BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

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

III. Jan-Jun 2023

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

number 98

December 2023

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

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

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

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

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INTRODUCTION

1. This issue of Pandectae[*] confirms the editors' aim to include the apical courts' rulings of the main SSM and SRM participating Member States in the body of the reported case law on the Banking Union. It not only summarizes the judgments of the Belgian, French and Portuguese apical courts which are added to those of the Austrian and Italian courts already included together with the Spanish ones in the previous issue, but it also focuses on the award of the Arbitral Tribunal constituted under the UNCITRAL rules on claims of several Mexican investors against Spain for acts and omissions of different Spanish institutions allegedly precipitating the resolution of BPE.

This extension of national case law to further countries participating in the Banking Union was made possible thanks to contributions from the Banco de España's Legal Department[1] and scholars of the University of Salzburg[2] and the Católica School of Law Lisbon,[3] as well as to the involvement of lawyers of the Legal Departments of the Banque Nationale de Belgique[4] and the Banco de Portugal[5] in the review of the judgments of their respective national courts.

Regarding the European level of judicial and administrative protection of the addressees of ECB and SRB decisions, this issue also reports – besides the judgments of the General Court and the Court of Justice – on some decisions of the Appeal Panel of the SRB on MREL and access to files issues.

2. Although the summaries are listed in chronological order, the ECJ's rulings on the legality of two corresponding ECB decisions come out first.

In case C-389/21 P of 4 May 2023, *ECB v Crédit Lyonnais*, the Court of Justice, setting aside the opposite previous decision of the General Court, found that the ECB's decision to grant Crédit Lyonnais with a permit to exclude exposures to the Caisse des dépôts et consignations from the measure of its total exposures for the purposes of the calculation of the leverage ratio within the limit of 66% was not in violation of Article 429(14) CRR nor it was based on manifest errors of assessment. The Court recalled, among others, that, when the Union law confers upon the ECB a broad discretion in relation to a specific matter, the judicial review carried out by the Court on the relevant decision must not lead it to substitute its own assessment for that of the ECB, but seeks to ascertain that the decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of powers.

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

[1] Contibution by Lucía Arranz.

[2] Contribution by Vanessa Aichstill and Paul Weismann for the section devoted to the Austrian case law and by Thibault Martinelli for those devoted to the Belgian and French sections.

[3] Contribution by Martinho Lucas Pires, for the section devoted to the Portuguese case law.

[4] Review of Marijke Dreesen.

[5] Review of Luís Barroso.

Ruling on the Case C-782/21 P, *Aeris Invest Sàrl v European Central Bank*, regarding the ECB's denial to give access to some documents pertaining to the resolution of Banco Popular, the Court dismissed the appeal brought by Aeris Invest and upheld the General Court's judgment. In deciding whether to grant the access under its decision of 4 March 2004, the Court held that the ECB was not required to take into account the fact that the applicant may need the documents for the purposes of a lawsuit. Moreover in the Court's view: (i) as to the exceptions envisaged in Article 4(1) of said decision, the ECB's refusal is mandatory where the disclosure of the document is likely to harm the interests protected therein, without any balancing with other competing interests being allowed; and (ii) as to the exception under Article 4(2), the right of defence constitutes a private interest and cannot amount as such to an overriding public interest justifying a disclosure under that provision.

In its judgement of 31 January 2023 on the case Case C-284/21 P, *Braesch and Others v Commission*, the Court of Justice denied the locus standi of holders of securities affected by burden sharing measures to bring an action for its annulment. The Court based its decision on the grounds that burden sharing measures are not an integral part of the Commission's decision, but rather purely national measures notified by the Member State and subject to challenge as such before the national judge, which the Commission took into account as a factual element in assessing the compatibility of the aid with the internal market.

Finally, in ruling the Case C-549/21 P, *Fondazione Cassa di Risparmio di Pesaro and Others v Commission* (judgment of 27 April 2023), the ECJ upheld the rejection by the General Court of the action brought against the Commission by former shareholders and subordinated bondholders of Banca delle Marche claiming damages on the grounds of an unlawful conduct of the Commission.

3. Among the General Court's judgments reported in this issue, the ruling on the Case T-72/20, *Satabank v ECB*, is worth mentioning first. Indeed, with its judgment of 22 March 2023, the General Court upheld the ECB's decision to deny access to documents related to an LSI, on the following grounds. As Article 32(1) of SSMFR refers to the right of access not to "prudential supervision" but to "supervisory procedures", and considering that a request for access to a file is based on the exercise of the rights of defence, such a request has no purpose in the absence of an administrative procedure affecting the legal interests of the applicant for access and, consequently, in the absence of a file concerning that person. It follows that a less significant institution may not validly exercise its right to access to file vis-à-vis the ECB to the extent that a supervisory procedure concerning the applicant is not already pending. In the context of a withdrawal procedure originating from an NCA's proposal under Article 14(5) of SSMR, a supervisory procedure before the ECB may be considered initiated only after the receipt of such a proposal. However, the lack of a supervisory file before that point in time does not imply that any documents relating to the applicant cannot be accessed under the rules governing public access to the ECB documents, according to the ECB's Decision 2004/258.

With its judgment of 26 April 2023, in Case T-557/20, the General Court annuled a decision of the European Data Protection Supervisor (EDPS) adopted vis-à-vis the Single Resolution Board (SRB). The EDPS held that the SRB – by failing to inform some shareholders and creditors of Banco Popular Español that the data collected through their responses on some forms prepared by the same SRB would have been transmitted to the independent evaluator – had infringed its obligation to provide the information prescribed under Article 15(1)(d) of Regulation 2018/1725. According to the General Court, too many flaws affected the EDPS's investigation, which did not adequately considered that: the independent evaluator held information, which were not related to an 'identified natural person', in so far as the alphanumeric code appearing on each response did not make it directly possible to reveal the identity of the natural person who filled in the form; the SRB alone held additional information enabling the affected shareholders and creditors who responded on the form to be identified, namely the alphanumeric code and the identification database.

4. Out of the five Appeal Panel decisions reported in this issue, three concern MREL topics.

In its decision on Case 2/2022 of 11 January 2023, the Appeal Panel of the SRB ruled on the SRB's decision setting the minimum requirement for own funds and eligible liabilities (MREL), sheding lights on the the interaction of prudential waivers, combined buffer and iMREL. Under the Appeal Panel's view, the SRB is not obliged to automatically grant a waiver of iMREL when the ECB has granted a capital waiver in accordance with Article 7 CRR, and such an ECB waiver is not, per se, a sufficient indication that a waiver of iMREL is to be granted. The SRB must be able to exercise its discretion as its assessment relates to the credit institution in a (potential) gone concern. In contrast, an assessment of the ECB, which relates to the credit institution in a going concern, is relevant but not binding upon the SRB. Supervisory and resolution objectives may, in certain circumstances, yield different outcomes, especially in the context of complex assessments such as those related to prudential and iMREL waivers.

Ruling on the Case 3/2022, the Appeal Panel remittted to the Board (decision of 21 March 2023) a decision on the determination of the MREL, based on a positive public interest assessment in resolution planning, due to the breach of the duty to state reasons. The SRB's decision, taken in the context of resolution planning, changed the outcome of the public interest assessment from negative to positive, considering winding up under normal insolvency proceedings no longer credible in a scenario of system wide events, and identifying resolution as the preferred strategy, with implications for the determination of the MREL.

In its decision in Case 1/2022 of 14 April 2023 the Appeal Panel of the SRB examined the procedural interplay between the remedies – administrative and judicial – available against the MREL decision and the resolution plan. In light of the 'functional link' between the MREL and the resolution plan, the Appeal Panel stated that, in determining the MREL, the SRB should take into account only and exclusively the resolution strategy and actions expressly envisaged in

the resolution plan. In addition, the Appeal Panel conducted a thorough review of the statement of reasons of the MREL decision, finding shortcomings in the reasoning provided with reference to multiple aspects and, with reference to these points, remitted the decision to the SRB for appropriate integration.

The other two Appeal Panel's decisions concern access to SRB files.

In its decision of 8 march 2023 in Cases 4/2022 and 6/2022, the Appeal Panel held that, in relying on the exceptions to the right to access provided for by Article 4(1)(a) fourth indent and Article 4(2) first indent of Regulation (EC) No 1049/2001, the SRB enjoys a margin of appreciation to the extent that such exceptions are based on broad or relatively undetermined legal concepts, such as "protection of financial, economic and monetary policy" and "protection of commercial interests". That margin of appreciation is less pronounced whenever the Board relies on the exception to the right to access of Article 4(1)(b) of Regulation (EC) No 1049/2001, concerning the protection of the privacy and integrity of the individuals, because the notion of "personal data" is defined by Article 3(1) of Regulation (EU) 2018/1725 and, therefore, is not a broad or undetermined legal concept. Therefore, the protection of privacy may, in principle, only justify the redaction of names and similar identifiers which would make it possible to connect a specific person to an information.

In ruling the Case 7/2022, the Appeal Panel held that, although Article 2(3) of Regulation 1049/2001 sets out that access to documents applies to all documents held by an institution, including documents "received by it and in its possession", the SRB can deny access to documents received from or exchanged with the ECB for internal use as part of the file and deliberations, as provided for in Article 4(3) of said Regulation. In such context, access must be requested directly to the ECB, because an indirect access through the SRB would allow a possible circumvention of the specific rules on public access provided for in the ECB's decision 2004/258. Consequently the SRB's decision to refuse access to documents originating from the ECB and to refer the applicant to the latter, was justified and did not deprive the appellant of the possibility to have its application for access to the documents originating from the ECB handled promptly by the ECB itself under the ECB Decision 2004/258.

5. As mentioned above, the section of this issue of Pandectae devoted to national judgments includes the rulings of Austrian, Belgium, France and Italian apical courts.

Among the several judgments, worthy of particular attention is the judgment of the Austrian Supreme Court of Justice (*Oberster Gerichtshof* – OGH) on the liability of the Republic of Austria concerning the supervisory activities of the FMA. Confirming the case law already highlighted in the previuos issue of Pandectae, the OGH held that the Republic of Austria cannot be held liable 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) Financial Market Authority

Act (*Finanzmarktaufsichtsbehördengesetz*) such damages do not fall within the protective purpose (*Schutzzweck*) of banking supervisory law.

As for the Belgian case law, this issue summarises two judgments of the *Conseil d'État*, *Section du contentieux*, both of 11 January 2023 (No 255.468 and No 255.469), on the "good repute" requirement of the members of the management body of a supervised entity. The *Conseil d'État* holds that the decision of the Belgian National Bank as to whether a supervised entity's board member fulfils the "good repute" requirement entails some degree of discretion and that consequently its judicial review is limited to the manifest error of appreciation. The BNB's decision based on Articles 234 and 19 of the Belgian banking law, which requires a supervised entity to remove a board member who no longer satisfies the "good repute" requirement, does not qualify as a disciplinary decision against that member and does not have a punitive character so that the principle of respect for defence rights does not apply prior to the adoption of such decision.

In starting the section dedicated to French case law on the Banking Union, this issue of Pandectae summarises the ruling of the French *Conseil d'État* No 449.898 although it is dated 22 July 2022, because of the relevance of the issues addressed therein. While confirming the validity of the ACPR's notice on the partial compliance with the EBA Guidelines on loan origination and monitoring (EBA/GL/2020/06), the *Conseil d'État* shed light, among others, on the latter's compliance with Article 79 of the CRD declining to make a preliminary ruling to the CJEU on the ground that there was no reasonable doubt as to the correct interpretation of EU law.

The Italian section of the case law concerning the Banking Union is devoted to two judgments of the *Consiglio di Stato*, both on the temporary administration of credit institutions. In its ruling of 11 January 2023 No 407, the *Consiglio di Stato* held that, when *Banca d'Italia* sets up the special administration of a credit institution under Article 70 of legislative decree No 385/1993 it may extend, as per Articles 98 and 105 of the same decree, the special administration to the de facto parent undertaking of the credit institution concerned. In line with its consolidated stance, the *Consiglio di Stato* also confirmed that the *Banca d'Italia* decision is to be notified to the parties concerned only after its adoption and entry into force, when the special administrators have taken office, and that consequently the parties concerned may exercise their due process rights only after such moment. In the ruling of 26 April 2023 No 4171, the *Consiglio di Stato* clarified that for the purpose of adopting the measure of temporary administration, a particularly significant deterioration of the credit institution's financial situation constitutes a relevant and appreciable element pursuant to Article 69-octiesdecies, paragraph 1, letter b), of the Italian Consolidated Law on Banking.

In its ruling of 9 March 2023, the Portuguese *Supremo Tribunal Administrativo* recognised the legality of the measure requesting the constitution of enhanced provisions and of the resolution measure applied to Banco Espírito Santo S.A by *Banco de Portugal*. The judgment is consistent with the one of the

ECJ of 5th May 2022 (Case C-83/20), holding that the Portuguese law under which the resolution action were taken in connection with Banco Espírito Santo is compatible with the right to property, and with the legal framework for banking resolution in Portugal.

This issue of Pandectae finally summarizes the award of 13 March 2023 of the Arbitral Tribunal constituted under UNCITRAL rules on a claim filed by several Mexican investors against Spain for certain acts and omissions of different Spanish institutions which allegedly precipitated the resolution of Banco Popular Español, S.A. ("BPE") leading to the destruction of their investment in BPE. The Tribunal ruled that Spain neither breached the Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain of 2006 nor abused the discretion it enjoyed under Spanish and EU law in not providing further ELA and, thus, dismissed the claim.

The case-law of the CJEU

Commission v Braesch and Others

1. Keywords and summary

Commission v Braesch and Others

Court of Justice – Case C-284/21 P – Judgment of 31 January 2023 – ECLI:EU:C:2023:58

Decision of the European Commission not to raise objections to a state aid for a bank's restructuring

Procedure for reviewing State aid – European Commission's decision under Article 108(3) TFEU – Action for annulment – Procedural rights – Legal standing – Party concerned – Interested party – Direct and individual concern

The preliminary stage of the procedure for reviewing State aid under Article 108(3) TFEU is intended merely to allow the Commission to form a prima facie opinion on the conformity of the aid and must be distinguished from the stage of the review under Article 108(2) TFEU. At the latter stage, which is designed to enable the Commission to be fully informed of all the facts of the case, the TFEU imposes an obligation on the Commission to give the parties concerned notice to submit their comments.

Therefore, where the Commission, without initiating the formal investigation procedure under Article 108(2) TFEU, finds, by a decision taken on the basis of Article 108(3) TFEU, that aid is compatible with the internal market, the persons intended to benefit from those procedural guarantees may obtain compliance with them only by challenging that decision before the EU Courts. For those reasons, an action for the annulment of such a decision by a person concerned within the meaning of Article 108(2) TFEU is admissible under Article 263 TFEU, where that person seeks to safeguard him or her procedural rights. The concept of 'interested party' laid down in Regulation 2015/1589 – which is analogous to the concept of 'party concerned' within the meaning of Article 108(2) TFEU – covers an indeterminate group of persons, i.e. any person capable of demonstrating that the aid is likely to have a specific effect on its situation.

On the other hand, if the applicant calls into question the merits of a decision taken on the basis of Article 108(3) TFEU or after the formal investigation procedure, the mere fact that it may be regarded as 'concerned' within the meaning of Article 108(2) TFEU does not render the action admissible. For this purpose, the applicant must demonstrate that the decision is of direct and individual concern within the meaning of Article 263 TFUE. That is the case in particular where his or her position on the market is substantially affected by the aid to which the contested decision relates.

Procedure for reviewing State aid – European Commission's decision under article 108(3) TFEU – Commitments given by the Member State

Where a notified aid measure incorporates, on a proposal from the Member State concerned, commitments granted by that State, it does not follow that those commitments must be regarded as being imposed as such by the Commission and that any adverse effects they may have on third parties are therefore attributable to the decision adopted by that institution.

With a decision adopted at the conclusion of the preliminary examination stage under Article 108(3) TFEU and Article 4(3) of Regulation 2015/1589, the Commission cannot impose or prohibit any action by the Member State concerned, but is only entitled to approve, by a decision not to raise objections, the planned aid as notified by that Member State, declaring that aid compatible with the internal market. By contrast, where the Commission has doubts as to the compatibility of the notified aid with the internal market, it is required to initiate the formal investigation procedure provided for in Article 108(2) TFEU and referred to in Article 4(4) of Regulation 2015/1589.

It follows that, by the decision at issue, the Commission merely authorised the Italian Republic to implement the notified State aid while taking note of the factual framework already defined by that Member State in the restructuring plan for the bank. Therefore, it cannot be considered that the burden-sharing measures notified in the present case by the Italian Republic with a view to being authorised by the Commission in the context of the preliminary examination procedure were imposed by the decision of the Commission itself, since those measures result solely from acts adopted by that Member State.

In the present case, contrary to what was held by the General Court, the burden-sharing measures referred to in the decision at issue were not imposed or rendered binding by the Commission in that decision, but constitute purely national measures notified by the Italian Republic under its own responsibility, which were taken into account by the Commission as a factual element in assessing whether the State aid in question could be declared compatible with the internal market at the conclusion of the preliminary examination stage.

Banking communication – Compatibility with the internal market – Limit to discretion – Burden-sharing measure – General principles of law – Exceptional circumstances

The Communication from the European Commission on the application of State aid rules to support banks in the context of the financial crisis (henceforth the "Banking Communication") is not capable of imposing binding obligations on the Member States, but does no more than establish conditions, designed to ensure that State aid granted to the banks is compatible with the internal market. The Banking Communication is not therefore binding on the Member States and

cannot require them to adopt burden-sharing measures on banks in distress, prior to the grant of a State aid.

The European Commission, by adopting guidelines, such as the Banking Communication, to establish criteria for assessing the compatibility of state aid measures with the internal market, imposes a limit on the exercise of its discretion under Article 107(3)(b) TFEU. Therefore, the Commission cannot, as a general rule, depart from these guidelines, because it could then incur a violation of general principles of law, such as equal treatment or the protection of legitimate expectations. Consequently, if a Member State notifies the Commission of a State aid that complies with these guidelines, the Commission must, in principle, authorize such aid.

Based on the foregoing, the fact that a State aid notified provides for a burden-sharing measure which meets the criteria set out in the Banking Communication, in particular point 44 thereof, constitutes a condition that is, as a general rule, sufficient ground for the Commission to declare that aid to be compatible with the internal market. However, this is not strictly necessary to that end.

Member States retain the right to notify the Commission of State aid which does not meet the criteria laid down by the guidelines and the Commission may authorise such aid in exceptional circumstances. Indeed, the Commission cannot waive, by the adoption of guidelines, the exercise of its discretion under Article 107(3)(b) TFEU. Therefore the adoption of a communication such as the Banking Communication does not relieve the Commission of its obligation to examine the specific exceptional circumstances relied on by a Member State to request the authorization of a State aid.

PROCEDURE FOR REVIEWING STATE AID – Principle of legality – Compatibility with the internal market

The procedure under Article 108 TFEU must never produce a result which is contrary to the specific provisions of the Treaty. Accordingly, State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market. Thus, in the decision at issue, the Commission verified that the State aid notified complied with Directive 2014/59 and reached the conclusion that that aid satisfied the conditions set out in Article 32(4)(d) of that directive. In that context, the Commission verified, inter alia, that the burden-sharing measures provided for in the restructuring plan were adequate for the purpose of limiting the amount of aid granted to the strict minimum necessary to achieve the objective of recapitalising the bank. However, the Commission was not required to verify whether that burden-sharing decided by the Italian Republic itself infringed the rights of the applicants as bondholders. Such an infringement, even if it were established, would not arise from the aid as such, but rather from the measures taken by that Member State in order to obtain from the Commission a decision authorising that aid at the conclusion of the preliminary examination stage.

Procedure for reviewing State aid – Interested party – Infringement of EU law – National court's jurisdiction

If a third party considers itself to be affected by measures adopted by the authorities of a Member State in the context of the restructuring of an undertaking, the fact that those measures form part of a restructuring plan requiring the payment of State aid and that, consequently, that Member State notifies that aid to the Commission in order to seek the approval of that aid, does not confer on that third party the status of 'interested party' within the meaning of Article 1(h) of Regulation 2015/1589, in the context of the procedure under Article 108 TFEU.

In such a case, if that third party considers that, as a result of the adoption of such measures, the Member State concerned has infringed national or EU law, it must challenge the legality of those measures before the national court, which has sole jurisdiction in that regard and which has the power to make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU, if necessary.

Procedure for reviewing State aid – National court's jurisdiction – Effective judicial protection

If a national court were to reach the conclusion, in the light of the interpretation of EU law given by the Court following a possible reference for a preliminary ruling under Article 267 TFEU, that the burden-sharing measures at issue are unlawful, it would be for the Italian Republic, if that unlawfulness meant that it was no longer able to fulfil all the commitments undertaken vis-à-vis the Commission by implementing the aid notified in accordance with the authorisation granted by the decision at issue, to notify new measures to the Commission under Article 108(3) TFEU, at the risk of being required to recover the aid already granted on the basis of that decision.

It follows that, first, the applicants are in no way deprived of the right to an effective judicial remedy guaranteed in the first paragraph of Article 47 of the Charter and, secondly, the General Court was wrong to hold in the judgment under appeal, that the applicants could defend their rights only by seeking the annulment of the decision at issue before the EU judicature.

Action for annulment – European Commission's decision under Article 108(3) TFEU – Legal standing – Bondholders

In light of all the reasons set out above, the applicants do not have the status of 'parties concerned' or of 'interested parties' within the meaning of Article 108(2) TFEU and Article 1(h) of Regulation 2015/1589 respectively, with the result that they cannot, to that end, be regarded as directly and individually concerned by that decision, within the meaning of the first limb of the fourth paragraph of

Article 263 TFEU, and consequently have no standing to bring proceedings in order to safeguard their procedural rights under Article 108(2) TFEU.

Similarly, in so far as the applicants seek to call into question the merits of the decision at issue, they have no standing, since that decision does not affected them individually by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons. Indeed, the applicants are affected by the burden-sharing measures referred to in the decision at issue in their capacity as holders of financial instruments in the same way as all other holders of instruments affected by those measures.

