564/15 and Case 68140/16 (x4)
Breach	Case 46564/15 and Case 68140/16
Common procedures	Case 59012/19
Credit institution under special administration	Case 46564/15 and Case 68140/16
Decision withdrawing a credit institution's authorisation	Case 46564/15 and Case 68140/16 (x2)
ECB's exclusive competence	Case 59012/19
EU Court's exclusive jurisdiction	Case 59012/19
Lack of discretion	Case 59012/19
Liability of a state party to the ECHR	Case 59012/19
Presumption of compliance	Case 59012/19 (x2)
Procedural safeguards	Case 46564/15 and Case 68140/16
Reopening of proceedings	Case 46564/15 and Case 68140/16
Res judicata	Case 46564/15 and Case 68140/16
Review mechanism	Case 59012/19
Right to complete and effective judicial protection	Case 46564/15 and Case 68140/16 (x2)
Right to property	Case 46564/15 and Case 68140/16
Winding-up of a credit institution	Case 46564/15 and Case 68140/16

3. Series of legal provisions

ARTICLE	CASES
ECHR, Article 6	Case 46564/15 and Case 68140/16; Case 59012/19
ECHR, Protocol 1, Article 1	Case 46564/15 and Case 68140/16

IV – The judgments of the national apical Courts

Austria

1. Synthesis

Public liability for deficient banking supervision

Oberster Gerichtshof, Judgment of 14 July 2022, 1 Ob 91/22x

Oberster Gerichtshof, Judgment of 12 October 2022, 1 Ob 104/22h

Oberster Gerichtshof, Judgment of 12 October 2022, 1 Ob 140/22b

Coverage of national deposit guarantee scheme

Oberster Gerichtshof, Judgments of 6 October 2022, 1 Ob 241/21d, and 18 November 2022, 6 Ob 58/22f

Decision on the ex-ante contributions to the resolution financing arrangements

Verwaltungsgerichtshof, Decision of 17 January 2022, Ra 2021/02/0236

Effect on request by NRA of annulment and replacement of SRB decision

Verwaltungsgerichtshof, Decisions of 2 June 2022, Ra 2022/02/0051, and 23 November 2022, Ra 2022/02/0186

2. Series of keywords

KEYWORDS	CASES
Action for annulment of a SRB decision	Ra 2022/02/0051; Ra 2022/02/0186
Activities of the Austrian National Bank within the framework of banking supervision	1 Ob 91/22x; 1 Ob 104/22h; 1 Ob 140/22b
Attribution to the FMA	1 Ob 91/22x; 1 Ob 104/22h; 1 Ob 140/22b
Concrete suspicious facts	1 Ob 104/22h
Criminal investigations	1 Ob 91/22x; 1 Ob 104/22h; 1 Ob 140/22b
Decision on the ex-ante Contributions to the Resolution Financing Arrangements	Ra 2021/02/0236 (x2)
Different coverage levels	1 Ob 241/21d; 6 Ob 58/22f
Group of persons concerned	1 Ob 91/22x
Implementation of EU law	Ra 2021/02/0236
Inspection of the files as a question of law	Ra 2021/02/0236
Interest on arrears	1Ob241/21d
Legal effects of annulled SRB decisions	Ra 2022/02/0051; Ra 2022/02/0186
Legal situation prior to reform	1 Ob 104/22h
National Deposit Guarantee Scheme	1 Ob 241/21d (x3); 6 Ob 58/22f
New SRB decision	Ra 2022/02/0051; Ra 2022/02/0186
No public liability claim	1 Ob 91/22x; 1 Ob 104/22h; 1 Ob 140/22b
Norm specifically intended to protect damaged party	1 Ob 91/22x
(No) suspensive effect	Ra 2022/02/0051; Ra 2022/02/0186
Oral proceedings	Ra 2021/02/0236

Order for payment	Ra 2022/02/0051; Ra 2022/02/0186
Protection of bank customers from pecuniary losses	1 Ob 91/22x; 1 Ob 104/22h; 1 Ob 140/22b
Protection of business secrets	Ra 2021/02/0236
Protective purpose of relevant § 3(1) (2nd sentence) of the Financial Market Authority Act	1 Ob 91/22x; 1 Ob 104/22h; 1 Ob 140/22b
Public liability	1 Ob 91/22x
Public liability for deficient banking supervision	1 Ob 91/22x; 1 Ob 104/22h; 1 Ob 140/22b (x2)
Pursuance of serious leads	1 Ob 104/22h
Real estate transactions relating to private residential properties	1 Ob 241/21d
Reflex effect	1 Ob 91/22x; 1 Ob 104/22h; 1 Ob 140/22b
Request of the FMA	Ra 2022/02/0051; Ra 2022/02/0186
Special legal relationship	1 Ob 91/22x
Switches and reswitches	1 Ob 241/21d; 6 Ob 58/22f