2. European Commission's decision not to raise objections to a bank's precautionary recapitalisation: lack of standing of holders of securities affected by burden sharing measures to bring an action for its annulment

by Luigi Sciotto

Introduction

With the decision at hand, concerning the precautionary recapitalisation of Banca Monte dei Paschi di Siena (MPS) carried out in 2017, the Grand Chamber of the Court of Justice clarifies whether and to what extent the holders of securities affected by burden sharing measures are to be considered "parties concerned" within the meaning of Article 108(2) TFEU and consequently have standing under Article 263(4) TFEU to bring an action against the European Commission's decision not to raise objections.

In order to put the facts of the case in context, brief introductory remarks on the applicable legal framework may be helpful, with particular regard to: (1) the notion of precautionary recapitalisation; (2) the burden sharing provided for by the 2013 Banking Communication;[1] (3) the European Commission's State aid approval procedure.

1. In general terms, a bank in need of extraordinary public financial support shall be deemed to be failing or likely to fail under Article 32 BRRD. By way of exception to this general principle, Article 32(4)(d)(iii) of the BRRD allows for a public capital injection in the form of "precautionary recapitalisation" without triggering resolution, provided that the aid, among other conditions, (a) is aimed at remedying a serious disturbance in the economy of a Member State and preserving financial stability, (b) is addressed to a solvent bank facing a potential capital shortfall in a stress test or asset quality review (AQR) conducted by ECB, EBA or the relevant national authority, (c) has received final approval under EU State aid rules (Articles 107 and 108 TFEU).

[1] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ 2013 C 216, p. 1).

2. As mentioned above, precautionary recapitalisation does not trigger resolution and therefore does not entail the implementation of resolution measures such as write-down or bail-in (necessary to limit the use of resolution funds). However, in order to be considered compatible with the internal market as intended to remedy a serious disturbance in a Member State's economy under Article 107(3)(b) TFEU, the aid (in the form of precautionary recapitalisation) must meet the requirements set out by the Commission in its 2013 Banking Communication. The latter provides, among other things, that shareholders and subordinated debt holders of the aided bank are normally required to make an appropriate contribution in order to minimize the amount of aid and reduce moral hazard.

3. Article 108 TFEU provides that if the Commission considers that a notified aid is not compatible with the internal market, it shall initiate a formal investigation procedure, under which the "concerned parties" have the right to submit comments. This procedure is detailed in Council Regulation (EU) 2015/1589,[2] which distinguishes the preliminary examination stage from the formal investigation procedure. Specifically, if the Commission finds that no doubts are raised as to the compatibility of a notified measure with the internal market, the preliminary examination concludes with a decision not to raise objections. Conversely, if doubts exist, the preliminary examination concludes with a decision to initiate the formal investigation procedure, in which the "interested parties" can submit their comments. The regulation defines "interested parties" as "any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations" (Article 1(h)).

Background to the dispute

In 2016, as a result of a stress test conducted by the EBA, MPS was found to have a capital shortfall in the adverse scenario. In response to this, the Italian authorities, after approving in late 2016 the Decree Law 237/2016,[3] which sets out the legal framework for precautionary recapitalisations, in 2017 notified the Commission of aid for the recapitalisation of MPS in the amount of €5.4 billion.

The restructuring plan submitted to the Commission included burden sharing measures by holders of MPS's shares and subordinated debt amounting to €4.3 billion. The securities affected by the burden sharing included, among other things, the so-called "FRESH shares" a particular type of shares subscribed to by the investment bank JP Morgan (JPM) in 2008, in the context of a complex transaction involving several contracts between JPM and MPS (a usufruct contract and a swap contract) and between JPM and third-party investors who had subscribed to FRESH bonds. Taken together, the provisions of these contracts

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[2] Council Regulation of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

[3] Decree-Law n. 237 of 23 December 2016, laying down urgent provisions for the protection of savings in the credit sector, which was amended and converted into a law by the Conversion Law of 17 February 2017 n. 15.

had the effect of making the shares non-computable in the bank's CET1. In that regard, the Decree-Law 237/2016 established that by effect of the adoption of the burden sharing measures, provisions related to patrimonial rights on the bank's shares that limit the full recognition of the shares as CET1 are void.[4]

By decision not to raise objections of 4 July 2017, adopted at the conclusion of the preliminary examination, the Commission approved the precautionary recapitalisation aid for MPS.[5] In 2018, some holders of the "FRESH bonds" brought an action before the General Court of the European Union for the annulment of this decision. Before the General Court, the Commission objected that the action was inadmissible due to the lack of standing of the applicants. As this plea of inadmissibility was rejected by the General Court,[6] the Commission brought an appeal before the Court of Justice.

The decision of the Court of Justice

The Court first notes that the appellants, while not disputing that the aid is compatible with the internal market, complain that the Commission unlawfully approved the burden sharing measures affecting them because, by stopping at the preliminary examination stage, it failed to respect their procedural rights to be consulted as "interested parties" in the formal investigation procedure. In fact, according to the applicants, the Commission should have found that there were serious doubts as to the compatibility of these measures with EU law (as discriminatory and affecting their right to property) and should therefore have initiated the formal investigation procedure.

The Commission argues, on the other hand, that the applicants lack standing to challenge the decision not to raise objections, as they are not included in the notion of "interested parties" within the meaning of Article 1(h) of Regulation 2015/1589. In the Commission's view, in fact, only those persons who can show that the State aid in question is likely to place them at a competitive disadvantage, that is, the beneficiary's competitors as well as other persons who can otherwise show that their market position is being harmed, are interested parties.

Partly disregarding the Commission's view, the Court states that the notion of interested party can include any person who can show that the granting of State aid is likely to materially affect his or her situation, regardless of the existence of a competitive relationship. However, the Court upholds the Commission's appeal, saying that the General Court erred in classifying the appellants as interested parties. Indeed, the General Court found that the Italian authorities' commitments regarding burden sharing constituted an integral part of the notified aid measures, since the Commission, by the decision at issue, had made those commitments binding, so that this decision concerns both the notified aid measures and the Italian

[4] Article 22, par. 4 Decree-Law 237/2016.

[5] Decision C(2017) 4690 final of 4 July 2017 on State Aid SA.47677 (2017/N) – Italy – New aid and amended restructuring plan of Banca Monte dei Paschi di Siena.

[6] Judgment of 24 February 2021, *Braesch and Others v Commission* (T-161/18, EU:T:2021:102).

authorities' commitments. In so ruling, the General Court, according to the Court, distorted the scope of the decision at issue.

On this point, the Court states that, where a notified aid measure incorporates commitments granted by the Member State concerned, it does not follow, however, that such commitments must be regarded to be imposed as such by the Commission and that their possible adverse effects on third parties are therefore attributable to the decision adopted by that institution. Indeed, by a decision not to raise objections adopted at the end of the preliminary examination stage, the Commission cannot impose or prohibit any action by the Member State concerned, but is only entitled to approve the planned aid as notified by that Member State, declaring that aid compatible with the internal market. In fact, there is nothing to prevent the Member State from notifying a plan containing different commitments, even at the risk of being subject to the initiation of the formal investigation procedure, also bearing in mind that the Commission itself could, in exceptional circumstances, approve a State aid that does not envisage the application of burden sharing measures (see *Kotnik*, C-526/14, Judgment 19 July 2016). Moreover, it should be noted that the decision at issue does not in itself constitute a sufficient legal basis to prohibit MPS from paying the FRESH bond coupons, as this prohibition originates not in that decision but in Italian law. Similarly, the annulment of the FRESH contracts is not a mandatory effect of the contested decision but derives from the measures, certainly related in fact but legally distinct, taken by the Member State that notified such aid to the Commission.

In this respect, a distinction must be made between a decision, such as the one at issue, approving a State aid as compatible with the internal market at the conclusion of the preliminary examination stage, and a "conditional decision" within the meaning of Article 9(4) of Regulation 2015/1589, adopted following the formal investigation procedure, by which the Commission itself attaches to its decision approving State aid conditions subject to which that aid may be considered compatible with the internal market (see Judgment of 13 June 2013, *Ryanair v. Commission*, C-287/12 P).

Ultimately, in the case at hand, the commitments referred to in the decision at issue were not imposed or made binding by the Commission in that decision, but constituted purely national measures notified by the Italian Republic, pursuant to Article 108(3) TFEU, under its own responsibility, which were taken into account by the Commission as a factual element in assessing whether the State aid in question could, in the absence of any doubt in that regard, be declared compatible with the internal market at the end of the preliminary examination stage.

In those circumstances, if the appellants consider that, as a result of the adoption of the burden sharing measures provided for in MPS's restructuring plan, the Italian Republic has infringed EU law, they must challenge the legality of those measures before the national court, which has sole jurisdiction in that regard and which has the power, or even the obligation, if it rules at last instance, to make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU, if necessary, on the interpretation or validity of the relevant provisions of European Union law.

Satabank v ECB

1. Keywords and summary

Satabank v ECB

General Court – Case T-72/20 – Judgment of 22 March 2023 – ECLI:EU:T:2023:149

ECB's decision to deny access to documents related to an LSI

Right to access – Refuse to grant access – Action for annulment – Admissibility

When an act is adopted by a procedure involving several stages, and particularly where it is the culmination of an internal procedure, it is, in principle, only a measure that definitively determines the position of the institution upon the conclusion of that procedure that is open to challenge, and not intermediate measures the purpose of which are to prepare the final decision.

However, if the ECB refuses access to the applicant's supervisory file, alleging that the applicant is not involved in any supervisory procedure and, therefore, there is no file to access, such refusal is challengeable, as it definitively determines the ECB's position on the access request.

Right to access – Prudential supervision – Supervisory procedure

In principle, a request for access to a file, being aimed at the exercise of the right to defence, has no purpose in the absence of an administrative procedure affecting the legal interests of the applicant and, consequently, in the absence of a file concerning that person.

Consistently, Article 32 of the SSM Framework Regulation provides that the right to access the supervisory file can be exercised in the context of a "supervisory procedure", that is, pursuant to Article 2(24) of the same Regulation, "any ECB activity directed towards preparing the issue of an ECB supervisory decision". By virtue of this definition, prudential supervision (and, in particular, indirect prudential supervision carried out by the ECB in respect of LSIs) can not be equated with a supervisory procedure, aimed at performing a specific task and taking a decision thereon. Therefore, the mere persistence of prudential supervision can not justify access to file under Article 32 of the SSM Framework Regulation, it being necessary for this purpose that, on the date of the request for access, a supervisory procedure before the ECB is pending in respect of the applicant.

Right to access – Authorisation withdrawal procedure – Initiation of the procedure

It cannot be assumed that the authorisation withdrawal procedure is already pending after the authorisation has been granted, given that Article 14(5) of the SSMR clearly states that such a procedure may be initiated by the ECB on its own initiative or on a proposal from a national competent authority. It follows that a supervisory procedure aimed at the authorisation withdrawal may be considered initiated only after the ECB decision to open it or the NCA proposal, being irrelevant the national competent authority's decision to order a credit institution to discontinue any activity, which did not have the effect of opening, on the date of that decision, the procedure for withdrawal of its authorisation before the ECB.

Right to access – Rational – Supervisory procedure – Charter of the fundamental rights of the European Union

Given that the right to access the file under Article 41(2) of the Charter of the Fundamental Rights of the European Union is associated with the right of a person to gain, by the administration, a treatment impartial, fair, and within a reasonable time of their affairs, this right applies to the file of the person concerned by such affairs and not to all documents held by the administration, being distinct from the right laid down in Article 42 of the Charter, which provides for access to any document of an institution, irrespective of the existence of the file of a person concerned and their legal interest.

Indeed, the right of access under Article 41(2) of the Charter, which is aimed at the exercise of the right to defence, implies that the person concerned can influence the decision-making process of the administration. Therefore, in the absence of an administrative procedure affecting the legal interests of the applicant for access, the request for access to a file has no purpose, since there is no decision-making process that the applicant could influence through access to relevant documents. It follows that Article 22 of the SSMR and Article 32 of the SSMFR, allowing credit institutions affected by a supervisory procedure to access to file of that procedure, in order to express their views during the decision-making process, are fully compliant with the Charter of the fundamental rights of the European Union.

Right to access – Supervisory file – Supervisory procedure

The concept of "file", as defined by Article 32(2) of the SSM Framework Regulation, concerns all documents obtained, produced, or assembled by the ECB during a supervisory procedure. Thus, in the absence of an ongoing supervisory procedure, any other documents held by the ECB relating to an intermediary can not be equated with the "file" within the meaning of Article 32 of the SSM

Framework Regulation and, therefore, can not be the subject of a request for access under that provision.

Right to access – Access to file – Public access to ECB documents – Supervisory procedure

Even though they lead to a comparable situation from a functional point of view, the right to consult the administrative file in the context of an administrative procedure and the right of access to documents of the institutions are legally distinct.

As for public access to ECB's documents, on the basis of Decision 2004/258, a person requesting access does not have to demonstrate any interest in having access to the documents requested. Consequently, such an application, even if made by a person with specific circumstances which distinguish them from any other EU citizen, must be examined in the same way as an application from any other person.

It should be considered that Decision 2004/258 does not require the applicant to specify the legal basis of their application, in accordance with the goal to ensure the widest possible access to documents. Moreover, the mere presence in that application of a reference to a "file", without express mention of a legal basis, is not sufficient to consider that this application is based only on Article 32 of the SSM Framework Regulation and not also on the Decision 2004/258.

It follows that such a request may not be validly denied on the assumption that it has been proposed solely under Article 32 of the SSM Framework Regulation, even though no supervisory procedure was pending against the applicant at the time of the request. On the contrary, it has to be examined also on the basis of the Decision 2004/258.

2. Composite administrative procedures and right of access of LSIs towards the ECB prior to the sending of the national proposal

by Francescopaolo Chirico

A less significant institution under Maltese law (hereinafter "the applicant") submitted a request for access to the ECB concerning the applicant's file. The ECB refused the access request, stating that the applicant was not the subject of proceedings within the meaning of Article 22 of the SSM Regulation and that, as a consequence, no access to any file could be granted to it under Article 32(1) of Regulation (EU) No 468/2014 (hereinafter "SSM Framework Regulation" or SSMFR).

A few months after the refusal of the access request, the Maltese competent authority (Malta Financial Services Authority, hereinafter "MFSA"), pursuant to Article 14(5) of Regulation (EU) No 1024/2013 of 15 October 2013 (hereinafter "SSM Regulation" or "SSMR") and Article 80 of SSMFR, submitted to the ECB a draft decision proposing the withdrawal of the applicant's authorisation. Afterwards, the ECB notified the applicant of a draft decision withdrawing its authorisation and, upon the applicant's request, granted access to its file.

The applicant contests the first ECB decision refusing the request for access submitted before the sending of the draft withdrawal decision by the MFSA.

Firstly, the Court recalls that, as already stated in the *Landeskreditbank* case,[1] the overall scheme of Article 6(4) to (6) of SSMR establishes a differentiation between prudential supervision of significant and less significant institutions in relation to seven of the nine tasks listed in Article 4(1). It is apparent from a combined reading of Article 6(5) and (6) that the direct prudential supervision of less significant institutions is conferred under the ECB's control on the national authorities.

With regard to the right of access, Article 32(1) of SSMFR provides that "*the rights of defence of the parties concerned shall be fully respected in ECB supervisory procedures*" and that "*for this purpose, and after the opening of the ECB supervisory procedure, the parties shall be entitled to have access to the ECB's file, subject to the legitimate interest of legal or natural persons other than the relevant party, in the protection of business secrets*".

Considering that a request for access to a file is based on the exercise of the rights of the defence, such a request has no purpose in the absence of an administrative procedure affecting the legal interests of the applicant for access and, consequently, in the absence of a file concerning that person. Accordingly, Article 32(1) of SSMFR refers to the right of access not to "*prudential supervision*" but to "*supervisory procedures*", defined by Article 2(24) as "*any ECB activity directed towards preparing the issue of an ECB supervisory decision, including common procedures and the imposition of administrative pecuniary penalties*".

Therefore, the mere persistence of prudential supervision, without a specific pending supervisory procedure, cannot be regarded as justifying access to the file under Article 32 of SSMFR. Indeed, the concept of "*file*" refers directly to the documents collected by the ECB in the context of the supervisory procedure. According to that provision, the files consist of all documents obtained, produced, or assembled by the ECB during the supervisory procedure. It follows that the absence of an ongoing supervisory procedure means that the documents relating to the applicant in the ECB's possession cannot be equated with its "*file*" within the meaning of Article 32 of the SSM Framework Regulation.

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[1] Judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg* v *ECB*, T-122/15, EU:T:2017:337.

Given that the applicant is a less significant institution, the ECB did not exercise on it constant supervision, which was the responsibility of the national competent authorities. Contrary to what the applicant claims, it cannot be assumed that the authorisation withdrawal procedure was already pending after the authorisation was granted, given that Article 14(5) of the SSM Regulation clearly states that such a procedure may be initiated by the ECB on its own initiative or on a proposal from a national competent authority. Therefore, according to the Court, there is nothing to suggest that, on the date on which the applicant lodged its request for access, a supervisory procedure before the ECB was pending in respect of the applicant itself.

Indeed, at that stage, the ECB had not taken any supervisory measure concerning the applicant nor received by the MFSA the draft decision proposing the withdrawal. The fact that, at the time of the access request, the procedure for the withdrawal of its authorisation as a credit institution was already pending at the national level does not imply that a supervisory procedure had been initiated before the ECB.

Even though the procedure for withdrawal of authorisation is a "*composite administrative procedure*" in which an EU body, namely the ECB, exercises alone the final decision-making power, leading to the consequences on jurisdictions already clarified by the CJEU,[2] such case-law does not concern the question of which stage of the composite administrative procedure gives rise to the right of access to the file of credit institutions before the ECB. According to the Court, when a withdrawal procedure originates from an NCA's proposal, a supervisory procedure before the ECB may be considered initiated only after the receipt of such a proposal.

Having said that, the lack of a supervisory file at the time of the request does not imply that any documents relating to the applicant cannot be accessed under the rules governing public access to ECB documents, namely Decision 2004/258.

In this respect, the Court recalls that the right to consult the administrative file in the context of an administrative procedure and the right of access to documents of the institutions are legally distinct, even though they lead to a comparable situation from a functional point of view.

According to Article 6(1) of Decision 2004/258, a person requesting access is not required to justify their request and therefore does not have to demonstrate any interest in having access to the documents requested. It follows that a request for access that falls within the scope of Decision 2004/258 and which is made by a person who relies on certain specific circumstances which distinguish them from any other Union citizen must nevertheless be examined in the same way as an application from any other person.

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2 See judgments of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, and of 3 December 2019, *Iccrea Banca*, C-414/18, EU:C:2019:1036.

Even though the applicant did use the term “file” in its request, the ECB could not conclude that the access request was based solely on Article 32 of the SSMFR. Indeed, the fact that the request for access concerned a “file” of the ECB relating to a credit institution (that is to say, a file governed by the SSMR and SSMFR) does not preclude that request from being based on the access to documents general provisions, since it is common ground that the latter may serve as the legal basis for a request for access to documents relating to an administrative procedure governed by another EU act.

It follows from the foregoing that the ECB erred in law in failing to examine the applicant’s request on the basis of the provisions on access to documents laid down in Decision 2004/258.

3. Reference to “notes de doctrine”

Pier Mario Lupinu, *Access to documents versus access to files in the context of ECB supervisory procedures (T-72/20 Satabank v ECB)*, EU Law Live, 18 April 2023.

SRB v EDPS

1. Keywords and summary

SRB v EDPS

General Court – Case T-557/20 – Judgment of 26 April 2023 – ECLI:EU:T:2023:219

EDPS finding of breach of Regulation 2018/1725 by the SRB for providing third parties with personal data relating to shareholders and creditors of a bank in resolution

Act open to review – Binding legal effects

The EDPS' decision finding that the SRB infringed Article 15(1)(d) of Regulation 2018/1725 produces binding legal effects, even though the EDPS stated that he was waiving his right to exercise his corrective powers provided for in Article 58(2) of Regulation 2018/1725. Therefore, being an act capable of affecting the interests of the person to whom that act is addressed by bringing about a distinct change in his or her legal position, said decision constitutes an act open to challenge for the purpose of Article 263 TFEU.

Protection of personal data – Concept of personal data – Subjective and objective information – Information linked to a particular person

In accordance with the definition of personal data laid down in Article 3(1) of Regulation 2018/1725, information constitutes personal data if two cumulative conditions are met: first, the information must 'relate' to a natural person and, second, that natural person must be 'identified or identifiable'.

The use of the expression 'any information' in the definition of the concept of 'personal data', within Article 3(1) of Directive 2018/1725, reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it 'relates' to the data subject. As regards the latter condition, the Court of Justice has held that it is satisfied where the information, by reason of its content, purpose or effect, is linked to a particular person. Consequently, personal views or opinions may constitute personal data if, after an examination based on their content, purpose or effect, they are linked to a particular person.

In the present case, in the absence of such examination, the EDPS erred in concluding that, in the context of a resolution procedure, the observations of the

shareholders and creditors of the credit institution concerned, which the SRB transmitted to a consulting firm for the valuation provided for in Article 20(16) to (18) of Regulation 806/2014, constitute information “concerning” natural persons within the meaning of Article 3(1) of Regulation 2018/1725.

Protection of personal data – Concept of identified or identifiable natural person

Pursuant to Article 3(1) of Regulation 2018/1725, an ‘identifiable natural person’ is one who can be identified, directly or indirectly. As further clarified by Recital 16 of Regulation 2018/1725, personal data which have undergone pseudonymisation, which can be attributed to a natural person by the use of additional information, must be considered to be information on an identifiable natural person.

The fact that additional information – i.e. an alphanumeric code – necessary to identify the authors of the comments received during the consultation phase was held not by the consulting firm, but by the SRB, does not exclude a priori that the information transmitted constituted personal data. However, it is undisputed that in order to determine whether the information transmitted to a third party constituted personal data, it is necessary to put oneself in the position of the third party itself.

Since the EDPS did not investigate whether the consulting firm had legal means available to it which could in practice enable it to access the additional information necessary to re-identify the authors of the comments, the EDPS could not conclude that the information transmitted to the consulting firm constituted information relating to an ‘identifiable natural person’ within the meaning of Article 3(1) of Regulation 2018/1725.

2. The General Court annuls a decision of the European Data Protection Supervisor (EDPS) *vis-à-vis* the SRB: a “checklist” for authorities when sharing data with a consulting firm

by Elisa Ruberti and Stefano Montemaggi

The judgment of the Court of First Instance in case T-557/20 arises from the appeal brought by the Single Resolution Board (SRB) against the European Data Protection Supervisor (EDPS), seeking the annulment of the latter’s decision of 24 November 2020, by which the EDPS found that the SRB had breached its privacy obligations in relation to the processing of some personal data of shareholders and creditors of Banco Popular Español.

The facts. Following the resolution of Banco Popular, on 14 June 2018, Deloitte sent to the SRB the valuation of difference in treatment, provided for

in Article 20(16) to (18) of Regulation No 806/2014, carried out in order to determine whether the shareholders and creditors would have received better treatment if Banco Popular had entered into normal insolvency proceedings. On 6 August 2018, the SRB published on its website a Notice regarding its preliminary decision on whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular have been effected and the launching of the right to be heard process. In particular, in accordance with Article 41(2)(a) of the Charter of Fundamental Rights of the European Union, the SRB invited the shareholders affected by the resolution to express their interest in exercising their right to be heard, so that the investigation could be considered complete and exhaustive and the SRB could take a final decision.

The SRB indicated that the right to be heard process would have taken place in two phases. In the first phase ('the registration phase'), the affected shareholders and creditors were invited to express their interest in exercising their right to be heard, using an online registration form by 14 September 2018. The SRB then had to verify whether each party that had expressed an interest did in fact qualify as an affected shareholder or creditor. In the second phase ('the consultation phase'), the affected shareholders and creditors whose status had been verified by the SRB were able to submit their comments. On 6 August 2018, the first day of the registration phase, the SRB also published, on the web page for registering for the right to be heard process and on its website, a privacy statement concerning the processing of personal data in the context of the right to be heard process.

The SRB examined the relevant comments from affected shareholders and creditors; then it asked Deloitte, in its capacity as independent valuer, to assess the relevant comments and to examine whether the "valuation of difference in treatment" (see above) was still valid in the light of those comments. The comments transferred to Deloitte bore an alphanumeric code: on account of that code, only the SRB could link the comments to the data received in the registration phase. The alphanumeric code was developed for audit purposes to verify, and if necessary to demonstrate subsequently, that each comment had been handled and duly considered. Deloitte had no access to the database of data collected by the SRB during the registration phase.

The challenged EDPS's decisions. On 19, 26 and 28 October, and 5 December 2019, some shareholders and creditors who had responded to the form submitted five complaints to the EDPS, arguing that the SRB had failed to inform them that the data collected through the responses on the forms would have been transmitted to third parties, namely Deloitte.

On 24 June 2020, the EDPS adopted its first decision, finding that the SRB had infringed Article 15 of Regulation 2018/1725 because it had failed to inform the complainants, in its privacy statement, that their personal data might be disclosed to Deloitte. As a result, the EDPS issued the SRB with a reprimand for that infringement, under Article 58(2)(b) of Regulation 2018/1725.

Nevertheless, on 24 November 2020, following a review procedure triggered by the SRB, the EDPS adopted a revised decision, finding that: - Deloitte was a recipient of personal data under Article 3(13) of Regulation 2018/1725; - the fact that Deloitte was not mentioned in SRB's privacy statement as a potential recipient of the personal data collected and processed by the SRB as the controller in the context of the right to be heard process constitutes an infringement of the information obligations laid down in Article 15(1)(d) of the cited Regulation 2018/1725; - in light of all the technical and organisational measures set up by the SRB to mitigate the risks for the individuals' right to data protection none of the corrective powers laid down in Article 58(2) of the Regulation had to be exercised; the SRB had to be reminded to ensure that the data protection notice in future covers the processing of personal data in both the registration phase and the consultation phase, and includes all potential recipients of the information collected, in order to fully comply with the obligation to inform data subjects.

The judgement of the General Court. The SRB brought an action against the EDPS, claiming that the Court should annul the revised decision and declare the original decision unlawful.

As a preliminary point, the Court finds that the SRB's application for a declaration that the original decision was unlawful is inadmissible, since, according to settled case-law, the ECJ does not have jurisdiction to give declaratory judgments in the context of a review of legality under Article 263 TFEU.

As regards the first head of claim, which seeks the annulment of the revised decision, the Court finds that the revised decision of the EDPS is an act of the EU which is capable of affecting the interests of the SRB and therefore constitutes a challengeable act within the meaning of Article 263 TFEU: according to the Court, the finding in the revised decision that the SRB infringed Article 15(1)(d) of Regulation 2018/1725 has binding legal effects, even though the EDPS declared that he waived his right to exercise his corrective powers under Article 58(2) of Regulation 2018/1725.

On the merits, the Court fully upholds the SRB's pleas and concludes that the investigation conducted by the EDPS was seriously flawed.

More specifically, the first head of claim concerned a breach of Article 3(1) of Regulation 2018/1725, as the SRB argued that the information provided to Deloitte did not constitute personal data.

The Court first addresses the requirement that, in order to constitute personal data, the information must "relate to" a natural person and, cumulatively, it must relate to an "identified or identifiable" natural person. In particular, the EU judges consider that the EDPS erroneously classified as personal data all the comments made by the shareholders and creditors concerned during the consultation phase, whereas it would have been appropriate to limit his assessment to the information provided to Deloitte, given that the breach found concerned only the failure to disclose an additional recipient in the SRB disclosure.

Furthermore, in line with established case law according to which personal data implies that the information relates to a specific person by reason of its content, purpose or effect, the Court notes that in the present case the EDPS had not only failed to examine the content, the purpose or the effect of the information transmitted to Deloitte, but it "*merely stated that the comments produced by the complainants during the consultation phase reflected their opinions or views and concluded, on that basis alone, that they constituted information relating to the complainants, which was sufficient to classify them as personal data. At the hearing, the EDPS confirmed that, according to him, any personal opinion constituted personal data. He also acknowledged that he had not examined the content of the comments submitted by the complainants during the consultation phase. Admittedly, it cannot be ruled out that personal views or opinions may constitute personal data. However, it is apparent from paragraphs 34 and 35 of the judgment of 20 December 2017, Nowak (C-434/16, EU:C:2017:994), cited in paragraphs 68 and 69 above, that such a conclusion cannot be based on a presumption such as the one described in paragraphs 71 and 72 above, but must be based on the examination of whether, by its content, purpose or effect, a view is linked to a particular person*".

Therefore, in the absence of such a thorough examination, the EDPS could not conclude that the information transmitted to Deloitte constituted information "concerning" a natural person within the meaning of Article 3(1) of Regulation 2018/1725.

As regards the other condition, namely that the information relates to an "identified and identifiable" natural person, the EDPS also failed, according to the Court, to carry out an adequate verification.

On this point, the Court highlights that, in the present case, it is not disputed that the alphanumeric code contained in the information sent to Deloitte did not, in itself, allow the identification of the authors of the comments and, second, that Deloitte did not have access to the identification data received during the registration phase, which would have made it possible to link the participants to their comments by means of the alphanumeric code.

Against this backdrop, the Court recalls that, pursuant to the criteria elaborated by the ECJ in the judgment of 19 October 2016, Breyer (C 582/14, EU:C:2016:779), in order to determine whether the information transmitted to a third can constitute personal data, it is necessary to put oneself in the position of the third itself. It was therefore incumbent on the EDPS to determine whether the possibility of combining the information provided to Deloitte with the additional information held by the SRB constituted a means that could reasonably be implemented by Deloitte to identify the authors of the transmitted comments from the Deloitte's point of view and not from the SRB's point of view, as the EDPS erroneously examined. More precisely, according to the Court, "*the EDPS is incorrect to maintain that it was not necessary to ascertain whether the authors of the information transmitted to Deloitte were re-identifiable by Deloitte or whether such re-identification was reasonably possible. It must be stated*

that, in the revised decision, the EDPS concluded that the fact that the SRB held additional information enabling the authors of the comments to be re-identified was sufficient to conclude that the information transmitted to Deloitte was personal data, while acknowledging that the identification data received during the registration phase had not been communicated to Deloitte. Accordingly, it is apparent from the revised decision that the EDPS merely examined whether it was possible to re-identify the authors of the comments from the SRB's perspective and not from Deloitte's".

In conclusion, since the EDPS did not verify whether Deloitte had legal and practical means to access the additional information necessary to re-identify the authors of the comments, the EDPS could not conclude that the information provided to Deloitte constituted information relating to an "identifiable natural person" within the meaning of Article 3(1) of Regulation 2018/1725.

Fondazione Cassa di Risparmio di Pesaro and Others v Commission

1. Keywords and summary

Fondazione Cassa di Risparmio di Pesaro and Others v Commission

Court of Justice – Case C-549/21 P – Judgment of 27 April 2023 – ECLI:EU:C:2023:340

The European Commission is not liable for the losses incurred by former shareholders of Banca delle Marche

Scope of the assessment of the Court – Distortion of facts – Burden of proof

The General Court's assessment of the facts, with the exception of the case of their distortion, does not amount to a matter of law which can be brought before the ECJ. Such a distortion occurs when the assessment of the evidence is manifestly wrong or contrary to its wording, without the need to collect further evidence. However, such a distortion should manifestly result from the case files, without the need to reassess the facts and evidence. Furthermore, when a claimant alleges distortion of evidence by the General Court, he/she must indicate precisely the evidence which would be distorted and prove the errors of assessment that, according to him/her, would have led the General Court to such distortion.

In the case at stake, the claimants merely criticized the General Court's reasoning, without proving that that reasoning was based on a distortion of the evidence brought to the Tribunal itself. Indeed, as far as the four letters sent by the Commission to the Italian institutions regarding the envisaged recapitalisation of Banca delle Marche by the Italian deposit guarantee scheme (FITD) are concerned, the applicants failed to demonstrate that the General Court reading was based on a distortion of their contents. Furthermore, as to the contention that the Commission had threatened the Italian authorities to block or prohibit any interventions taken by the FITD in favour of Banca delle Marche in the light of Article 107 TFEU, the applicants aim at obtaining a re-assessment of the facts and of the evidence, which is as such inadmissible.

Non-contractual liability of the European commission – Relevant elements of fact and law

The unlawfulness of an act or conduct which may trigger the non-contractual liability of the Union, must be assessed only on the basis of the elements of fact

and law existing at the time of the adoption of such an act or conduct. Therefore, given that the ECJ ruled only in its judgment of 2 March 2021 (Commission v Italy and Others, C-425/19 P) that the European Commission had unlawfully qualified the FITD's intervention in favour of Banca Tercas as a State aid measure, the "four letters" in which the Commission had expressed its view on the nature of FITD's intervention could not, at the time of their adoption, be considered illegal, despite the possible link with the Tercas case.

Non-contractual liability of the European commission – Causal link – Burden of proof

The existence of a non–contractual liability of the Union requires simultaneously various conditions, namely a sufficiently qualified violation of a legal rule intended to confer rights on individuals, the existence of a damage and of a causal link between the violation of the obligation by the author and the damage suffered by the injured party. The requirement of a causal link pertains to the existence of a sufficiently direct cause-effect relationship between the conduct of the EU institutions and the damage, a relationship that has to be proved by the claimant, so that the alleged conduct must be the immediate cause of the damage.

In the case at stake, in so far as the claimants' argument seeks to demonstrate that the General Court erred in law by holding that, in order for the European Union to incur non-contractual liability, an exclusive causal link must be established between the Commission's conduct and the damage that they claim to have suffered, that argument is based on a manifestly incorrect reading of the judgment under appeal and, consequently, must be rejected. In fact, the General Court did not require the claimant to demonstrate the existence of an exclusive causal link, but it merely found that the determining cause of the damages was the autonomous decision of the Italian Authorities to put Banca delle Marche under resolution.

2. The Commission is not liable for the losses incurred by former shareholders of Banca delle Marche: the ECJ upholds the decision of the Tribunal of 30 June 2021 Fondazione Cassa di Risparmio di Pesaro and Others v European Commission (Case T-635/19)

by Donato Messineo and Giuseppe Calarco

Banca delle Marche S.p.A. was an Italian bank, which, due to serious violations and irregularities, on 15 October 2013, was placed under extraordinary administration as per Articles 70 and 98 of the Italian Consolidated law on Banking.

In order to restore it to a healthy condition, the temporary administrators planned an intervention involving the financial support of one of the Italian deposit guarantee schemes, which entailed restructuring the bank and recapitalizing it up to euro 1,2 billion.

The arranged capital injection in Banca delle Marche was supposed to be backed jointly by another bank (Credito Fondiario) and the Italian Interbank Deposit Protection Fund (hereinafter "FITD"). However, such endeavor failed due to some hurdles in the dialogue between the EU Commission and the Italian institutions.

And indeed, in October 2014 the EU Commission had initiated on its own motion a preliminary investigation in the rescue plan of another Italian bank (Tercas), concerning the role of the FITD in that operation. In particular, the Commission had notified the Italian institutions with a request for information, warning that the intervention of the FITD might have amounted to a State aid measure, subject – as such – to the prior approval regime laid down under 108, para 3, TFUE.

Thus, when the rescue plan for Banca delle Marche was deliberated by the temporary administrators on 8 October 2015 and communicated to the Bank of Italy right away, the latter was already aware of the view of the EU Commission. Therefore, the Bank of Italy immediately sent a notice to the Commission describing the financial situation of the bank and the terms of the envisaged recapitalization plan, which also involved an intervention by the FITD. With a joint statement of 19 November 2015, the Members of the Commission Mr Hill and Mrs Vestager reiterated the stance that recourse to a deposit guarantee scheme to recapitalize a bank was subject to State aid rules. Bearing in mind the fast deterioration of the financial position of the bank, which did not allow to go through the pre-notification procedure required in the case of State aid, on 21 November 2015 the Bank of Italy was left with no other choice but to place Banca delle Marche under resolution.

The applicants, former shareholders and bondholders of Banca delle Marche, by application lodged at the Court Registry on 25 September 2019, brought an action before the Tribunal against the Commission, claiming that, by providing Italian Institutions with illegal instructions, it prevented the recapitalization of Banca delle Marche, therefore negatively affecting their investment. With its judgment of 30 June 2021 Fondazione Cassa di Risparmio di Pesaro and Others v European Commission (Case T-635/19) the Tribunal rejected the applicants' request for damages.[1]

The appellants sought the annulment and/or reform of the judgment of the General Court and the issuance of an order to the Commission to pay compensation

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[1] See on this Newsletter, No 07-08, July-August 2021: "Il Tribunale dell'Unione nega ai soci il risarcimento, da parte dell'Unione medesima, per il mancato salvataggio della Banca delle Marche" by Guido Crapanzano.

for the damage caused to the them or, alternatively, to refer the case back to the General Court for the purposes of examining the other pleas in law presented at first instance.

First, the applicants contested the view of the Tribunal that the “four letters”[2] sent by the Commission to the Italian institutions were merely procedural in nature and did not contain any assessment of a defined and specific measure, nor any indication of the way in which the Commission interpreted notion of “aid” under Article 107 of the TFUE. Furthermore, the applicants claimed that the requests addressed to Italian institutions by the Commission amounted to unlawful acts, given that the FITD intervention, as clarified by the Court in the Judgment of 19 March 2019, Italy and Others v Commission (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), was clearly not a State aid measure, as it was not attributable to the Italian institutions.

In this regard, the Court notices that, according to its settled case-law, the assessment of the facts, with the exception of the case of their distortion, does not amount to a matter of law which can be brought before the Court. The distortion of the facts, which may represent a ground to validly appeal a decision, occurs only when, without the need of acquiring new evidence, or to proceed to a re-assessment of the facts or the evidence, the assessment of the existing elements appears to be manifestly wrong and contrary to their own formulation.

In the Court’s view, the applicants’ arguments deserve to be dismissed, as they only criticize the reasoning of the Tribunal, without advancing any compelling arguments to support their interpretation or to demonstrate that the Tribunal reading was based on a distortion of the contents of the “four letters”, or even highlighting any inaccuracy in the Tribunal interpretation.

Furthermore, as to the contention that the Commission had threatened the Bank of Italy and the Ministry of Finance, before the adoption of the resolution decision, to block or ban any future FITD intervention in favor of the Bank, or that, it had anyway exercised pressure on them, the EU judges notice that, since the applicants, with this argument, aim at obtaining a re-assessment of the facts and of the evidence, for which the Tribunal is exclusively competent, the applicant’s plea is to be rejected.

In the same vein, the Court finds inadmissible the plea related to point 60 of the Tribunal Decision, considering that the applicants simply claim that the content of the provisional valuation conducted by the Bank of Italy cannot be completely distorted, without explaining with the necessary clarity and precision, how the Tribunal would have distorted the analysis made by the Bank of Italy. In this regard, it is worth recalling that the Bank of Italy, in the context of the provisional valuation carried out in accordance with Article 25 of the Legislative Decree 180/2015 and Article 36, para 8, of Directive 2014/59, before the adoption

[2] i.e. the Commission’s letters of 10 October 2014, 18 December 2014, 21 August 2015, and 19 November 2015.

of the resolution decision, stated that the FITD intervention turned out to be unfeasible and incompatible with a prompt solution of the crisis.

Indeed, according to the Tribunal (point 60 of the contested judgment), the resolution decision was due only in part to the fact that Bank of Italy deemed necessary to notify in advance the Commission. Indeed, while it is certainly true that notification requirements represented an element capable of slowing down crisis management activities, this cannot be considered as a pivotal element of the choice to proceed with the resolution, considering also the fact that the rescue plan was not complete at that time, yet.

With regard to the argument relating to point 62 of the contested decision, the Court concludes that the applicants did not provide any evidence as to how the Tribunal distorted the content of the letter of 4 November 2015. In particular, with such letter the temporary administrators of Banca delle Marche informed the Bank of Italy of the imminent inability of the bank to pay its debts as they fell due, and shared their concerns regarding the actual possibility to save the bank. According to the Tribunal, the view expressed by the temporary administrators confirms that the FITD intervention was considered unfeasible in light of the wobbly situation of the Bank and not simply because of the need to notify the measure to the Commission.

The appellants also challenged point 66 of Tribunal Decision, in so far as it made reference to the fact that the President of the Court, in the order of 13 November 2019, Commission v Italy and Others (C-425/19 P, not published, EU:C:2019:980, paragraphs 17 to 21), rejected the applicants' request for leave to intervene in support of the order sought by the applicants in the first instance proceeding. According to such order, the claimants had failed to show an interest in the outcome of Case C-425/19 P, within the meaning of the second paragraph of Article 40 of the Statue of the Court of Justice of the European Union; they had also failed to establish the existence of a causal link between the position adopted by the Commission in the Decision taken in respect of Banca Tercas, and the resolution of Banca delle Marche.

In this regard, the appellants claimed that the existence of a correlation between the Tercas case and the resolution of Banca delle Marche is demonstrated by the acts of the Commission, and it is not contradicted by the rejection by the president of the Court of the application for leave to intervene.

According to the Court, such arguments are not sound, as they merely explain the position taken by the President of the Court in the order of 13 November 2019. If it is true that the request was rejected on the basis of Article 40, para 2 of the Statute of the Court, it is nonetheless true that, in order to establish the existence of the interest of the parties to take part in that proceeding, the President of the Court had to take a position on the existence of a link between the Tercas and Banca delle Marche cases, as he had to examine, in light of the argument put forward by the applicants, whether the Commission Decision on Tercas had an influence on the entire Italian credit system.

More importantly, the Court underlines – consistently with its consolidated case law – that the unlawfulness of an act or conduct capable of potentially triggering the non-contractual liability of the Union, shall be assessed solely on the basis of the elements of fact and law existing at the time of the adoption of such an act or behavior.

Therefore, it is only from the date of the Decision of the Tribunal of 19 March 2019, in case Italy and Others v Commission (T-98/16, T-196/16 and T-198/16, EU:T:2019:167), or, more correctly, from the date of rejection of the appeal (judgment of 2 March 2021, Commission v Italy and Others (C-425/19 P, EU:C:2021:154) that the qualification by the Commission of the FITD intervention as a State aid measure can be considered as an unlawful act. Consequently, the "four letters" in which, according the applicants, the Commission had expressed its legal view on the nature of the FITD interventions cannot be, at the time of their adoption, be considered illegal acts, despite the existence of a possible link with the Tercas case.

With the second part of the first plea, the applicants contend, *inter alia*, that the Tribunal, departing from consolidated case law, erred in law by assessing and examining in isolation the evidence submitted by them, while omitting to take into account the broader context of which they were part.

The Court rejected such argument, by clarifying that the Tribunal conducted a two-steps assessment, by analyzing first the four letters according to their chronological order, and, then, by carrying out an overall analysis of all the relevant evidence. Nonetheless, according to the EU judges, a global approach to the "four letters" would not have changed the results of the analysis, as with those letters the Commission simply requested the Italian institutions to notify any FITD intervention, since it was not possible to rule out, on the basis of the information in its possession, that the contested measure amounted to a Stated aid measure.

Anyway, in the Court's view, in its decision, the Tribunal adopted a holistic approach taking into account all the relevant context, as it is demonstrated by the fact that it concluded that the decision by the Italian institutions to commence a resolution was shaped mainly by the economic situation of the bank and by the impossibility to find a private market solution during the temporary administration, rather than by the possible delays caused by the need to notify the State aid measure to the Commission. It was indeed thanks to the overall assessment of all the elements of facts that the Tribunal ruled that, while the Commission behavior may have played a certain role in the decision making process of the Italian institutions, the decision to place Banca delle Marche under resolution was to be considered as an autonomous decision, as such not influenced in a decisive manner by the attitude of the Commission.