3. Series of legal provisions

ARTICLE	CASES
Charter of Fundamental Rights, Article 47	Ra2021/02/0236
Regulation (EU) 575/2013, Article 4	1 Ob 241/21d
Directive 2014/49/EU, Article 6	1 Ob 241/21d; 6 Ob 58/22f
BaSAG[4]	Ra2021/02/0236
ESAEG § 12[5]	1 Ob 241/21d; 6 Ob 58/22f
ESAEG § 14(2)[6]	1 Ob 241/21d
FMBAG § 3(1)[7]	1 Ob 91/22x; 1 Ob 104/22h; 1 Ob 140/22b
General Law on Administrative Proceedings § 38[8]	Ra2022/02/0051; Ra2022/02/0186
Law on Proceedings before Administrative Courts § 17[9]	Ra2022/02/0051; Ra2022/02/0186
Decision SRB/ES/SRF/2017/05	Ra2022/02/0051; Ra2022/02/0186

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4 German version available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009037.

5 German version available at https://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009251&Artikel=&Paragraf=12&Anlage=&Uebergangsrecht=&ShowPrintPreview=True.

6 German version available at https://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009251&Artikel=&Paragraf=14&Anlage=&Uebergangsrecht=.

7 German and English version available at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2001_1_97/ERV_2001_1_97.html.

8 German and English version available at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1991_51/ERV_1991_51.html.

9 German and English version available at: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2013_1_33/ERV_2013_1_33.html.

Germany

1. Synthesis

Reform of the European Stability Mechanism: constitutional complaint dismissed

Bundesverfassungsgericht, Zweiten Senats, Order of 13 October 2022

2. Series of keywords

KEYWORDS
Common backstop
Conditionality
Constitutional complaint
Decision-making process
ECB and Commission’s functions
ESM reform (x4)
Financial assistance
No bail out clause
No transfer of decision-making powers
No transfer of sovereign powers
Precautionary conditioned credit lines
Preparatory and supporting activities
Prohibition of monetary financing
Right to democratic self-determination
Transfer of sovereign powers

3. Series of legal provisions

ARTICLE
TFEU, Article 123(1)
TFEU, Article 125
TFEU, Article 136(3)
German Basic Law, Article 23(1) second and third sentence
German Basic Law, Article 38(1) first sentence of the
Agreement Amending the ESM, Article 18a(6)

Italy

1. Synthesis

Collective removal of the management body and the internal control body of a credit institution

Consiglio di Stato, sez. VI, Judgment of 19 July 2022 No 6254

Bank of Italy's administrative pecuniary sanctions against members of the Board of Statutory Auditors

Corte di Cassazione, Judgment of 4 August 2022 No 24170

Bank of Italy's administrative pecuniary sanctions against a non-executive member of the management body of a credit institution

Corte di Cassazione, Judgment of 9 August 2022 No 24491

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

Corte di Cassazione, Judgment of 14 September 2022 No 26983

2. Series of keywords

KEYWORDS	CASES
Administrative pecuniary sanctions	Cass. 24170/2022 (x2) // Cass. 24491/2022 (x3) // Cass. 26983/2022 (x5)
Auditors' supervisory powers and duties	Cass. 24170/2022
Burden of proof	Cass. 24170/2022 // Cass. 26983/2022
Collective removal measure	CdS 6254/2022 (x3)
Cumulative application	CdS 6254/2022
Discretion	Cass. 24170/2022 // Cass. 26983/2022
Duty to act in an informed manner	Cass. 24491/2022
Duty to state reasons	CdS 6254/2022
Early intervention measures	CdS 6254/2022 (x2)
Error of fact	Cass. 26983/2022
Inapplicability	CdS 6254/2022 // Cass. 24491/2022 // Cass. 26983/2022
Judicial review	CdS 6254/2022
Liability of members of the management body of a credit institution	Cass. 24491/2022
No violation of Article 6 ECHR	Cass. 24491/2022
Non-executive members of the management body	Cass. 24491/2022
Not criminal in nature	Cass. 24491/2022 (x3) // Cass. 26983/2022 (x2)
Presumption that the infringement was culpable	Cass. 24491/2022
Principle of *lex mitior*	Cass. 24491/2022 // Cass. 26983/2022
Principle of proportionality	CdS 6254/2022
Procedural safeguards	CdS 6254/2022
Prudential supervision	Cass. 24491/2022 // Cass. 26983/2022
Purposes of early intervention measures	CdS 6254/2022 (x2)
Quantification	Cass. 24170/2022 // Cass. 26983/2022

Rules entered into force during the proceedings	Cass. 24491/2022 // Cass. 26983/2022
Scope of the assessment of the Court	Cass. 26983/2022
Starting moment	Cass. 26983/2022
Technically complex assessment	CdS 6254/2022
Time limit for the conclusion of a sanctioning procedure	Cass. 26983/2022

3. Series of legal provisions

ARTICLE	CASES
CFREU, Article 41	CdS 6254/2022
CFREU, Article 48	Cass. 24491/2022
ECHR, Article 6	Cass. 24491/2022
Italian Constitution, Article 27	Cass. 24491/2022
Italian Constitution, Article 97	CdS 6254/2022
Directive 2014/59/EU, Article 28	CdS 6254/2022
Italian Civil Code, Article 2381	Cass. 24491/2022
Italian Civil Code, Article 2392	Cass. 24491/2022
Italian Civil Code, Article 2403	Cass. 24170/2022
Italian Law 689/1981, Article 11	Cass. 24170/2022
Italian Law 689/1981, Article 3	Cass. 24491/2022; Cass. 26983/2022
Italian Law 265/2000, Article 24	CdS 6254/2022
Italian Delegation Law 154/2014	Cass. 26983/2022
Italian Legislative Decree 385/1993, Article 144	Cass. 24170/2022
Italian Legislative Decree 385/1993, Article 144 (version in force before the transposition of the CRD IV)	Cass. 24491/2022; Cass. 26983/2022
Italian Legislative Decree 385/1993, Article 53	Cass. 24170/2022
Italian Legislative Decree 385/1993, Article 69 vicies semel	CdS 6254/2022
Italian Legislative Decree 72/2015	Cass. 26983/2022

Spain

1. Synthesis

Absence of pecuniary responsibility of Banco de España for the supervision of BPE (as national competent authority in the context of the SSM)

Audiencia Nacional (Sala de lo Contencioso-Administrativo, Secc. 5ª), Judgment of 29 May 2019 No 2273/2019

Audiencia Nacional (Sala de lo Contencioso-Administrativo, Secc. 5ª), Judgment of 26 February 2020 No 27/2020

Audiencia Nacional (Sala de lo Contencioso-Administrativo, Secc. 5ª), Judgment of 10 June 2020 and Judgment of 9 September 2020 No 2397/2020

Absence of pecuniary responsibility of Banco de España (i) for the supervision of BPE (before and after the SSM), (ii) for the provision of ELA, and (iii) for the actions of the FROB

Consejo de Estado, several opinions

2. Series of keywords

KEYWORDS	CASES
Absence of pecuniary responsibility of Banco de España for the supervision of BPE (as national competent authority in the context of the SSM)	SAN 2273/2019; SAN 27/2020; SAN 2397/2020
Absence of pecuniary responsibility of Banco de España for the supervision of BPE (before and after the SSM)	Opinions of the Consejo de Estado
Diligence in the provision of ELA	Opinions of the Consejo de Estado
No responsibility of Banco de España for the actions of the FROB	Opinions of the Consejo de Estado

3. Series of legal provisions

ARTICLE
TFEU, Articles 123 and 130
TFEU, Article 127(6)
TFEU, Articles 268 and 340
Protocol on the statute of the ESCB and of the ECB, Article 14
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Spanish Law 13/1994,[1] Articles 7 and 9

[1] Law 13/1994, of 1 June, of autonomy of the Banco de España; english version available at https://www.bde.es/f/webbde/COM/sobreelbanco/organiza/ficheros/en/leyautone.pdf.

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[2] Law 10/2014, of 26 June 2014, on the regulation, supervision and solvency of credit institutions; english version available at https://www.bde.es/f/webbde/INF/MenuHorizontal/Normativa/eng/ficheros/Ley_10_2014_LOSSEC.PDF.

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[4] Law 39/2015, of 1 October, of the common administrative procedure of the public administrations; spanish version available at https://www.boe.es/buscar/act.php?id=BOE-A-2015-10565.

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