The Court also rejects the complaint that the Tribunal did not take into account point 55 of judgment of the Tribunal of 19 March 2019, in which the Court recognized that "*the contested decision not only made it impossible for the*

FITD to adopt a measure for the benefit of Tercas in the present case, but it also precluded the possibility of adopting other support measures in the future, by reducing the FITD's autonomy and that of its member banks": in the Court's view, such argument is based on an erroneous understanding of the abovementioned judgement. Indeed, the assessment on which the applicants seem to rely was conducted for the purpose of assessing the admissibility of the action brought by the FITD, and not when examining the merit of the case. In addition, the interpretation proposed by the applicants is contradicted by point 59 and 65 of the challenged decision, in which the Tribunal clarifies that the Commission did not prohibit, after the Tercas decision, the recourse to such schemes, but rather subjected them to a case-by-case analysis.

With the second plea in law, the applicants essentially claimed that the Tribunal erred in law in its interpretation of the notion of "sufficiently direct causal link", by requiring the applicant to demonstrate that the conduct of the Commission was the sole and exclusive cause of the damage.

On a general level, the existence of a causal link between the institution conduct and the damage needs to be ascertained in order to establish the liability of the Union. In particular, as the Court emphasizes, in order for such link to be established it lies with the applicant to demonstrate a cause-effect link between the conduct and the damages, so as that the former can be considered as the "proximate cause" of the latter. According to the EU judges, the argument of the applicants must be rejected, since it is based on a manifestly wrong reading of the Tribunal's decision. In this regard, the Court holds that the Tribunal did not require the applicant to demonstrate the exclusivity of the causal link, but, more limitedly, it stated, at the point 67 of the decision, that the proximate cause underlying the resolution decision was the autonomous decision of the Italian institutions.

Aeris Invest v ECB

1. Keywords and summary

Aeris Invest v ECB

Court of Justice – Case C-782/21 P – Judgment of 27 April 2023 – ECLI:EU:C:2023:345

ECB's decision denying access to documents requested under the ECB Decision 2004/258 (ECB/2004/3)

Right to access – Public access to ECB documents – Irrelevance of specific purposes for access of the applicant

Since, as specified in its Article 2(1), the purpose of the ECB Decision 2004/258 is to regulate the right of the general public to access to ECB documents and not to establish rules to protect the interest to access of a particular person, the ECB must assess applications for access under such Decision independently of whether the applicant has put forward any particular circumstance (e.g. the applicant's need to use those documents in judicial proceedings). The lack of consideration by the ECB for the specific interest to access put forward by the applicant does not vitiate its decision denying access.

The case-law concerning the right to effective judicial protection under Article 47 of the Charter of Fundamental Rights of the European Union does not require the ECB, in the context of an application made under the ECB Decision 2004/258, to grant access to certain documents which the person requesting access claims to need for the purpose of preparing a judicial action.

Moreover, pursuant to Article 4(1) of the ECB Decision No 2004/258, access to documents must be denied if the disclosure would likely undermine the interests which that provision protects. Therefore, the ECB, when deciding on applications for access under such Decision, cannot balance those interests against others of a private nature.

2. Access to documents relating to the resolution of Banco Popular: the Aeris Invest case

by Michelino Villani

On 27 April 2023 the European Court of Justice issued the appeal ruling in case *Aeris Invest Sàrl v European Central Bank* (ECB),[1] regarding the ECB's

[1] Judgment of 27 April 2023, *Aeris Invest Sàrl v ECB* (C-782/21).

denial to give access to some documents pertaining to the resolution of the Spanish credit institution Banco Popular Español, SA. The Court dismissed the appeal brought by Aeris Invest and upheld the General Court's judgment.

It seems appropriate to provide a summary of the dispute from the outset.

1. *The request of access*

Aeris Invest Sàrl was a shareholder in Banco Popular. On 7 June 2017 the Single Resolution Board (SRB) placed Banco Popular under resolution. The bank was subject to the sale-of-business tool, which consisted in the trasfer of the Banco Popular shares to Banco Santander for the purchase price of EUR 1. As a result of the SRB's determination Aeris Invest was deprived of ownership of its shares.

Aeris Invest asked the European Central Bank (ECB) to disclose some documents relating to Banco Popular pursuant to the ECB's Decision on public access of 4 March 2004.[2] The access was instrumental to the legal actions that the company intended to bring against the resolution. For the same purpose, the company presented analogous requests to the SRB, in order to obtain the documents concerning the resolution of Banco Popular in possession of this institution.[3]

Following the ECB's negative response,[4] the company submitted a confirmatory application,[5] in which it demanded the disclosure, in summary, of: 1) the non confidential version of the documents indicating the overall amount of the Emergency Liquidity Assistance (ELA) disbursed to Banco Popular, the ceiling established by the ECB, the related collateral and some other details; 2) the ECB's Failing and Likely to Fail Assessment regarding said bank; 3) any document from the Bank of Spain showing the daily and average balance (positive or negative) of the deposits of Banco Popular and the daily balance of the withdrawals in the period immediately preceding the resolution 4) documents and corrispondence sent by Banco Popular to the ECB or to the Bank of Spain the days preceding the resolution.

With three decisions adopted on 7 November 2017 the ECB denied access to the above documents, relying on some of the exceptions to the right of access provided for in Article 4 of the Decision of 4 March 2004.

As to the documents concerning the ELA provided to Banco Popular, the ECB based the refusal on the necessity of protecting: i) the confidentiality of

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

3 The company actually challenged the resolution before the General Court, which dismessed the action (judgment of 1 June 2022; T-628/17). The appeal against the first instance ruling is currently pending.

4 As far as can be understood, the ECB granted very partial access.

5 According to Article 8(2) of the Decision.

the proceedings of the ECB's decision-making bodies (Article 4(1)(a), first indent); ii) the public interest in the financial, monetary and economic policy of the Union (Article 4(1)(a), second indent); iii) the stability of the financial system (Article 4(1)(a), seventh indent). The ECB stated that the disclosure of those documents could have impaired the central banks' ability to effectively address temporary liquidity problems in future cases and thus to preserve the financial stability as well as the effectiveness of monetary policy. In the ECB's view, the disclosure of the ELA ceiling and the amount of ELA actually granted to a given bank might lead to an expectation that national central banks and the ECB will act in the same way even in situations not warranting such an approach; similarly, the publication of information concerning the collateral given to obtain the liquidity would deter banks from seeking ELA at the appropriate time and could also have the effect of reducing the national central banks' flexibility as to the determination of the type of assets to accept as collateral in the future.

As to the data relating to the monitoring of deposits and withdrawals, the ECB applied the exception under Article 4(1)(c), which aims at safeguarding "*the confidentiality of information that is protected as such under Community law*". The ECB objected that, according to said provision of the Decision of 4 March 2004, the information relating to the prudential supervision on Banco Popular was covered by a general presumption of confidentiality, since it fell under the professional secrecy regime laid down in European law (Article 27 of the SSM Regulation;[6] Article 53 of the CRD;[7] Article 84 of the BRRD).[8]

With reference to the FOLTF assessment and the documents that the ECB and the Bank of Spain received from Banco Popular, the denial was founded on the exceptions under Article 4(1)(c) and Article 4(2), first indent. In the ECB's view, those documents not only concerned the supervision on Banco Popular and therefore were subject to the secrecy regime, but also contained information on Banco Popular's market position and its assets and liabilities, publication of which could adversely affect the commercial interests of Banco Popular and Banco Santander.

2. *The first instance judgment*

Aeris Invest brought an action for the annulment of the ECB's denials. The company alleged that those refusals were in contrast with the Decision of 4 March 2004 and, in any case, infringed its right to an effective remedy as provided for in Article 47 of the Charter of Fundamental Rights of the European Union (CFREU). In the course of the lawsuit the applicant further complained that the ECB failed to fully motivate its refusal to disclose the information on the liquidity assistance to the Spanish bank.

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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.

The General Court upheld the company's application only in very limited part.

The Court agreed with the applicant's contention that the decision to deny the access to the documents concerning the ELA provided to Banco Popular was not adequately motivated, but only with regard to the refuse to give access to the outcome of the vote in the Governing Council on the matter. Since the exception under Article 4(1)(a), first indent of the Decision only covers the outcome of the proceedings of the Governing Council, it was concluded that the ECB had failed to state the reasons why this provision should extend to the outcome of the vote of that body.

In respect of all the other data regarding the liquidity assistance (amount, ceiling, collateral), the Court found the refusal to be lawful, as the ECB explained that their disclosure would have specifically and actually undermined the public interest in the monetary policy and financial stability of the European Union.[9]

Likewise, as regards the documents pertaining to the supervision on Banco Popular, the judgment concluded that the ECB's denial was well founded.

In this respect the Court observed that the Article 4(1)(c) of Decision of 4 March 2004 cannot be interpreted as enabling the ECB to rely on a general presumption of confidentiality covering all the information collected in the performance of its supervisory tasks. Indeed the recognition of a presumption would be inconsistent with the approach adopted by the European Court of Justice in *Baumeister* and *Buccioni*. In those decisions the Court considered that the confidentiality obligations established under Article 54 of the MiFID[10] and Article 53 of the CRD do not imply that all the information held by the supervisory is inherently confidential. Rather, the authorities can oppose the confidentiality only if they have checked 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.[11] This verification necessarily entails a factual and concrete assessment, which cannot be circumvented by the use of presumptions.

However, the Court found the denial to be lawful, for the reason that the motivation of the ECB's decisions was not merely based on this presumption, but referred to some circumstances indicating that the two conditions for triggering the confidentiality regime were actually met.

First, the data sought could not be seen as largely in the public domain at the time the ECB issued the decision, even if the market was aware of most of

[9] In the light of the reasons provided by the ECB, the Court held that the refusal, while not falling within the scope of Article 4(1)(a), first indent, was correctly grounded on Article 4(1)(a) second and seventh indent.

[10] Directive 2004/39/EC of 21 April 2004.

[11] Judgment of 19 June 2018, *Baumeister* (C-15/16), paras 34-35. See also judgment of 13 September 2018, *Buccioni* (C-594/16), paras 39-40.

the information relating to the resolution of Banco Popular, as it had appeared in the press or had been disseminated by the banks themselves in compliance with their transparency obligations towards the market. In the Court's view, the confidentiality is not ruled out by the fact that comparable information has been published by third parties, since such a situation cannot oblige the authority to disclose.

Second, at the point in time when the ECB made the assessment, it could be assumed that the information to which it refused access was capable of specifically and actually undermining the interests of Banco Popular or of Banco Santander. The Court observed that the adoption of a resolution scheme does not enable the conclusion that the information relating to the commercial position of the credit institution subject to resolution automatically becomes historical as if the bank ceased to exist. One of the objective of the resolutions is in fact to ensure the continuity of the critical functions. As for Banco Popular, after the resolution the bank remained in business as part of the Banco Santander group until April 2018 when it was merged by absorption with Banco Santander.

A disclosure would also have jeopardized the proper functioning of the prudential supervision. The Court agreed with the ECB's argument according to which there could be a risk that market operators would have engaged in speculation based on the data concerning Banco Popular's liquidity situation prior to its resolution.

Nor, in the Court's view, was there scope for applying the exceptions to confidentiality envisaged in the third subparagraph of Article 53(1) of the CRD and in Article 84(6) of the BRRD: as known, both allow, in different terms, the access for the purpose of exercising the right of defence (in particular by those harmed by a bank crisis). Indeed, the first provision refers only to credit institutions that have been declared bankrupt or are being compulsorily wound up; hence, it cannot apply to the information concerning banks that have been placed under resolution, on account that the nature and objectives of bankruptcy are essentially different from those of resolution. Likewise, the second one is devoid of relevance since it aims at leaving room for cases of access established in the national law, while the applicant submitted its request under the European law, namely under the ECB's Decision on public access. In the context of the CRD and of the BRRD – the Court recalled – the confidentiality is the general rule, the accessibility is the exception; as a result, the exceptions to the secrecy laid down therein must be interpreted strictly.

Finally, the Court dismissed the applicant's plea concerning the alleged violation of Article 47 of the Charter of fundamental rights. Aeris Invest argued that the contested decisions prevented it from gaining access to the documents on which the resolution of Banco Popular was grounded and thus from fully exerting its right to seek the judicial review of the resolution.

The judgment's reasoning is rooted in the characteristics of the public access established by the Decision of 4 March 2004. Purpose of the Decision is to define

the conditions governing applications for public access to documents held by the ECB and thereby implement the principle of transparency enshrined in Article 15 of the Treaty on the European Union; beneficiary of the right of access recognized therein is any citizen of the Union and any natural or legal person residing or having its registered office in a Member State. It follows that the Decision is not intended to lay down rules designed to protect the particular interest which a specific individual may have in gaining access. This finding is confirmed by the fact that a request for public access, if accepted, makes documents public *erga omnes*. Such an *erga omnes* effect – the judgment pointed out – would manifestly exceed the boundaries of the legitimate interests of a party seeking to rely on his or her right of defence in a case before the Court. Only in an action against the resolution of Banco Popular, therefore, Aeris Invest could raise any issue relating to the documents to be produced in the judicial proceeding for the purposes of the judicial review of the resolution.

In the light of all the above arguments, the Court annulled one of the contested decisions only inasmuch as it refused access to the outcome of the vote in the Governing Council in relation to the matter of the ELA to be provided to Banco Popular; as to the remainder, the Court deemed the action unfounded.

3. *The appeal judgment*

Aeris Invest filed an appeal against the first instance ruling relying on two pleas in law. In both the company insisted, from different perspectives, that the denied access constituted a violation of the right to an effective remedy laid down in Article 47 of the Charter of fundamental rights. The appelant did not repeat the other legal grounds put forward before the General Court.

The European Court of Justice ruled in line with the reasoning of the first instance judgment and rejected the appeal.

Basically the appeal judgment confirmed that the public access legal regime is not designed for the protection of the right to an effective remedy. Such a right, in the Court's view, cannot be exercised specifically through an application for public access.

This means that, when deciding whether to grant the access under the Decision of 4 March 2004, the ECB is not required to take into account the fact that the applicant may need the documents for the purposes of a lawsuit. Nor is the protection of said right such as to prevent the application of the exceptions enumerated in Article 4 of the Decision. As to the exceptions envisaged in Article 4(1) – the Court noted – the institution's refusal is mandatory where disclosure of a document is likely to harm the interests preserved by that provision, without any balancing with other competing interests being allowed. As regards the exception under Article 4(2), the Court observed that the right of defence constitutes a private interest and therefore cannot amount to an overriding public interest justifying a disclosure under that provision.

4. Some remarks

Overall, the case presents some issues worthy of attention.

In the judgment of first instance, the General Court confirmed that the Decision of 4 March 2004, as a matter of principle, enables the ECB to refuse access to the information concerning the ELA provided to banks. For that purpose, the ECB may rely on the protection of the monetary policy (Article 4(1) second indent) and financial stability (seventh indent), on the one hand, and on the confidentiality of the proceedings of the ECB's decision making bodies (first indent), on the other hand. But, according to the ruling, the latter exception has a very narrow scope, since it covers the outcome of deliberations of Governing Council – as the European Court of Justice held in *Espirito Santo Financial*[12] – and does not shield from access other elements reported in the minutes of the meeting (e.g. votes).

As to the information deriving from the ECB's activity as banking supervisor, the judgment excluded that the professional secrecy under Article 53 CRD permits the ECB to avail of a general presumption of confidentiality, because it would be inconsistent with the "Baumeister test", which requires the ECB to verify on a case-by-case basis if a disclosure would actually undermine the interests the professional secrecy intends to preserve.

More generally, the reasoning of the Court seems to align to the settled case-law elaborated by the European courts in interpreting the Regulation (EC) No 1049/2001.[13] Until now the Courts have allowed the European institution to presume the confidentiality of documents as regards clearly defined sets of documents relating to specific proceedings, with the aim of protecting the effectiveness of those proceedings. As a rule – according to said case-law – the institutions, when deciding to refuse a public access request, are mandated to explain how disclosure of the documents sought could specifically and effectively undermine the interest protected by the exception upon which they are relying. It follows that presumptions are a means of simplification to be applied carefully and only where appropriate, given that relying on general presumptions, instead of examining each document individually and specifically, results in a restriction of the general principle of transparency.

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[12] In this judgment of 19 December 2019 (C-442/18) the European Court of Justice considered that Article 4(1)(a), first indent of the Decision "*must be interpreted as safeguarding the confidentiality of the outcome of deliberations of the Governing Council, without it being necessary that the refusal to grant access to documents containing that outcome be subject to the condition that the disclosure thereof undermines the protection of the public interest*" (para 43).

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

Some months after its ruling on the present case, the General Court followed the same approach in *Malacalza Investimenti v ECB*[14] and *Corneli v ECB*.[15] In both the Court quashed the ECB's decision to deny the access to the documents pertaining to the Banca Carige's temporary administration, because the ECB had wrongly availed of a presumption of confidentiality. Unlike in the *Aeris Invest* case, in these two judgments the Court held that the ECB, having exclusively relied on this presumption, had failed to comply with the obligation to explain what adverse consequences could have occurred if access had been granted.

Also noteworthy is the motivation provided in both the first and second instance judgments regarding the conflict between the right to an effective remedy and the protection of confidentiality.

According to the rulings in question, neither the ECB's public access framework nor the exceptions to professional secrecy envisaged by the CRD and the BRRD warrant the right of defence of those who seek for the access with the intention of challenging the validity of the resolution in court. On the one hand, the ECB is not required to take into account the fact that the person who asked the public access may need the documents for the purposes of a lawsuit, because – as the Courts maintened in the present case – public access is a tool of transparency and as such cannot serve an individual purpose. On the other hand, those persons cannot benefit from any of the exceptions to confidentiality established in the CRD and in the BRRD because these are subject to strict interpretation.

The combination of these two interpretative positions has quite penalizing consequences, expecially for those who are entitled to seek for the judicial review of the resolution decision.

It should be considered that the legal framework governing the resolution does not envisage the exercise of procedural rights before the measure is adopted. As a result, the persons potentially affected by the resolution cannot have access to the file in the course of the administrative proceeding.[16]

There remains only the possibility to file an action for the annulment of the resolution decision and then to apply for a Court measure imposing the SRB or the ECB to lodge a non-confidential version of the relevant documents for the judicial review of the contested decision.[17]

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14 Judgment of 28 September 2022 (T-552/19 OP); see "The General Court's rulings on the access to the documents relating to the Banca Carige's temporary administration" in this Newsletter, No 20, September 2022.

15 Judgment of 29 June 2022 (T-501/19).

16 The absence of procedural sadeguards was one of the objections raised by Aeris Invest in support of its action for annulment of the resolution (T-628/17). The General Court rejected it (judgment of 1 June 2022, paras 220-272).

17 See Articles 91(b), 92(3) and 103(3) of the Rules of procedure of the General Court. See also Article 24 of the Statute of the Court of Justice of the European Union.

Against this legal environment, it is reasonable for interested parties to apply for public access for an individual purpose – collecting documents in support of an intended legal action – rather than for the sake of transparency. Interestingly, the aforementioned *Malacalza* and *Corneli* cases also concerned public access requests aimed at obtaining documents relating to an administrative proceeding (that of the temporary administration) in which the right to be heard is not guaranteed. The applicants, both shareholders of Banca Carige, sought for the documents that the ECB had not previously disclosed for the purposes of a legal action against the early intervention measure.

The European Courts may have to deal with similar disputes again in the near future.

ECB v Crédit lyonnais

1. Keywords and summary

ECB v Crédit lyonnais

Court of Justice – Case C-389/21 P – Judgment of 4 May 2023 – ECLI:EU:C:2023:368

Exclusion of certain exposures to public sector entities for the purposes of the calculation of the leverage ratio

Leverage ratio – Exclusion of certain exposures to public sector entities – Discretion of the ECB – Scope of the assessment of the Court

Under Article 429(14) of Regulation (EU) No 575/2013, in its version preceding the amendment of 2019, the ECB had a broad discretion in deciding whether or not to permit a credit institution to exclude an exposure to a public sector entity with the characteristics stipulated therein from its total exposure measure for the purposes of calculating it leverage ratio.

The judicial review of such a decision must not lead the Court to substitute its own assessment for that of the ECB, but needs to seek to ascertain that the ECB's decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of power. The General Court, in so far as it replaced the ECB's assessment in the contested decision with its own assessment of the risk of fire sales of assets to which the credit institution concerned was exposed, without establishing how the ECB's assessment set out in that decision was vitiated by a manifest error of assessment, exceeded the scope of its judicial review and, therefore, its judgment must be set aside.

Leverage ratio – Exclusion of certain exposures to public sector entities – Discretion of the ECB – Circumstances apt to be taken into consideration

It falls within the ECB's legitimate use of its discretion under Article 429(14) of Regulation (EU) No 575/2013, in its version preceding the amendment of 2019, to deny or limit the exclusion by a credit institution of certain exposures to a public sector entity from its total exposure measure for the purposes of calculating its leverage ratio on the basis of the assessment that such credit institution is exposed to specific risks related to those exposures taking into account three factors, namely the creditworthiness of the national central government, the risk of fire sales of assets and the level of concentration of exposures to the public sector entity.

Leverage ratio – Exclusion of certain exposures to public sector entities – Responsibility of credit institutions

When in 2019 the Union legislature amended Regulation (EU) No 575/2013 and transposed the provision regulating the possibility to exclude exposures to public sector entities with specific characteristics for the purposes of the calculation of the leverage ratio from Article 429(14) to Article 429a(1)(j), it also deleted the reference to a permit to be provided in this regard by the competent authority. As it is apparent from the wording of the amended Article 429a(1)(j), the purpose of such provision is not to exclude by operation of law certain exposures from the measure of total exposure for the purposes of calculating the leverage ratio, but to remove the obligation for the institutions concerned to obtain authorisation from the competent authorities for the purposes of such exclusion, by transferring to them the responsibility to assess whether that exclusion is justified for exposures satisfying the conditions laid down in Regulation (EU) No 575/2013.

2. The Court of Justice on the exclusion of certain exposures to public sector entities for the purposes of the calculation of the leverage ratio)

by Giuseppe Pala

1. On 4 May 2023, the Court of Justice may have put an end to a legal dispute that has seen the ECB confront some French banks since 2015,[1] concerning the correct interpretation and application of Article 429(14) of Regulation (EU) No. 575/2013 (Capital Requirements Regulation - CRR).[2] Under this provision, which regulates the calculation of the leverage ratio (i.e. capital measure divided by total exposure measure) of credit institutions and investment firms, an institution may be authorised by the competent authority to exclude from its total exposure measure exposures that have the following characteristics: (a) they are exposures to a public sector entity; (b) they are treated, for prudential purposes, as exposures to the central, regional or local government to which the public sector entity belongs (i.e. as exposures with very low credit risk), by reason of the existence of an adequate guarantee by that government; (c) they arise from deposits that the institution is legally obliged to transfer to that public sector entity for the purpose of funding general interest investments.

In 2015, *Crédit Agricole SA* (a significant institution subject to direct

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1 See, also, "*Criteri per l'esenzione delle esposizioni verso organismi di diritto pubblico nel calcolo del coefficiente di leva finanziaria*" in this Newsletter, No 4, April 2021, and Crapanzano, G., *Case-study: the Livret A cases*, in D'Ambrosio, R. (edited by), *Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)*, Quaderno di Ricerca Giuridica della Consulenza Legale, No 88, April 2020.

2 This provision was later amended and moved by the Union legislature from Article 429(14) to Article 429a(1)(j) CRR. See, also, point 3 of this article.

supervision by the ECB, like the group at the top of which it is placed, that comprises *Credit Lyonnais*) applied to the ECB, for itself and for the banks in the group, for permission under said Article 429(14) CRR to exclude from the measure of their overall exposures the exposures to the *Caisse des dépôts et consignations* (CDC), a French public entity to which banks are required to transfer (at least in part) sums deposited by clients following the opening of special tax-exempt savings accounts governed by national law.

The ECB's decision of August 2016 denied the permit by reason of the prudential relevance of such exposures for the calculation of the leverage ratio. In the following judicial proceeding (case T-528/16), the General Court, by judgment of 13 July 2018, annulled the decision, censuring that the ECB had emphasised, in negative terms, characteristics of the exposures to the CDC that, by being attributable to all the exposures referred to in Article 429(14) CRR, would led to the substantial inapplicability of the exclusion provided for therein. Moreover, in the General Court's view, the ECB had not carried out the required examination of all the elements of the case brought to its attention.

In 2018, *Crédit Agricole* reiterated to the ECB its request for permit pursuant to Article 429(14) CRR. The resulting ECB's decision of 3 May 2019 authorised the exclusion of the said exposures by *Crédit Agricole* and its subsidiaries, with the exception of *Crédit lyonnais*, to which the exclusion was granted in the limit of 66%.

In particular, with regard to this bank, the ECB considered, first, that the rating assigned to the French Republic by the external credit assessment institutions (ECAIs) is not the highest possible and that its probability of default is not considered to be zero; second, that the obligation for banks to return to their clients the sums deposited when they opened the savings accounts implied that, in the face of unexpectedly large requests of withdrawal similar to those experienced in recent banking crises, the banks themselves may be forced to resort to emergency sales of their assets ('fire sales') pending the transfer of funds by the CDC, which according to national law must take place within ten days; third, that *Crédit Llyonnais* did not benefit from the solidarity mechanism existing within the *Crédit Agricole* group, which required institutions to provide support to each other in the form of capital and liquidity, if needed. Therefore, taking also into account the high concentration of exposures to the CDC of *Crédit lyonnais* (amounting, in relation to Tier 1 capital, to 134% in 2015 and 231% in 2018), the ECB deemed it necessary to prudentially grant the exclusion within the aforementioned limit of 66%.

Crédit lyonnais challenged the ECB's new decision before the General Court, claiming non-compliance with the aforementioned judgment of 2018; that the decision was erroneous in conflict with Article 429(14) CRR; and that the ECB's assessments were unfounded on the merits (case T-504/19).

The General Court, on 14 April 2021, once again annulled the ECB's decision, finding that it was unlawful for the following several reasons (but excluding non-compliance with the previous judgment).

Indeed, the General Court emphasised that, although the judgment of 2018 did not prevent the ECB from taking into account the risk of excessive leverage linked to the possibility of massive requests of withdrawal by clients during a crisis, such an assessment should nevertheless have been accompanied by a careful examination of the characteristics of the savings products governed by French law.

On the contrary, and therefore unlawfully, the ECB failed to take into account three aspects highlighted by the applicant: (i) since the savings accounts at hand constitute 'safe haven assets' because they are liquid and, at the same time, guaranteed by the State, during a crisis deposits related to such products tend to increase rather than decrease; (ii) the risk of excessive leverage refers to the situation where a credit institution finances too large a part of its investments with debt rather than with its own funds, but the sums deposited in the regulated savings accounts must be transferred to the CDC and, therefore, cannot be invested in risky or illiquid assets; (iii) the sums that credit institutions are required to transfer to the CDC benefit from a double guarantee of the French Republic, one for the depositors, the other for the credit institutions.

2. Upon appeal by the ECB, on 4 May 2023 the Court of Justice, First Chamber, set aside the judgment of the General Court of 14 April 2021 and dismissed the action brought in by *Crédit lyonnais* (case C-389/21).

The Court recalled that, according to its settled case-law, when the Union law confers upon the ECB (or any other Union institution) a broad discretion in relation to a specific matter, as it is the case for the decision whether or not to grant the permit under Article 429(14) CRR, the judicial review carried out by the Court on the relevant decision must not lead it to substitute its own assessment for that of the ECB, but seeks to ascertain that that decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of powers.

In the case at hand, according to the Court, the reasoning on the basis of which the General Court partially annulled the ECB's decision did not call into question the material accuracy, reliability and consistency of the factors taken into account in that decision, nor established that those factors did not constitute all the relevant information which had to be taken into consideration. On the contrary, the General Court carried out its own assessment of the level of the risk of fire sales of assets to which *Crédit lyonnais* was exposed, and substituted it for the ECB's assessment without establishing how the ECB's own assessment was, in that regard, vitiated by a manifest error of assessment and, moreover, in a situation in which that institution enjoys a broad discretion.

Therefore, the Court set aside the General Court's judgment and then, in accordance with the first paragraph of Article 61 of the Statute of the Court of

Justice, it proceeded to give final judgment in the matter, holding that the state of the proceedings so permitted.

The Court examined, in particular, the *Crédit lyonnais*' pleas in the action at first instance that had not been already definitively rejected by the General Court, *i.e.* first, the plea according to which, when assessing the risk of fire sales of assets, the ECB did not carry out a detailed analysis of the characteristics of the regulated savings accounts at hand and, second, the plea relating to the supposed ECB's omission in adducing evidence supporting the likelihood of a default on the part of the French Republic, which would justify a refusal, even in part, to authorise the exclusion provided for in Article 429(14) CRR.

As regards the first plea, the Court stated that the ECB assessed, in the light of all the relevant characteristics of regulated savings accounts, that *Crédit lyonnais* was exposed to the risk that, in case of massive withdrawals in a short period of time during a banking crisis, it would need to adopt emergency measures, including distressed selling of assets, in order to have the funds necessary to comply with those requests for withdrawals. In other words, the ECB carried out a prudential analysis of a provisional nature, determining the effects that events that may or may not occur could have on an institution's ability to withstand those events.

Such an assessment by the ECB did not require the proof of the existence of past events with the same characteristics as the scenario analysed and, in any case, was not manifestly implausible nor based on manifest errors, considering that the arguments and evidence put forward by *Crédit lyonnais* which make it possible to make the finding that, during certain past banking crisis episodes, the overall level of deposits on certain regulated savings accounts tended to increase, were not as to clearly establish that there was no risk at all that depositors would make instantaneous and massive withdrawals of those savings with the aim, for example, of reinvesting them in safer institutions.

Furthermore, as regards the plea relating to the likelihood of a default of the French Republic, the Court found that the ECB assessed the risk of default on the basis of evidence (the rating attributed to the French Republic by the external credit rating bodies, which include Standard & Poor's, which was not '*the highest possible*', and the five-year credit default swaps, which implied '*a non-negligible probability of default* [of that country]') which reasonably allowed the view to be taken that the risk linked to the creditworthiness of the French central government was not negligible. There was, in other words, no manifest error of assessment by the ECB, which acted within its broad discretion in concluding that such risk gave rise to 'prudential issues' which would justify it not authorising in total the exclusion under Article 429(14) CRR to *Crédit lyonnais*.

In light of these arguments, the Court of Justice rejected all the pleas of the applicant and dismissed the action.

3. It is worth mentioning, in conclusion, that in 2019 the Union legislature amended the CRR and transposed the provision regulating the exposures to

public sector entities with the characteristics described above for the purposes of the calculation of the leverage ratio from Article 429(14) to Article 429a(1)(j) CRR. In doing so, the Union legislature also deleted the reference to a permit to be provided by the competent authority, that is therefore not necessary anymore.

Responding to an argument brought forward by *Crédit lyonnais* against the ECB's decision, leveraging on the supposed assessment of the legislature of the irrelevance, for the purposes of leverage risks, of the exposures to public sector entities, the Court remarked that the purpose of the new provision is not to exclude by operation of law certain exposures, such as those related to regulated savings, from the measure of total exposure for the purposes of calculating the leverage ratio, but to remove the obligation for the institutions concerned to obtain authorisation from the competent authorities for the purposes of such exclusion, "*by transferring to them the responsibility to assess whether that exclusion is justified for exposures satisfying the conditions laid down in the* [CRR]".

Therefore, the Court appears to say, the new provision does not exclude sic et simpliciter any relevance of such exposures for the purposes of the calculation of the leverage ratio, but entrusts the institution with the task of assessing whether the exclusion of the same exposures would be reasonable and prudent or not.

3. Reference to "notes de doctrine"

Maurizia De Bellis, *Judicial review and administrative discretion: the revival of a standard of deference in ECB vs. Crédit Lyonnais?*, EU Law Live, 4 July 2023.

The case-law of the EU administrative review bodies

Case 2/2022, decision of 11 January 2023

1. Keywords and summary

[.] v the Single Resolution Board

Case 2/2022 – Final decision of 11 January 2023

SRB's decision setting the minimum requirement for own funds and eligible liabilities (MREL)

MREL – Combined Buffer Requirement (CBR) – Compliance with Article 10a SRMR – Competence of the Appeal Panel

The Combined Buffer Requirement referred to in Article 128(1), point (6), CRD IV (CBR) is different from the Combined Buffer Requirement referred to in Article 10a SRMR (CBR-M). The situation described in Article 10a SRMR occurs when a credit institution meets the CBR in addition to its Pillar 1 and Pillar 2 capital requirements but fails to meet the CBR-M in addition to the MREL. There is a "stacking order" between MREL (including iMREL) and the CBR-M, meaning that institutions have to meet the MREL/iMREL requirement first and then the CBR-M. Thus, to assess a CBR-M shortfall under Article 10a SRMR, the entity must first be MREL compliant, which means that available own funds must have been accounted for MREL.

The language of Article 10a SRMR sets out that the procedure under Article 10a: (i) is "downstream" to the MREL decision; (ii) must be initiated after the MREL decision is taken and only as a result of the specific assessment under Article 10a SRMR; and (iii) materializes in a decision posterior and different from the MREL decision, which is adopted under a different legal basis (Article 10a instead of Article 12 SRMR). Such a decision is not listed in Article 85 SRMR and, therefore, cannot be challenged before the Appeal Panel and must be directly challenged before the General Court of the European Union.

MREL – Waiver of iMREL – Conditions for the waiver

The SRMR provides for two exceptions to the compliance with iMREL for non-resolution entities: (i) where the SRB permits the requirements to be met through a collateralized guarantee, under Article 12g(3) SRMR; (ii) where the SRB waives the requirement altogether, under Article 12h SRMR. In the scenario of collateralized guarantee, the resolution entity and the subsidiary must take the initiative, as they need to provide evidence to the Resolution Authority that the guarantee meets the requirements under Article 12h SRMR.

MREL DECISION – Waiver of iMREL – Conditions for the waiver – Burden of proof

The SRB is not obliged to automatically grant a waiver of iMREL when the ECB has granted a capital waiver in accordance with Article 7 CRR, and such an ECB waiver is not, per se, a sufficient indication that a waiver of iMREL is to be granted. The SRB must be able to exercise its discretion as its assessment relates to the credit institution in a (potential) gone concern. In contrast, an assessment of the ECB, which relates to the credit institution in a going concern, is relevant but not binding upon the SRB. Supervisory and resolution objectives may, in certain circumstances, yield different outcomes, especially in the context of complex assessments such as those related to prudential and iMREL waivers. An appellant who claims that a waiver should have been granted, given the circumstances, must provide evidence that the factual elements necessary for such an assessment were all available to the SRB.

2. The Appeal Panel of the SRB on the interaction of prudential waivers, combined buffer and (i)MREL

by Guido Crapanzano

The facts of the case can be summarised as follows.

Beta bank is a subsidiary institution of its parent institution Alpha bank, both established in the same Member State. The group qualifies as significant under the SSMR and, therefore, all supervised entities of the group are subject to the direct supervision of the ECB. The competent authority has granted Beta the waiver under Article 7(1) CRR, and therefore that bank is not subject to the prudential requirements under Article 6(1) CRR on an individual basis. However, both Alpha and Beta are required to comply with the prudential requirements at their consolidated and sub-consolidated levels, respectively.

From a resolution perspective, Alpha and Beta belong to the same resolution group, whose resolution entity is Alpha and whose perimeter differs from both Alpha's consolidated and Beta's sub-consolidated perimeters. Accordingly, in its MREL decision, the SRB set the level of MREL for Alpha, at the resolution group level and, under Article 12g of the SRMR, the level of iMREL for Beta at its individual level.

Beta challenged the decision on its iMREL before the Appeal Panel.

The appeal was based on three grounds:

1. several errors in law, as (i) Beta should not have been subject to any iMREL, (ii) the SRB incorrectly considered that Beta had to maintain a combined buffer requirement in addition to the iMREL (the 'CBR-M'), and (iii) the SRB wrongfully applied the methodology set out in the

Commission Delegated Regulation (EU) 2021/1118 to an entity that is not a resolution entity;

2. violation of the principle of proportionality, as the SRB, taking into account the waiver granted by the ECB under Article 7(1) CRR, should have applied less onerous and constraining alternatives;
3. violation of the principle of good administration in the exercise of discretion and manifest error of assessment, as the SRB understated Beta's level of own funds (by deducting an amount corresponding to a combined buffer requirement – the 'CBR') and did not take into account the decision of the competent authority waiving the prudential requirement on an individual basis.

The appeal has been eventually dismissed in its entirety, in part because some of the pleas were inadmissible because unrelated to the determination of the iMREL, but rather to the consequences, pursuant to Article 10a SRMR, of a possible breach (if any) of the CBR-M. In fact, under Article 85 SRMR, decisions under Article 10a SRMR are not among those which the Appeal Panel can rule on.

Nonetheless, the decision allows examining some critical and challenging issues on the interaction of prudential and resolution requirements, not only on points that the Appeal Panel was in a position to examine, but also on points that the Panel was unable to explore despite being crucial in the assessment of this interesting case.

Amongst the different interesting topics dealt with in the decision, two issues emerge.

1. Interaction of prudential and resolution requirements

One of the first arguments Beta raised in its appeal, as part of the first plea of error in law, was that the decision setting its level of iMREL violated the applicable framework, because no iMREL can be set to credit institutions that have been waived of prudential requirements at the individual level under Article 7(1) CRR. According to this view, prudential and resolution requirements should always move in parallel, so that no iMREL can be set when the competent authority has assessed that conditions under Article 7(1) CRR are in place. In fact, for the waiver of prudential requirements at the individual level to be granted, the competent authority has to assess that the supervision on a consolidated basis is sufficient to cover the subsidiary.[1] In the appellant's view, if the competent

[1] Namely, amongst other elements, that the subsidiary institution is included in the supervision on a consolidated basis of its parent, the parent's risk management procedures also sufficiently cover the subsidiary, the distributions of own funds between the two entities is adequate, and there is no impediment to the transfer of funds within the group to cover the subsidiary's potential losses.

authority has assessed all those elements and is content with supervising the subsidiary only on a consolidated basis, as part of the group, then no iMREL can be imposed on the subsidiary, either because it is superfluous – as, similarly to the prudential requirements, the MREL imposed on the resolution entity, at the resolution group level, will automatically cover the subsidiary – or because the decision of the competent authority implies that the conditions for waiving the iMREL pursuant to Articles 12h or 12i SRMR are in place, with no need of a formal request from the subsidiary institution.

The Appeal Panel dismissed this plea.

The Panel upheld the SRB's argument that the presence of a capital waiver from the competent authority does not imply an automatic iMREL waiver, although it is an important element which needs to be considered, among all other factual and legal circumstances, to verify whether conditions under Articles 12h or 12i SRMR are in place. The decision is based on the argument that, according to the wording of Articles 12h and 12i SRMR, the resolution authority «*may*» waive the iMREL, and thus the waiver comes from a discretionary decision, which is triggered by no automatic conditions. The Appeal Panel notes that the decision to allow the MREL being met with a guarantee under Article 12g(3) SRMR likely requires a previous formal request from the institutions involved, as they have to depict the guarantee's features to the resolution authority; on the contrary, the Panel argues that the SRMR does not explicitly require a previous request, for the resolution authority to grant the waivers under Articles 12h or 12i SRMR. However, despite the resolution authority being allowed granting the waiver on its own initiative, in the case at hand, no evidence has been provided that the SRB did have the relevant information to assess whether the conditions for a waiver were in place, and therefore it was under no obligation to make such an assessment.

In this context, the Appeal Panel argues that the prudential waiver granted by the competent authority under Article 7(1) CRR, however important, is not, *per se*, a sufficient indication that also an iMREL waiver needs to be granted, because the resolution authority is required to make a – discretionary – assessment related to a (potential) gone concern, while the competent authority is required to perform a – discretionary – assessment in going concern.

This substantial argument looks decisive, and correctly identifies the different purposes, rationales and objectives that allow distinguishing not only the different waivers under the CRR and the BRRD/SRMR but also, more generally, prudential and resolution requirements. When the competent authority grants the waiver under Article 7(1) CRR, it has to assess whether the group in its entirety has sufficient resources and adequate risk management procedures to cover all losses that may occur – up to an ideal confidence interval – to each subsidiary in a going concern scenario, that is, assuming that their business is not undergoing major structural changes. On the other side, iMREL waivers are assessed by the resolution authority having in mind a situation of potential gone concern, in which the continuity of critical functions can be assured only

through some major structural and/or financial changes to the group's business. Bearing in mind this difference, it may well happen that the ability of the group to cover losses of its subsidiaries through a transfer of funds, which has been assessed by the competent authorities on a going concern basis when granting the waiver under the CRR, may not be held true in a gone concern scenario. In this respect, any different assessment between the two scenarios will likely depend on the features of the event that eventually creates the crisis and on the expected resolution actions to be adopted.[2]

At least in some cases, if correctly motivated, the decision to impose an iMREL to a subsidiary that does not have to comply with prudential requirements on an individual basis can be claimed neither illegitimate nor unreasonable.

2. *A difficult point: how to calculate the iMREL of entities that are waived from prudential requirements on an individual basis?*

Though such a decision may have solid grounds, a difficult technical point remains: how can Beta's iMREL be calculated, if all elements (the Pillar 1 and Pillar 2 requirements, as well as the CBR) according to which the MREL components (the LAA(-L), the RCA(-L) and the MCC)[3] are calculated, are identically set equal to zero on an individual basis due to the waiver under Article 7(1) CRR? It is true that, according to the reasoning in the previous section, positive prudential requirements may well be imagined applying to Beta after a potential resolution, as there is no reason to assume that the competent authority will necessarily maintain the waiver after the application of resolution tools and powers. Still, this line of reasoning seems partial, as it only affects the determination of the RCA(-L) and MCC (which are centred around the *perspective* capital and buffer requirements after the resolution). According to this reasoning, it should be

[2] For instance, if the resolution plan anticipated that the resolution entity might not be in a position to recapitalise the subsidiary in a FoLTF scenario and that, at the same time, the subsidiary could not be wound up under ordinary insolvency procedure and would have to be kept in business (or even separated from the rest of the group, through a sale or a bridge bank), then there would be good arguments to require the subsidiary to comply with an iMREL, even though it were granted the waiver under Article 7(1) CRR.

[3] It is useful to remind that, under Articles 45c BRRD and 12d SRMR, the MREL-TREA is calculated – disregarding many details – as the sum of a Loss Absorption Amount (LAA, centred around the sum of the *current* Pillar 1 and Pillar 2 requirements) and a Recapitalisation Amount (RCA, centred around the sum of the *perspective* Pillar 1 and Pillar 2 requirements, plus an additional Market Confidence Change – MCC – aimed at taking into account the need to restore and maintain market access after resolution. The MCC is centred around the difference between the *perspective* combined buffer requirement under Article 128, first paragraph, point (6), CRD and the *perspective* countercyclical buffer under Article 128, first paragraph, point (2), CRD). In this context, *perspective* requirements refer to the amounts that are expected to apply after implementing the preferred resolution strategy. The calculation of the MREL-TEM is a bit simpler, as it is calculated – disregarding many details – as the sum of a Loss Absorption Amount (LAA-L, centred around the *current* Pillar 1 leverage requirements) and a Recapitalisation Amount (RCA-L, centred around the *perspective* Pillar 1 leverage requirements).

admitted that Beta's *current* capital requirements really seem to be equal to zero, and thus at least its LAA(-L) should, in principle, have been set accordingly.

Still, I believe there are good reasons to think otherwise.

In fact, the application of the waiver under Article 7(1) CRR does not mean that Beta's business entails no risks and needs no capital to be maintained. It only means that Beta's capital requirements at an individual level are absorbed into the consolidated requirements at the group level, as the competent authority was content with the group risk management procedures and the availability of sufficient funds, at the group level, that may be transferred to the subsidiary in case of losses. All of Beta's assets and liabilities remain as a part of the group's consolidated accounts, and generate capital needs at the consolidated level; conversely, Beta's own funds become part, though filtered through the consolidation and the minorities deductions, of the consolidated own funds of the group, and determine the group's capital ratios.

Therefore, it is always possible, at least in principle, to piece together the elements (the Pillar 1 and Pillar 2 requirements, as well as the CBR) necessary to set the subsidiary's iMREL components (the LAA(-L), the RCA(-L) and the MCC), even though the subsidiary has been granted a capital waiver and is not required to comply with prudential requirements on an individual basis directly. In that case, all those elements will be calculated *on a notional basis*, and such notional amounts will affect the determination of the (i)MREL components (and also the CBR-M on top of the (i)MREL).[4]

How to determine those notional amounts?

The decision of the Appeal Panel does not elaborate on the methodology applied by the SRB in this specific case, probably because the determination of the iMREL components was not the object of any specific pleas. The only information that can be recollected from the decision is that the SRB used "*the*

[4] Under Articles 16a BRRD and 10a SRMR, institutions are required to maintain an additional buffer on top of the MREL-TREA (the CBR-M), whose amount is equivalent to the amount of the combined buffer requirement under Article 128, first paragraph, point (6), CRD existing '*at any point in time'*. In this context, 'at any point in time' means that, if the CBR changes because some of its components are subject to a new determination of the competent or designated authorities, or because they are dynamically linked to some economic variables (as it is the case of the SyRB and the CCyB), the amount of the CBR-M will change accordingly. It is important to remark that a positive CBR-M sitting on top of the (i)MREL can well be necessary even when no CBR sits on top of the (Pillar 1 and 2) capital requirements due to the waiver under Article 7(1) CRR. In fact, under Articles 16a BRRD and 10a SRMR, the CBR-M is required to protect the (i)MREL and to force the institution, under some circumstances, to limit the distributions to stakeholders and to use its annual income to increase its own funds. Given its functioning, it seems clear that the CBR-M is supposed to operate, in going concern, every time an (i)MREL applies, irrespectively of whether the (Pillar 1 and 2) capital requirements and CBR do. This is because the CBR-M may trigger the M-MDA, which in turn affects the distribution of the institution's income in the periods in which that income accrue; namely in a going concern scenario.

same methodology" as in Delegated Regulation (EU) 2021/1118 to determine the CBR-M under Article 10a SRMR.[5]

Apart from the CBR-M, what methodology can determine the notional amounts of the LAA(-L), the RCA(-L) and the MCC in the case at hand?

Two different methods come up intuitively: synthetic and analytic, and both come with pros and cons.

The synthetic method is essentially the one adopted in Delegated Regulation (EU) 2021/1118 for estimating the Pillar 2 requirements and the CBR in the cases where the resolution group's perimeter differs from the prudential consolidation's perimeter. The idea is relatively simple: when exact figures for the Pillar 2 requirements and the CBR are not available at the resolution group level, the Delegated Regulation requires the resolution authority to refer to the prudential requirements applied to another level of the group that is "sufficiently close" to the resolution group.[6] The main arguments in favour of this approach are that it relies on assessments already made by the competent authority and does not require any complicated calculation. The main argument opposing this approach is that it is unclear how easily the methodology in Delegated Regulation (EU) 2021/1118 can be extended, even by analogy, to cases that are out of the scope of that Regulation. On the one side, the Delegated Regulation has been adopted, according to its mandate, to set the MREL of resolution entities; thus, it is not clear, as already pointed out in Beta's appeal, whether the same method may be applied to set the iMREL of subsidiaries that have been granted the waiver under Article 7(1) CRR. On the other side, the Delegated Regulation is focused, again according to its mandate, on determining the Pillar 2 requirements and the CBR; still, it does not identify any methodology to determine the Pillar 1 requirements

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5 Yet, the CBR-M is an additional requirement that goes on top of the (i)MREL, and is therefore external to the determination of the (i)MREL and to the decision of the resolution authority, so that the Appeal Panel declared inadmissible the plea on the method used for its calculation. According to the Panel, it is up to the Court of Justice to decide whether the same methodology as in Delegated Regulation (EU) 2021/1118 can be used to calculate the CBR-M in a case in which no CBR applies because of the waiver under Article 7(1) CRR.

6 The metric used to determine the distance of the various levels is the difference of their total risk exposure amounts. This choice reveals that the delegated legislator considered the total risk exposure amounts as the key metric to compare the risks between the group's components, and this will condition the determination of the LAA-L and the RCA-L, irrespective of whether those components currently have (or will perspectively maintain) the same underlying risk density. For the determination of the Pillar 2 requirements of the resolution group, two levels are considered "sufficiently close" when their total risk exposure amounts differ by less than 5 %. If no level can be identified that is sufficiently close to the resolution group, Delegated Regulation (EU) 2021/1118 requires the resolution authority to make reference, depending on additional conditions, to the prudential requirements applied to the Union parent institution or to the weighted average of the prudential requirements applied to the institutions in the resolution group at their individual level. In some cases, the requirements applied to the Union parent institution can be adjusted upward or downward to align them to the risks at the resolution group level. For the determination of the CBR, the Delegated Regulation requires the resolution authority to make reference, depending on additional conditions, to the buffers applied to the Union parent institution or to another level in the group that is close in terms of total risk exposure amount.

for the purpose of setting the MREL. Identifying the Pillar 1 requirements is necessary to set both the LAA(-L) and RCA(-L); yet, it is not a trivial process. In fact, it would be simplistic to assume that Pillar 1 requirements are calculated by applying a simple coefficient (8 % or 3 %) to easily established variables, because the total risk exposure amount and the total exposure measure result from the application of a large number of rules and normative options, some under the control of the institutions and others under the control of the competent authority. Therefore, when an institution has been granted the waiver under Article 7(1) CRR, and there is no clear sign of how those options may be exercised, the same determination of its Pillar 1 requirements may become unclear.

Conversely, the analytic method would require a direct estimation, basically line-by-line, of the entity's Pillar 1 requirements, Pillar 2 requirements and CBR, through an exhaustive and detailed dialogue between the resolution and the competent authorities. In the case at hand – namely, with respect to subsidiaries institutions that have been granted the waiver under Article 7(1) – this should be done in principle at the entity's individual level, but considering that the subsidiary's exposures, liabilities and own funds, however filtered, are reflected in a prudential consolidation, so that the *notional amounts* about its financial position and requirements may be somehow "extracted" from that prudential consolidation. Yet, it should be considered that every consolidated situation, especially from a prudential perspective, is far from being just a sum of the parts. The main argument in favour of this method is that it allows a more accurate determination of the (i)MREL of the subsidiary institution, while the main contrary argument is that it requires a very complex and sometimes unproportionate analysis, whose outcome can quickly become highly controversial.

If this issue seems challenging from a theoretical perspective, it is probably even harder from a practical point of view, because the waiver under Article 7 CRR also excludes (amongst others) the application of the rules on supervisory reporting on an individual basis. It is true that the credit institution may still be subject, on an individual basis, to the resolution reporting under Implementing Regulation (EU) 2021/763. Still, the resolution reporting is designed to complement the supervisory reporting under the CRR; thus, assessing the risks in the institution's activity may be challenging, without recourse to the granular data coming from the individual COREP and FINREP.

The European Commission has shown awareness of the issue's complexity and has proposed some targeted amendments to deal with it, in the context of a planned reform of the bank crisis management and deposit insurance framework (CMDI).[7] In this context, the Commission's proposal clearly opts for applying the synthetic method and aims at extending the application of Commission Delegated Regulation (EU) 2021/1118 to cover both resolution entities at the resolution group level, and also "entities that are not themselves resolution entities, where

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[7] Available at https://finance.ec.europa.eu/publications/reform-bank-crisis-management-and-deposit-insurance-framework_en.

the entity is not subject to those requirements [namely, Pillar 2 requirements and CBR] under Directive 2013/36/EU on the same basis as the requirements referred to in" the provision on iMREL.[8] Similarly, the Commission proposes to use the methodology in Commission Delegated Regulation (EU) 2021/1118 to calculate the CBR-M for all those entities.[9]

We will see if the co-legislators will accept those proposals and whether, during the trialogue, they will also address the additional issues that emerge for institutions that have been granted a waiver under Article 7 CRR: namely, the need to identify a suitable methodology to calculate their Pillar 1 requirements, and to provide the resolution authorities with the granular and individual data they need to set the (i)MREL requirement.

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8 See the new proposed Article 45c(4) BRRD.

9 See the new proposed Article 16(7) BRRD.

Case 3/2022, decision of 13 February 2023

1. Keywords and summary

[.], Appellant, v the Single Resolution Board

Case 3/2022 – Final decision of 13 February 2023

SRB's technical discretion and its review by the Appeal Panel. Distribution of jurisdiction as for the fishing request under Article 12d(5) SRMR

Public interest assessment – Technical discretion – Standard of review of the Appeal Panel – Procedural safeguards

When the SRB prepares and implements a resolution strategy, including its assessment of whether the resolution is in the public interest and is preferable to liquidation under domestic insolvency law, it enjoys a margin of technical discretion. The Board is indeed required to make choices of a technical nature, which are necessarily based on forecasts and complex assessments. This means that such a margin of technical discretion needs to be respected unless there is a manifest error of assessment, in line with the case-law of the European Courts.

At the same time, a review of the compliance of the SRB with certain procedural guarantees when it makes choices based on technical discretion is of fundamental importance. Those guarantees include the obligation to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions.

Regarding the standard of review of the manifest error of assessment, European courts do not perform a de novo assessment of the subject matter brought before them and respect technical discretion. Yet, as part of their legality review, European courts closely scrutinize all possible factual and legal errors, as well as the respect of procedural rights, and apply an appropriate standard on the duty to state reasons. This may also require, when it comes to complex technical assessments based on forecasts and hypotheticals, that the Appeal Panel has to verify: (a) at a minimum, according to the case law of the European courts developed so far in the supervisory and resolution context, that the Board's assessment is not implausible; (b) that the assessment is factually supported by the evidence in the file and is proportionate, reasonable and not discriminatory.

Review standard of the Appeal Panel – Powers of the Appeal Panel – Technical discretion

Whereas other Boards of Appeal (such as ECHA's and ACER's Boards of Appeal, as well as the Boards of Appeal of EUIPO, CPVO, and EPO) can exercise

on appeal “any power which lies within the competence of the agency” or remit the case, the Appeal Panel of the SRB can only confirm or remit. Such difference seems to be associated with the institutional design of these entities, leading to the conclusion that some principles affirmed by the General Court, according to which the review of some Boards of Appeal is not limited to verifying the existence of manifest errors but extended to the errors tout court, may not be deemed applicable to the Appeal Panel.

It follows that the Appeal Panel needs, on the one hand, to perform a full assessment of facts (to the extent that its procedural rules allow it) and a review of the interpretation and application of law made by the contested decision. On the other hand, to the extent that the Board’s decision, in its public interest assessment, is based on forecasts and complex economic assessments, the Appeal Panel review also needs to verify this assessment in line with the case-law of the European courts and without overstepping the margin of technical discretion which lies with the Board.

SRB’s competence and powers – Public interest assessment – Technical discretion – Duty to state reasons

Whereas the SRB’s determination on the public interest assessment rests, by necessity, on complex hypotheticals and forecasts of remote, yet possible, scenarios, the statement of reasons of decisions with so far-reaching implications must offer sufficient indication of the specific qualitative and quantitative data and of the methodology used in order to clearly show all relevant inferences on plausible direct or indirect contagion effects, and their likely significant adverse effects on the financial stability of a Member State in the sense of Article 14(2)(b) SRMR.

The decision’s findings must be supported by qualitative and quantitative data, enabling the person concerned to understand them and the review by the competent Court. In particular, when the SRB prepares and implements a resolution strategy, the decision has to provide sufficient details on the impact that the adverse macroeconomic scenario considered by the SRB would have had on the credit institution concerned and on the consequences of the liquidation of this entity under domestic insolvency law, rather than through resolution tools.

Fishing request by NRA – Effects of the request – Distribution of powers between the SRB and the NRAs

Article 12d(5) SRMR sets out specific rules for certain designated entities, namely resolution entities that are part of a resolution group with total assets below EUR 100 billion. Those entities are outside the scope of paragraph 4 of the same Article 12d SRMR. Still, they may be designated by the national resolution

authority as likely to pose a systemic risk in the event of failure to the effect of making paragraph 4 applicable to them. More specifically, upon such a "fishing request" made by the national resolution authority, the SRB shall apply the requirements of paragraph 4 also to such designated entity. Under Article 12d(5) SRMR, the Board is bound by the request of the national resolution authority and has no margin of discretion in amending or rejecting the request.

EU AND NATIONAL JURISDICTION – Composite procedure – Fishing request by NRA

As already clarified by the Court of Justice in Case C-97/91 Oleificio Borelli v Commission [1992] ECLI:EU:C:1992:491, if an EU agency is bound by a national decision, it is up to national courts to control the legality of the national act. This applies in vertical composite proceedings not only where the act of the national authority is a decision, but also where such an act is a request, to the extent that this request is necessary to justify the exercise of power by the European agency and is binding upon the European agency in the double sense that it requires the European agency to take the requested decision and it informs the final content of that decision, which stems directly from Article 12d(4) SRMR, once its application is triggered by the "fishing request".

Therefore, the legality of the "fishing request" needs to be reviewed by the national courts and is clearly beyond the remit of the Appeal Panel. Only the competent national court may decide upon the claims raised against the "fishing request" and pertaining to the validity of such decision in accordance with the national administrative law.

2. The Appeal Panel of the SRB remits to the Board a decision on the determination of the MREL, based on a positive public interest assessment in resolution planning, due to the breach of the duty to state reasons

by Marco Di Pietropaolo

The content of the appeal

A credit institution filed an appeal with the SRB's Appeal Panel pursuant to Article 85(3) of Regulation (EU) No. 806/2014 (the Single Resolution Mechanism Regulation – "SRMR"), against the SRB's determination of its MREL, taken in the context of the 2021 Resolution Planning Cycle (RPC). According to the appealed decision, winding up under normal insolvency proceedings was considered no longer credible in a system-wide event scenario, and instead the application of resolution tools and the exercise of resolution powers were considered necessary.

The decision, therefore, also sets out a recapitalisation amount and a market confidence amount, in the MREL determination, taking into account the change of the preferred strategy to resolution.

The decision followed the SRB's revised approach to the public interest assessment in resolution planning,[1] which now takes into account the fact that a bank's failure may not only occur in an idiosyncratic scenario, but also "*at a time of broader financial instability or system wide events*", as set out in Article 8(6), subpar. 4, SRMR.

According to the SRB's decision, it could not be excluded that the failure of the credit institution and its winding up under normal insolvency proceedings, at a time of broader financial instability or system-wide events, would be likely to have significant adverse effects on the financial stability of the entity with "*indirect contagion effects on the real economy both at regional and national level*". Avoiding such effects is one of the resolution objectives set out in Article 14(2)(b) SRMR.

The appellant contested both the merits of the decision, arguing that the credit institution could not be classified as a resolution entity, and the failure to comply with the requirements of a fair proceeding, in particular of the duty to state reasons, as the decision contained general, summary statements on the classification as a resolution entity, without sufficiently specific references to the entity, and the SRB did not disclose the underlying analysis and assessment. According to the appellant, the SRB's refusal to "*comprehensively disclose its considerations regarding the entity classification as resolution entity*" was contrary to the rule of law and the right to an effective judicial protection.

In a second plea, the appellant argued that the SRB was not bound by the NRA's request pursuant to Article 12d(5), subpar. 1, SRMR to apply the requirements of Article 12d(4) SRMR for MREL (the so called "fishing request"), as the appellant considered this request to be erroneous and unlawful.

The SRB's technical discretion and its review by the Appeal Panel

The decision of the Appeal Panel addresses several issues of general relevance for the decision-making process of the SRB. First, the Appeal Panel recognises that the SRB has a margin of technical discretion in decisions relating to the preparation and implementation of the resolution strategy, including its assessment of whether resolution is in the public interest and is preferable to liquidation under normal insolvency proceedings. Indeed, the Board is required to make choices of technical nature, which are necessarily based on forecasts and complex assessments. Such margin of technical discretion must be respected and

[1] The revised approach is based on the "Addendum to the Public Interest Assessment: SRB Approach" of 31 May 2021.

only manifest errors of assessment can be reviewed by the Appeal Panel and by the European Courts.

In its review, in line with the scope of judicial review under EU case law, including in the field of the Banking Union,[2] the Appeal Panel must examine: (a) not only whether the evidence relied on was factually accurate, reliable and consistent, but also whether that evidence contained all the relevant information to be taken into account, in order to assess a complex situation and whether it was capable of substantiating the conclusions drawn from it; (b) whether the Board's assessment is not implausible; and (c) whether the assessment is factually supported by the evidence in the file and is proportionate, reasonable and non-discriminatory.

The Appeal Panel's decision also examines whether the recent case law of the European Courts, concerning the standard of review of other Boards of Appeal of European Agencies outside the financial sector, and in particular the findings of the CJEU in relation to the Boards of Appeal of the European Chemicals Agency (ECHA) and the European Union Agency for the Cooperation of Energy Regulators (ACER),[3] could alter the limits of its review of the SRB's decisions. In particular, the Appeal Panel considers whether it could undertake a more thorough review of the SRB's economic and technical assessment than the one of the European Courts, reviewing also "erroneous" assessments, and not only "manifestly erroneous" ones, taking into account the expertise and composition of the Appeal Panel, which includes economic experts.

The Appeal Panel, however, concludes that while, on the one hand, it must carry out a full assessment of the facts and a review of the interpretation and application of the law, on the other hand, where the decision is based on forecasts and complex economic assessments, it must carry out its review in accordance with the case law of the European Courts, without overstepping the SRB's margin of technical discretion.

The different conclusions of the CJEU regarding the standard of review of the appeal body of ECHA and ACER are indeed based on the provisions according to which they may exercise "*any power which lies within the competence of the agency or remit the case*" (Article 93(3) Reg. No. 1907/2006 and Article 19(5) Reg. No. 713/2009), while the Appeal Panel of the SRB can only "*confirm the decision*" or "*remit the case*" to the Board (Article 85(8) SRMR), and therefore an analogy to the case law in *BASF* and *Aquind* is not admissible.

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2 See the judgements of 1 June 2022, *Fundación Tatiana Pérez v SRB*, T-481/17, par. 164-171; *Del Valle Ruiz v SRB*, T-510/17, par. 106-111; *Eleveté Invest Group v SRB*, T-523/17, par. 110-115; *Algebris v Commission*, T-570/17, par. 104-109; *Aeris Invest v Commission and SRB*, T-628/17, par. 114-119; see also judgement of 6 July 2022, *ABLV Bank AS v SRB*, T-280/18, par. 91-94; judgment of 7 December 2022, *PNB Banka v ECB*, T-301/19.

3 Judgment of 20 September 2019, *BASF v ECHA*, T-125/17, par. 87-89; judgment of 18 November 2020, *Aquind v ACER*, T-735/18, par. 50-70. The Court of Justice, after the decision of the Appeal Panel, confirmed the principles stated by the General Court, with its judgement of appeal of 9 March 2023, *ACER v Aquind*, C-46/21 P, par. 55-72.

The duty of the SRB to state reasons in its decisions

Notwithstanding the limits of the Appeal Panel's review, due to the SRB's technical discretion, the Appeal Panel considers however that, in accordance with the settled case law of the European Courts, the respect by the SRB for procedural guarantees when making decisions based on technical discretion is of fundamental importance. These guarantees include the obligation to carefully and impartially examine all the relevant elements of the situation in question and to provide an adequate statement of the reasons for its decisions.

The Appeal Panel refers to its previous decision of 27 January 2022 in case 2/2021 (par. 108), in which the duty to state reasons in the context of resolution planning was clearly and comprehensively examined, also in the light of the case law of the General Court:[4] "*The statement of reasons required under Article 296 TFEU 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, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the courts, to provide the person concerned with sufficient information to ascertain 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 which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations*".

The Appeal Panel takes into account that, according to the CJEU,[5] the analysis of the compliance with the duty to state reasons must be carried out not only by reference to the wording of the measure in question, but also to its context and to the whole body of legal rules governing the matter in question. The Appeal Panel, therefore, asked the SRB to provide also the preparatory documents and the minutes of the Board, where the SRB came to the conclusion that resolution was the preferred strategy for the credit institution. These documents were provided by the SRB in a redacted version. After analysing the decision and the documents provided by the SRB, and following the clarifications provided by the parties at the hearing, the Appeal Panel concluded that the reasoning of the contested decision was insufficient.

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[4] See, in the Banking Union context, judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg v ECB*, T-122/15, par. 122-124, and judgment of 6 October 2021, *Ukrselhosprom Versobank v ECB*, T-351/18 and T-584/18, par. 385-387.

[5] Judgment of 16 June 2015, *Gauweiler and Others v Deutscher Bundestag*, C-62/14, par. 70; judgement of 11 December 2018, *Weiss and Others v Bundesregierung and Others*, C-493/17, par. 33.

The statements of reasons of the SRB's decision, which are quoted in the Appeal Panel's decision (see par. 84), are considered to be too broad and too high level 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*".[6]

The Appeal Panel emphasises that the more intrusive a decision and its measures are, the higher the level of reasoning required, and considers this principle compelling in the present case, where the SRB's decision reverses the previous public interest assessment, and includes, for the first time, simulations of the effects at a time of system-wide events and the impacts on the business model and specificities of the credit institution concerned, for the marketing of MREL securities.

The Appeal Panel concludes that, despite its relevant implications, the contested decision does not provide any quantitative data or any other measurable and objective reference as specific reasons to justify its conclusions. According to the Appeal Panel, the recitals of the contested decisions do not provide sufficient details on the concrete impact of the adverse macroeconomic scenario on the entity and of the consequences of its liquidation under normal insolvency proceedings instead of resolution, in terms of the risk of indirect contagion. The decision, in the Appeal Panel's view, lacks the disclosure of qualitative and quantitative data and measurable assumptions and therefore does not "*disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure*" and does not allow the appellant, nor the Appeal Panel or the European Courts, to review it.

The Appeal Panel also requires that the meaningful elements, on which the decision should be based, are not kept completely confidential vis-à-vis the appellant, "*if the Appellant's right to properly understand the Contested Decision and to ask for a meaningful review of it is to be taken seriously*". The redacted version of the resolution plan, provided by the Board for the confidential examination of the Appeal Panel, contained some additional data and diagrams that were not disclosed to the appellant, who was not able to challenge them, and which therefore could not be taken into account.

In conclusion, the Appeal Panel remitted the decision to the Board, as it had failed to provide sufficient entity-specific and sector-specific evidence to support its conclusions and had failed to provide qualitative and quantitative data that could be analysed and challenged by the appellant and properly reviewed by the Appeal Panel and by the European Courts.

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6 See the already mentioned judgements *Landeskreditbank*, par. 123, and *Versobank*, par. 386.

Jurisdiction of the national courts in relation to the "fishing request"

In the second plea, the appellant argued that the SRB was not bound by the NRA's request under Article 12d(5), subpar. 1, SRMR, to apply the requirements of Article 12d(4) SRMR for MREL (the so-called "fishing request"), as the appellant considered this request to be erroneous and unlawful.

The Appeal Panel focuses on the case law of the CJEU, on the jurisdiction of national and European courts in the case of composite procedures, according to which, where an EU authority is bound by a national decision, national courts review the legality of the national act.[7]

The Appeal Panel considers that pursuant to Article 12d(5) SRMR ("*At the request of the national resolution authority of a resolution entity, the Board shall apply the requirements laid down in paragraph 4 of this Article*") the Board is bound by the request of the NRA and has no discretion to amend or reject it and therefore the "fishing request" must be reviewed by the national court and is beyond the competence of the Appeal Panel.

Finally, the Appeal Panel finds that the appellant has failed to show that the "fishing request" was *manifestly* unlawful, in a manner "*which could be found by the Board and could justify the Board's refusal to duly implement the fishing request*", although only the competent court can decide on the validity of the "fishing decision".

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[7] Judgment of 3 December 1992, *Oleificio Borelli v Commission*, C-97/91, par. 9-13; in the context of the Banking Union, judgement of 19 December 2018, *Silvio Berlusconi and other v. Banca d'Italia and IVASS*, C-219/17, par. 41-46; judgement of 3 December 2019, *Iccrea Banca v Banca d'Italia*, C-414/18, par. 37-42.

Case 4/2022 and Case 6/2022, decision of 8 March 2023

1. Keywords and summary

[.], Appellant, v the Single Resolution Board

Case 4/2022 – Final decision of 8 March 2023

[.], Appellant, v the Single Resolution Board

Case 6/2022 – Final decision of 8 March 2023

SRB's decision denying public access to documents in the context of a banking resolution

Right to access – Public access to documents – Proceeding before the Appeal Panel

In the course of the proceedings before the Appeal Panel for the review of a Single Resolution Board's decision denying a request for public access to documents concerning resolution in accordance with Regulation (EC) No 1049/2001, the appellant cannot be granted access to such documents, because the object of the procedure of review is the Single Resolution Board's decision regarding the public access, not those documents.

To grant such access to the appellant would be tantamount as a circumvention of rules on public access to documents and the Appeal Panel's decision on the legality of the Single Resolution Board's denial of disclosure would be made irrelevant and devoid of purpose.

These conclusions apply also if the Appeal Panel, in the course of the proceeding, ordered the Single Resolution Board to deposit the documents concerning resolution with the Appeal Panel's Secretariat as a measure of inquiry, specifying that the above documents should neither be communicated to the Appellant nor should be part of the file of the proceedings, corresponding exclusively to a mere element intended for comprehensive information and due diligence on the case on the part of the Appeal Panel.

Right to access – Confidentiality of supervisory information – Obligation to maintain professional secrecy

In line with the judgment of the Court of Justice of 19 June 2018, BaFin v Ewald Baumeister (C-15/16, ECLI:EU:C:2018:464) and with the decision of the Appeal Panel of the Single Resolution Board in case 1/2021, Article 88 of the SRM Regulation must be interpreted as meaning that all information relating to

a supervised entity and communicated by it to the competent authority, and all statements of that authority in its supervision files, including its correspondence with other bodies, do not constitute, unconditionally, confidential information that is covered by the obligation to maintain the professional secrecy laid down in that provision. Only information held by competent authorities which is not public and the disclosure of which is likely to affect adversely the interest of the person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of supervised entities, is to be kept secret.

Right to access – Duty to state reasons

In line with the judgment of the Court of Justice of 29 September 2011, Elf Aquitaine v Commission (C-521/09 P, ECLI:EU:C:2011:620), the statement of reasons must disclose clearly and unequivocally the reasoning followed by the institution which adopted the decision to deny access, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court to exercise its jurisdiction to review legality.

As clarified by the case-law of the Court of Justice (judgments of 4 September 2018, ClientEarth v Commission, C-57/16 P, ECLI:EU:C:2018:660, of 22 March 2018, De Capitani v Parliament, T-540/15, ECLI:EU:T:2018:167, and of 25 January 2023, De Capitani v Council, T-163/21, ECLI:EU:T:2023:15), the institution, body, office or agency which has refused access to a document by relying on an exception to right to access provided for in Regulation 1049/2001 must provide a statement of reasons from which it is possible to ascertain, first, whether the document requested does fall, in whole or in part, within the sphere covered by that exception and, secondly, whether the need for protection relating to that exception is genuine. The statement of reasons must also explain how access to that document could specifically and actually undermine the interest protected by that exception, and the risk of that undermining must be reasonably foreseeable and not purely hypothetical.

Institutions must assess precisely the contents of the documents the access to which has been requested, and offer specific reasons to determine which parts of those documents may be disclosed or not (see also judgment of the Court of Justice of 19 December 2019, European Central Bank v Espirito Santo Financial, C-442/18 P, ECLI:EU:C:2019:1117).

Therefore, the statement of reasons by the Board has to be deemed insufficient if the Board has not properly and specifically justified whether the redacted part of the document requested by the Appellant is covered by the exception relied on and whether the need for protecting that exception is genuine.

Right to access – Application of exemptions under Regulation (EC) No 1049/2001 – Discretion of the Single Resolution Board – Standard of review of the Appeal Panel

In relying on the exceptions to the right to access provided for by Article 4(1) (a) fourth indent and Article 4(2) first indent of Regulation (EC) No 1049/2001, the Single Resolution Board enjoys a margin of appreciation (so-called technical discretion) to the extent that such exceptions are based on broad or relatively undetermined legal concepts, such as "protection of financial, economic and monetary policy" and "protection of commercial interests". In such cases, review is in principle limited to verify whether procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers. In particular, the Appeal Panel exercises its judgment examining the nature and content of the specific documents, scrutinizing the substance of the Board's grounds with particular regard to the concrete circumstances, especially in cases where the grounds for objection required expert and technical assessment (such as allegations that the disclosure of documents could undermine financial stability, or give rise to unfounded speculations in the market). The Appeal Panel remits the case to the Board whenever the grounds are found to be insufficient, making distinctions between the reasonableness of different grounds, and the justifiability of different redactions, when such distinctions are needed.

That margin of appreciation is less pronounced whenever the Board relies on the exception to the right to access of Article 4(1)(b) of Regulation (EC) No 1049/2001, concerning the protection of the privacy and integrity of the individuals, because the notion of "personal data" is defined by Article 3(1) of Regulation (EU) 2018/1725 and, therefore, is not a broad or undetermined legal concept. Therefore, the protection of privacy may, in principle, only justify the redaction of names and similar identifiers which would make it possible to connect a specific person to an information.

Right to access – Application of exemptions under Regulation (EC) No 1049/2001 – Disclosure of information on the triggers of a crisis

In the framework of resolution, the Single Resolution Board is not subject to rigid triggers to be applied in a mechanistic fashion and/or must apply those triggers in a mechanistic fashion. On the contrary, the triggers of an idiosyncratic crisis are often context-specific, and therefore lessons learnt from the data pertaining to a specific crisis are not necessarily transposable to other financial institutions.

As a consequence, disclosing information on the triggers of a specific crisis – like percentages giving evidence of how the liquidity of the concerned credit institution had deteriorated in the days preceding the resolution and how this entity was consequently assessed as "failing or likely to fail" – does not compromise,

in principle, the Single Resolution Board's methodologies nor would lead to an expectation that the Single Resolution Board will act in a similar way in all future crises. Therefore, it is manifestly erroneous to assess that disclosure of such information would plausibly undermine the stability of the financial system of the Union and its financial or economic policy as requested by Article 4(1)(a) fourth indent of Regulation (EC) No 1049/2001 in order to lawfully deny access to such information.

Case 1/2022, decision of 14 April 2023

1. Keywords and summary

BNP Paribas S.A., BNP Paribas Personal Finance and BGL BNP Paribas v the Single Resolution Board

Case 1/2022 – Final decision of 14 April 2023

SRB Appeal Panel's decision states on principles for determining the MREL and the "functional link" between the MREL and the resolution plan

Proceeding before the Appeal Panel – Interest in bringing proceedings – Repeal of the MREL decision

According to the settled case-law of the EU's courts, in order to obtain a decision on the substance, it is not enough that the appellant had an interest at the time when they brought the action. The appellant's interest must continue until the final decision, and such an interest may disappear in the course of the proceedings when a decision on the merits cannot bring the applicant any benefit. This is notably the case when the defendant institution, body, or agency repeals the contested measures and replaces them with a subsequent measure after the action has been brought. The same principle applies to the joint decisions determining the MREL, if repealed by a new decision, resulting in the lack of interest in appealing the first decision.

Proceeding before the Appeal Panel – Nature of the MREL Policy – Relevance of MREL Policy in Appeal Panel proceedings – Legitimate expectations

According to articles 85(3) and 12(1) of the SRMR, unlike the determination of MREL for individual institutions, acts such as the MREL Policy fall outside the remit of the Appeal Panel. This, however, does not mean that the content of the MREL Policy is irrelevant and should, on the whole, be disregarded by the Appeal Panel. Even though the MREL Policy is not a regulatory act, it still constitutes an exercise of interpretation undertaken by the SRB, allowing the Appeal Panel to understand better how the SRB construes certain provisions and ascertains their meaning, and it provides a context for individual decisions falling inside the remit of the Appeal Panel, such as the MREL decision. Moreover, to the extent that the MREL Policy helps ascertain the Board's understanding of certain provisions, and indicates its interpretation, it may

constitute a potential source of legitimate expectations for the credit institutions concerned.

Proceeding before the Appeal Panel – Appeal Panel's remit – EU court's jurisdiction – Interplay between the General Court and the Appeal Panel

An action before the General Court of the European Union for the annulment of the MREL decision under Article 12 SRMR is admissible only after the applicant has previously exhausted the possibilities of appeal before the Appeal Panel. Indeed, Article 86(1) SRMR expressly limits the direct access to the application for annulment before the General Court "where there is no right of appeal to the Appeal Panel." This is also in line with a contextual and teleological interpretation, because the obligation to exhaust administrative remedies before contesting an agency's decision in court is a common feature of the provisions establishing boards of appeal entrusted with the task of reviewing administrative decisions of the EU agencies.

On the contrary, the decision adopting the resolution plan must be appealed directly before the General Court, since it falls outside the remit of the Appeal Panel. Such legislative choice seems premised on the assumption that the resolution plan and the MREL decision can be scrutinised separately, as their content is different, an assumption that appears to be contradicted by the practice. However, being the remit of the Appeal Panel clearly provided for by Article 85(3) SRMR, excluding any competence as for the decision on the resolution plan, the interplay between the Court's and Appeal Panel's reviews may be managed, if appropriate, through the decision to stay the proceeding pending before the Appeal Panel.

MREL determination – Resolution plan –Recovery actions envisaged in the recovery plan

Given the centrality of the resolution plan for the MREL decision, the latter accepts only adjustments to the balance-sheet size of the resolution entity recognised by the resolution plan. Indeed, if the MREL decision could be based on adjustments that are not reflected in the resolution plan, the MREL decision could result in an amount less than that which is needed according to the resolution strategy adopted by the resolution plan, disregarding the clear instrumentality and the functional link existing between the MREL determination and the resolution plan. Moreover, the resolution plan would be exposed to the risk of being backed by an insufficient recapitalisation amount in respect of the resolution strategy adopted, thus running the risk of being devoid of purpose. It follows from the foregoing that the SRB is bound to consider, when determining the MREL, only the changes set out in the resolution plan, disregarding the recovery actions envisaged in the recovery plan that had not been included in the resolution plan.

MREL DETERMINATION – TLAC – Additional requirement – Duty to state reasons – Failure to state reasons

Under a textual, contextual, and finalistic interpretation of the text of the relevant provisions, including the international standard on which such provisions were based, namely the TLAC standard approved by the Financial Stability Board (FSB), setting a level of MREL higher than the common minimum of the TLAC standard does not constitute in itself a breach of the law. Under Article 12e(3) SRMR, the SRB may assess that, for EU G-SIIs, the amount of the common minimum of TLAC is not sufficient to fulfil the conditions set out in Article 12d SRMR, leading to the determination of an add-on necessary to ensure that the conditions set out in Article 12d SRMR are fulfilled.

However, the SRB cannot impose a MREL add-on over TLAC without justifying the need for such an add-on in the given circumstances of each specific case. The decision to impose an additional requirement must contain the reasons for that decision, including a full assessment of the reasons why the requirement in itself is not sufficient to ensure the objectives and conditions of the MREL-setting, and why the additional requirement ensures that such objectives and conditions are fulfilled.

RIGHT TO PROPERTY – Principle of proportionality – MREL decision – TLAC – Additional requirement

Given that the right to property and the freedom to conduct a business may be restricted under the conditions of Article 52(1) of the Charter of Fundamental Rights of the European Union, as long as restrictions do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, the circumstance that the SRB set an MREL add-on over TLAC cannot be considered per se against the law, nor the principle of proportionality, since the TLAC provisions themselves provide for this possibility.

In order to prove a breach of principle of the proportionality, the appellant must demonstrate that the MREL level set by the SRB was disproportionate under a yardstick different from the methodological requirements set forth under the SRMR or that the MREL levels were so high that they did not respect the essence of the right to property or the freedom to conduct a business.

MREL DECISION – Resolution plan – Summary of the resolution plan – Duty to state reasons Failure to state reasons

Under Article 8 SRMR, the Board has to disclose only a summary of the resolution plan to the entity concerned. Consequently, if the SRB, in its MREL decision, decides to justify many of its choices by referring to the

resolution plan without specifically describing the relevant content of that plan, the summary of the plan becomes part of the "assessment", which informs the "reasons" given under Article 12d(8) SRMR. In other terms, the Board may choose to explain the assessment made in the MREL decision itself or by attaching the summary of the resolution plan to the decision. However, in this case, the summary of the resolution plan must be scrutinised by the Appeal Panel, despite it also constitutes a part of an act falling outside the remit of the Appeal Panel.

MREL DECISION – Nature of the MREL Policy – Principle of protection of legitimate expectations

As well as the European Commission when adopting the Banking Communication, the SRB, once it adopted its MREL Policy, imposed a limit on the exercise of its discretion and could not, as a general rule, depart from those guidelines, at the risk of being in breach of the principle of protection of legitimate expectations. This being said, the adoption of the MREL Policy did not relieve the SRB of the obligation to examine specific circumstances, where required by the law. Moreover, for expectations to be protectable, the assurances stemming from the MREL Policy should be consistent with the applicable rules, as expectations may be created beyond what the law says, but not against it.

MREL DECISION – Market Confidence Charge (MCC) – MREL Policy – Duty to state reasons – Failure to state reasons

Given that Article 12d(6) SRMR provides the SRB a margin of technical discretion on whether to set a Market Confidence Charge (MCC) for non-resolution entities, neither the wording of that provision nor any other references in the recitals nor the legislative history justify a restrictive interpretation whereby the imposition of the MCC would be justifiable only if the entity relies significantly on access to the financial markets.

However, since the MREL Policy set out that the MCC for iMREL for entities that are not resolution entities is applied only where "the MCC is necessary to sustain market confidence because of the subsidiary's complexity and strong reliance on wholesale funding", the Board chose to make these terms relevant to properly discharge its duty to state reasons in the iMREL decisions, also assuming the burden of providing certainty about those terms.

2. On the MREL decision: the Appeal Panel of SRB addresses new issues, both substantive and procedural, while confirming some of its own previous positions

by Enrica Consigliere

1. The appeal filed by BNP Paribas S.A. and other group companies[1] (hereinafter, 'Appellant') provides the Appeal Panel of the SRB (hereinafter, 'Panel') with an opportunity to dwell on and provide clarification on some interesting and complex issues concerning the minimum requirement of own funds and eligible liabilities (MREL).[2] At the same time, the Panel confirms some of its own previous positions on the SRB's duty to state reasons.

Some of the most interesting profiles addressed in the decision are summarized below.

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[1] The appeal was filed by BNP Paribas S.A., BNP Paribas Personal Finance S.A., and BGL BNP Paribas against the resolution college's MREL decision of the of November 4, 2021; later, the grounds of appeal were extended to the MREL decision adopted, for the following year, on May 4, 2022 (on the possibility to challenge MREL decisions taken by the resolution college before the Appeal Panel, please see "*The joint decision on MREL taken by the resolution college can be challenged before the Appeal Panel*", on this Newsletter, July-August 2022, n. 19). The pleas are divided into three sub-appeals that respectively concern: *i*) the external MREL determination for BNP Paribas; *ii*) the request for exemption from internal MREL (i-MREL) for BNP Paribas Personal Finance (this request had been rejected by the first decision, while the second decision made no reference to it, maintaining silence); *iii*) the MREL determination for BGL BNP Paribas. The Panel decision deals only with the pleas against the second decision, as it deemed the appeal against the first decision had become moot and devoid of purpose. On this point, the Panel aligns to the well-established EU case-law, according to which, in order to reach a decision on the merits, the interest in the appeal not only must exist at the time the appeal is lodged, but it must also persist until the final decision. Conversely, the interest is lost whenever it can be considered that any decision on the merits would not be likely to bring any benefit to the appellant; which is particularly the case when the defendant institution, body or agency repeals the contested act and replaces it with a later act after the appeal has been filed (paras. 92-96). In the case at hand, the second MREL decision abrogated and totally replaced the first MREL decision, which therefore results to be the only one binding on the Appellant at the time of the Panel's review.

[2] The Single Resolution Mechanism Regulation (Regulation (EU) No 806/2014, SRMR, Articles. 12 ff.) and the Banking Recovery and Resolution Directive (Directive 2014/59/EU, BRRD, Articles 45 ff.) require institutions established in the European Union (EU) to meet, as a precautionary measure, a minimum requirement of own funds and eligible liabilities (MREL) to ensure effective and credible application of the bail-in tool and overall effectiveness of the resolution action. The basic idea of MREL is to ensure sufficient loss-absorbing and recapitalization capacity in the event of resolution. Specifically, a part of the entity's instruments would be written off to absorb losses, and then the remainder would be converted into capital to ensure that capital levels allow the entity to continue to perform critical functions without resorting to public financial support. Thus, the MREL helps ensure that shareholders and creditors contribute to loss absorption and recapitalization. This goal is common to the *Total Loss Absorbing Capacity* (TLAC), standard developed by the Financial Stability Board (FSB) for global systemically important banks (G-SIBs) internationally (on this, please see *infra*).

First, the Panel reiterates – as already done before – the inadmissibility of the pleas against the MREL Policy, which fall outside of its remit.[3]

Second, the Panel addresses a delicate and interesting procedural issue: the **interplay between the administrative review of the MREL decision and the action for annulment of the resolution plan** brought by the appellant before the General Court (case T–71/22). This is with a view to assessing a possible stay of the proceedings, pending the annulment judgment.

The starting point of the Panel's reasoning is a substantive consideration: the MREL decision is intrinsically linked to the resolution plan, in the context of a biased relationship. In other words, that decision is, at least in part, the direct result of key elements and parameters contained in the resolution plan (with particular reference to the preferred resolution strategy and to the actions that the resolution plan considers credible or feasible before or on the resolution date).

However, the procedural rules on the remedies available against these two decisions do not seem to reflect perfectly this functional relationship. Indeed, MREL decisions can be challenged before the Appeal Panel; action before the General Court is admissible only after exhaustion of administrative remedies, *i.e.* only after the Panel has adopted its decision on the disputed decision of the SRB.[4] On the contrary, the decision on the resolution plan can be appealed directly before the General Court, as it clearly falls outside the remit of the Panel.[5]

Well, according to the Panel, the procedural implications of these rules are far from straightforward.

Indeed, should the General Court annul the resolution plan adopted for BNP Group (before the Panel's decision on the MREL determination), it would not

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[3] Article 85(3) SRMR. This does not mean that the content of the Policy is irrelevant or should not be considered by the Panel. The Policy constitutes an exercise of interpretation by the SRB and, as such, allows the Panel to reconstruct the context of the challenged decisions, thus enabling it to better ascertain their legality and correctness. Moreover, to the extent that it illustrates the SRB's position regarding a particular issue, the Policy comes to the fore as a source of legitimate expectations (paras. 102-104). Elsewhere in the decision, the Panel draws a parallel between the MREL Policy and the 2013 Banking Communication on state aid: just like the Commission with the aforementioned Communication, with the MREL Policy the SRB has set a limit on the exercise of its discretion, setting guidelines for its behaviour from which, in principle, it cannot deviate, at the risk of violating principles such as equal treatment or the protection of legitimate expectations (para. 216).

[4] This conclusion is confirmed by Article 86(1) of the SRM, read in conjunction with Article 85 (3) SRMR, and by systematic and teleological interpretation: the obligation to exhaust administrative appeals before challenging an agency's decision before the Court of Justice of the European Union is a common feature of the provisions establishing the Boards of Appeal charged with reviewing the administrative decisions of EU agencies.

[5] Resolution plans drawn up by the SRB do not fall within the group of SRB decisions that can be challenged before the Appeal Panel, pursuant to Article 85(3) SRMR ("*Any natural or legal person, including resolution authorities, may appeal* [before the Appeal Panel] *against a decision of the Board referred to in Article 10(10), Article 11, Article 12(1)* [MREL decisions]*, Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) which is addressed to that person, or which is of direct and individual concern to that person*").

simultaneously annul the MREL decision: the action against the MREL decision would be most likely found inadmissible, having the Appellant failed to exhaust the available administrative remedies (despite the aforementioned functional link).

At the same time, as long as the General Court does not take its decision on the resolution plan, the Panel cannot decide whether the decision on the MREL can remain standing despite the (possible) annulment of the resolution plan. As a consequence, this issue should still be examined by the Panel, downstream of the General Court's decision; and this would be precisely to allow the Appellant to exhaust the administrative remedies, in order to (possibly) challenge the MREL decision before the Court of Justice. All these considerations – in the light of prudent reflection on the parameters of proper administration of administrative and judicial review – call for staying the proceedings before the Panel, until the final outcome of case T–71/22, even with only reference to the question of the determinability of the MREL in case of annulment of the resolution decision.[6]

Against such a backdrop, the Panel makes some critical remarks. According to it, the procedural complexities related to the interplay between the two proceedings, however unintended, inevitably arise from the legislature's choice to limit the Appeal Panel's review to the MREL decision alone, without extending it to the decision adopting a resolution plan. This choice seems to be based on the assumption that the two decisions can be reviewed separately, as their content is different; an assumption that seems to be contradicted by practice, as it is in the case. In principle – here there are some hints in a *de jure condendo* perspective – it would be "*preferable, for the effectiveness and timeliness of the overall system of review, that both the decision adopting the resolution plan and the decision determining the MREL could be appealed before the Appeal Panel and then, if the appellant were unsuccessful, the Appeal Panel's decision could be challenged with an action for annulment before the General Court*".[7]

As it reads between the lines, this option would "realign" the substantial relationship between the two decisions (the one on the resolution plan and the MREL decision) and the procedural framework of the available remedies, avoiding complexity.

However, the Appeal Panel concludes that, for the time being, "*the legislative choice on the remit of the Appeal Panel is clear*" and, of course, binding on the Panel itself, which cannot fail to take note of it.

2. The decision highlights the close connection **between MREL** and the **resolution plan**. Indeed, the Panel rejects the Appellant's argument that, in

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[6] See, in particular, par. 118.

[7] Par. 120.

determining the MREL (and, in particular, the recapitalization amount, RCA),[8] the SRB should refer not only to the resolution strategy and actions expressly set out in the resolution plan, but also to any additional actions set out in the recovery plan and, more generally, to the impacts that resolution would necessarily have on the banking group, even where no specific actions are envisaged in the resolution plan.

To reject the plea the Panel recalls Article 12*d*(3) SRMR, which states that "*in setting the recapitalization amounts […] the SRB shall: (a) use the most recently disclosed values for the amount of total risk or measure of total relevant exposure*,[9] *adjusted for any changes resulting from the resolution actions*" provided for (only) "*in the resolution plan*". The provision makes no reference at all to any other adjustments. Further confirmation of this comes from the interpretation given by the European Commission in Q&A EBA No 2019/4901, according to which "*when calibrating the amount of recapitalization, the resolution authority shall assess the impact of all resolution actions planned for the implementation of the resolution strategy […] <u>as set out in the group's resolution plan</u>* [...]"[10] (emphasis added).

After all – this is the conclusion – if it were not so (meaning, if the MREL determination could be based on adjustments not envisaged by the resolution plan), the MREL could result in an amount less than required under the resolution strategy outlined in the resolution plan; but this would "*disregard the clear instrumentality*" and break the "*functional link*" that exists between the MREL and the resolution plan.[11]

In other words, the resolution plan could risk to be supported by an insufficient amount of recapitalization, ending up being unfit for purpose.[12]

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8 For resolution entities the MREL is composed of: *a*) an amount of the losses to be absorbed in resolution that corresponds to the resolution entity's own funds requirements, and *b*) a recapitalization amount that allows the resolution group resulting from resolution to restore compliance with its own funds requirements after the implementation of the preferred resolution strategy (Article 12*d* (3) SRMR and Article 45*c* (3) of BRRD).

9 The MREL requirement is calculated as the amount of own funds and eligible liabilities, expressed as percentages of the total risk exposure amount (total risk exposure amount, 'TREA') and the total exposure measure (leverage ratio exposure, or 'LRE'), as reported by the intermediary from time to time (Article 12*a* (2) SRMR and Article 45(2) BRRD).

10 Therefore again according to the Q&A cited above – when determining whether recovery or other measures are relevant to determining the amount of recapitalization, two factors must be considered: "*(a) they are included in the resolution plan as a resolution action that forms part of the preferred resolution strategy; and (b) in case they are not implemented by the resolution entity or other entities of the group prior to resolution, the resolution authority has deemed it feasible and credible to implement them in resolution*".

11 Par. 139. The link is also evidenced by Article 8(9)(o) SRMR, which provides that MREL constitute an element of the resolution plan.

12 An entirely different question – which, however, is outside the Panel's competence – is whether or not the resolution plan must take into account the actions provided for in the recovery plan and, in any case, whether it contains adequate justification with reference to this profile (par. 140 and par. 141).

3. With reference to a number of issues the Panel stigmatizes – as already done on several occasions in the past – the deficiencies of the **statement of reasons** of the MREL decision,[13] and remits the decision to the SRB for appropriate integration. One of these issues is the application to global systemically important banks (G-SIBs) of the *Total Loss Absorbing Capacity* (TLAC) standard, and the possible imposition of an MREL add-on over it.[14] In the Appellant's view, said MREL add-on could be imposed only if strictly necessary. The Panel does not share the argument: the relevant provisions (and, even before that, the international standard on which those provisions are based) expressly allow the imposition of an add-on over the TLAC, whenever the TLAC minimum requirement is not sufficient to absorb losses and to recapitalize a G-SII under the chosen resolution strategy.[15] Thus, the SRB did not breach the law simply by setting a level of MREL that was higher than the common minimum of the TLAC standard. Nevertheless "*this does not mean that the SRB can impose an MREL add-on over TLAC without justifying the need for such add-on*".[16] The imposition of the MREL add-on can be based only on a specific and individualized assessment of all the circumstances of the case, to be reflected in the reasoning of the decision, as provided for by Article 12*e* (4) SRMR. In other words, the SRB should have explained why "*in the specific and individual case of BNP Paribas an additional MREL add-on had to be imposed*".[17]

The statement of reasons is extremely important also to eliminate possible <u>ambiguities</u> arising from <u>the MREL Policy</u>. More in detail, the Appellant claimed that the SRB deviated from several provisions of the MREL Policy regarding the

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[13] Notwithstanding the limits of its review, due to the SRB's technical discretion, the Panel has repeatedly held that, in accordance with the settled EU case law, the respect by the SRB for procedural guarantees is of fundamental importance. These guarantees include the obligation to carefully and impartially examine all the relevant elements of the situation in question and to provide an adequate statement of the reasons for its decisions (previous decisions on case 2/2021, January 27, 2022, and on case 3/2022, published on March 21, 2023; on the latter, please see "*The Appeal Panel of the SRB remits to the Board a decision on the determination of the MREL, based on a positive public interest assessment in resolution planning, due to the breach of the duty to state reasons*", on this Newsletter, March 2023, n. 26).

[14] The TLAC standard was adopted by the Financial Stability Board (FSB) on November 9, 2015 and was introduced into the EU legal system by Regulation (EU) 2019/876 amending Regulation (EU) No 575/2013 (CRR II), Directive (EU) 2019/879 amending Directive 2014/59/EU (BRRD II) and Regulation (EU) 2019/877 amending Regulation (EU) No 806/2014 (SRMR II). As clarified by Recital 16 of the CRR II "*the TLAC standard and the MREL pursue the same objective of ensuring that institutions have sufficient loss absorption capacity*": therefore "*the two requirements should be complementary elements of a common framework*"; please see also Recitals (1) and (2) of BRRD and SRMR II.

[15] See Article 12*e* (3) SRMR and Article 45*d* (3) BRRD.

[16] Para. 202.

[17] Para. 202.

calculation of the RCA,[18] and that this resulted in a clear violation of legitimate expectations. The MREL Policy does not refer to the actions provided for in the resolution plan (only): this would have given the recipients the belief – or rather, the legitimate expectation – that adjustments not provided for in the resolution plan could also come into play in determining the RCA.

The complaint is rejected by the Appeal Panel, which highlights that the SRMR stipulates that the calculation of the RCA must take into account the (only) actions in the resolution plan. Against this background, the MREL Policy could not give rise to any *contra legem* expectation;[19] nevertheless it did create an ambiguity that was on the SRB to resolve, through an appropriate justification, which, however was not provided in the present case.

The statement of reasons is deemed to be insufficient also with regard to the request for an exemption to the internal MREL submitted by one of the BNP group companies. Here, the Panel condemns the SRB's behaviour in ignoring the request – deeming it late – without offering the slightest explanation.[20]

Finally, the Panel addresses the complaints directed against the decision to include, in the MREL (specifically, in the RCA) of BGL – a subsidiary of the banking group which is not a resolution entity – the Market Confidence

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[18] Paras. 211- 221. The decision also rejects complaints about an alleged incompatibility of the MREL decision with other general principles, concerning respect for the right to property, freedom of enterprise and the principle of proportionality (paras. 222-234). These fundamental principles and rights of European Union law –which are expressly referred to in the SRMR – are not absolute and, as such, may be subject to restrictions and limitations, albeit under the conditions set forth in Article 52 of the Charter of Fundamental Rights of the European Union. Such restrictions must, in particular, be provided for by law, respect the essence of these fundamental rights and freedoms, and be necessary in order to meet objectives of general interest recognized by the Union. These objectives include the safeguarding of financial stability, which, as recognized on several occasions by the European courts, has justified very invasive regulatory (C-686/18, *Adusbef a.others v. Banca d'Italia*, July 16, 2020) and/or supervisory measures (among others, C-526/14, *Kotnik a. others*, July 16, 2016; C/8/15P, *Ledra Advertising a. others v. Commission and ECB*, September 20, 2016). That cannot be said with reference to a measure of a preventive nature such as the MREL, based on a harmonized and extremely detailed regulatory framework; all the more so since, the Appellant has not provided any concrete argument or evidence to support the claim that the level of the MREL would have been disproportionate or so high as to not respect the essence of the content of the right to property or freedom of enterprise. Likewise rejected is the complaint regarding the violation of the right to be heard. According to the Panel, the Appellant had the fullest opportunity to present his views, assessments and objections during the proceedings before the SRB (parr. 240-247).

[19] See, in particular, par. 217. According to EU case law, legitimate expectations require unconditional and consistent with the applicable rules, such that the recipient can have "*well-founded expectations*". Such expectations, however, can only be created "*beyond what the law says, but not against it*" (par. 216).

[20] Par. 252. The lack is even more serious because the point had already been highlighted in a previous Appeal Panel decision (case 2/2021, 27 January 2022; on this, and for a general overview of the interpretive issues concerning the exemption from i-MREl, see "*The Appeal Panel of the Single Resolution Board rules on the waiver of iMREL*" and "*The Appeal Panel of the SRB on the interaction of prudential waivers, combined buffer and (i)MREL*", both on this Newsletter, respectively April 2022, n. 16, and May 2023).

Charge (MCC).[21] After reiterating that, even in determining this requirement, the SRB was authorized to disregard any actions not provided for in the resolution plan,[22] the Panel points out that the reference provision – very broad, built on the key concept of sustaining the market confidence – grants the SRB a wide margin of technical discretion.[23] Therefore, it would not be possible to support restrictive readings, of the kind suggested by the Appellant, according to which the imposition of the MCC would be justifiable only when the entity relies significantly on market funding.

Thus, the MREL Policy regarding MCC come to the fore as limits to the exercise of discretion. Specifically, the Policy provides for the application of the MCC when the SRB deems it necessary to sustain market confidence due to the *complexity* of the company and to the *strong reliance placed on wholesale financing*. These are to be considered the "*proxies for determining the need for the MCC*".[24] For this reason, these are the concepts to be considered in assessing the completeness and adequacy of the justification.

In conclusion, although there is no objective evidence that the SRB failed in its duty to carefully and impartially examine all the circumstances of the concrete case, the Panel finds that the SRB did not adequately justify the *complexity* of BGL for the purpose of imposing the MCC.

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21 The Market Confidence Charge (MCC) is applied where warranted to ensure that a bank sustains market confidence post-resolution, therefore adjusting the RCA upwards. For non-resolution entities, the reference provision is Article 12*d* last sub-paragraph SRMR ("*[…] That amount [recapitalisation amount] shall be adjusted upwards if, after consulting the competent authorities including the ECB, the Board determines that a higher amount is necessary to sustain sufficient market confidence […]*"].

22 The clear wording of Article 12*d* (6), last sub-paragraph, SRMR depicts this.

23 In this regard, the Appeal Panel recalls the ABLV Bank AS ruling (T-280/18, *ABLV Bank AS v. SRB*, July 6, 2022), in which the General Court clarified that in assessing a liquidity risk and liquidity shortage scenario, the Supervisory and Resolution Authorities are not bound by regulatory definitions (e.g. on liquidity ratios), but must take into account all the circumstances peculiar to the specific case.

24 Par. 282.

CASE 7/2022, DECISION OF 10 MAY 2023

1. Keywords and summary

[.], Appellant, v the Single Resolution Board

Case 7/2022 – Final decision of 10 May 2023

SRB's decision to deny public access to documents received from the ECB

RIGHT TO ACCESS – Public access to documents – Application not sufficiently precise – Procedural safeguards

If a request for public access to documents is not sufficiently precise, pursuant to Article 6 of Regulation 1049/2001 it is duty of the institution or agency receiving the request to seek clarification from the applicant, in order to better define the scope of the inquiry.

In the present case, the SRB fulfilled such a duty by sending to the applicant two request for clarification, trying to circumscribe a broad request for access to a more specific meaning.

RIGHT TO ACCESS – Public access to documents – High number of documents – Principle of proportionality – Procedural safeguards

In the case of an application relating to a very large number of documents, the principle of proportionality has to be used as a yardstick to assess the burden for the institution or agency receiving the request and the course of action adopted on the face of such burden. The institution or agency, pursuant to Article 6 of Regulation 1049/2001 and in light of the principle of proportionality, must try to reach an agreed solution with the applicant, which may consist in circumscribing the scope of the request or otherwise making it more manageable.

In the case at hand, the SRB fulfilled its duties by approaching the applicant, first by trying to define the scope of the request more precisely and second by proposing to split the request into two groups.

RIGHT TO ACCESS – Public access to documents – General and rebuttable presumption

In line with the case-law of European Courts, once an institution or agency asserts that a document does not exist, it is not obliged to create this document and can rely on a rebuttable presumption about the non-existence of

that document. Said presumption could be rebutted by pertinent and consistent evidence to the contrary to be provided by the applicant, who failed to do so in the present case.

Right to access – Public access to documents – Documents originating from the ECB – Confidentiality and professional secrecy – Interinstitutional cooperation

Although, Article 2(3) of Regulation 1049/2001 sets out that access to documents applies to all documents held by an institution, including documents “received by it and in its possession”, the SRB can deny access to documents received from or exchanged with the ECB for internal use as part of the file and deliberations, as provided for in Article 4(3) of the same Regulation.

In such context, access must be requested directly to the ECB, because an indirect access through the SRB, on the one hand, would allow a possible circumvention of the specific rules on public access provided for in the ECB Decision 2004/258; on the other hand, it would undermine the interinstitutional cooperation between the ECB and the SRB. As can be inferred form the judgment of the Court of Justice in Baumeister (judgment of 19 June 2018, BaFin v Ewald Baumeister, C-15/16), the need to protect the proper functioning and the effectiveness of the interinstitutional cooperation can justify keeping confidential the information exchanged between authorities, such as the SRB and the ECB, and subjecting the sharing of that information to the express consent of the institution originating the same information.

The special status of the ECB duly recognised by the Treaties strengthens the above considerations, due to both the ECB’s special regime of access to documents, and the special relevance that confidential information has for the ECB, as the institution entrusted with monetary stability and prudential supervision.

In light of the foregoing, the SRB decision to refuse access to documents originating from the ECB and to refer the applicant to the ECB, is justified and did not deprive the appellant of the possibility to have its application for access to the documents originating from the ECB handled promptly by the ECB itself under the ECB Decision 2004/258.

Duty to state reasons – Public access to documents

Despite the SRB’s refusal to disclose the documents while referring the request to the ECB does not raise an issue of substantive legality, the denial should nonetheless be justified in any given case through a sufficient statement of reasons. In particular, the refusal of public access to documents by the SRB has to be justified through a statement of reasons which must make reference to the

pertaining exceptions to public access, also in the case of documents originating from third parties.

In the present case, the SRB did not disclose in a clear and unequivocal fashion the reasoning followed, because it merely stated that the requested documents originated from the ECB, without clarifying that such documents had been received in the context of the SRB's internal decision making to the effect of the exception under Article 4(3) of Regulation 1049/2001. It follows that the statement of reasons of the contested decision is insufficient as regards the justifications and exceptions relied on by the SRB in consultation with the ECB to deny access to the documents originating from the ECB.

The judgments of the national apical Courts

Austria

by Paul Weismann (*) and Vanessa Aichstill (**)

B* H* and J* H* v Republic of Austria

1. Keywords and summary

B H* and J* H* v Republic of Austria*

Oberster Gerichtshof, Judgment of 27 January 2023, 1 Ob 261/22x[1]

Judgment on public liability for deficient banking supervision and the obligation to draw up a prospectus

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 Financial Market Authority (*Finanzmarktaufsichtsbehörde* – FMA), because pursuant to § 3(1) (2nd sentence) Financial Market Authority Act (*Finanzmarktaufsichtsbehördengesetz*) 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.

Obligation to draw up a prospectus – Directive 2003/71/EC (outdated)

The obligation to draw up a prospectus laid down in the Capital Market Law (*Kapitalmarktgesetz*) roots in Directive 2003/71/EC. This Directive, even after its amendment by Directives 2010/73/EU and 2010/78/EU, only relates to securities, which is why for (mere) investments the obligation to draw up a prospectus does not result from a provision of Union law.

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* Associate Professor at the Salzburg Centre of European Union Studies, University of Salzburg.

** Doctoral student and Research assistant at the Salzburg Centre of European Union Studies, University of Salzburg.

1 Available at https://ris.bka.gv.at/Dokumente/Justiz/JJT_20230127_OGH0002_0010OB00261_22X0000_000/JJT_20230127_OGH0002_0010OB00261_22X0000_000.pdf.

State liability

State liability of Member States for violation of EU law applies under three conditions: First, the aim of the Union provision which has been infringed is to grant rights to the individual; second, the breach is sufficiently serious; third, there is a direct causal link between that breach and the loss or damage sustained by the injured parties.

I* v Einlagensicherung Austria Ges.m.b.H.

Pursuant to Article 6(2) of Directive 2014/49/EU, certain deposits, e.g. deposits resulting from real estate transactions relating to private residential properties, 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. In the statute on deposit guarantee and investor compensation (*Einlagensicherungs- und Anlegerentschädigungsgesetz* – ESAEG), this latter provision is contained in § 12.

1. Keywords and summary

I v Einlagensicherung Austria Ges.m.b.H.*

Oberster Gerichtshof, Judgment of 31 January 2023, 4 Ob 202/22t[2]

Judgment on switches and reswitches regarding national deposit guarantee schemes

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) are still covered by § 12 ESAEG. These deposits continue to be protected if, as the result of a comprehensive examination, they are still available on these accounts. This applies independently of whether they qualify as current accounts, time deposit accounts or savings accounts.

[2] Available at https://ris.bka.gv.at/Dokumente/Justiz/JJT_20230131_OGH0002_0040OB00202_22T0000_000/JJT_20230131_OGH0002_0040OB00202_22T0000_000.pdf.

DI (FH) M* and W* GmbH v E* Ges.m.b.H. and K* GmbH

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).

1. Keywords and summary

DI (FH) M and W* GmbH v E* Ges.m.b.H. and K* GmbH*

Oberster Gerichtshof, Judgment of 18 April 2023, 6 Ob 139/22t[3]

Judgment on trusteeships within national deposit guarantee schemes

National Deposit Guarantee Scheme – Article 7(3) (2nd sentence) of Directive 2014/49/EU and § 11(2) ESAEG

The clear wording of § 11(2) ESAEG and of the provision which is thereby transposed into Austrian law, Article 7(3) (2nd sentence) of Directive 2014/49/EU, stipulates that if there is more than one trustor for an escrow account, the question whether a claim against the scheme is valid is to be answered with a view to the single depositor, not with a view to the deposit itself.

Trusteeship – § 11 ESAEG

A trusteeship in Austria is not regulated by law. Its content in detail is to be found out with a view to what the parties agreed upon among themselves. Where the purchaser of a flat has transferred the purchase price to an escrow account, which the trustee (a lawyer) ought to remit to the vendor once the property rights regarding the flat are assigned to the purchaser, the OGH qualifies this as a multilateral trusteeship. Here the trustee has to protect the interests both of the purchaser and of the vendor.

If in such a case the purchasing price is lost after the trust was concluded and after the sum of money was duly transferred to the escrow account, but before the condition for remitting it to the vendor (here: the assignment of property to the purchaser) was met, and if this loss is neither party's fault, it is to be borne

[3] Available at https://ris.bka.gv.at/Dokumente/Justiz/JJT_20230418_OGH0002_0060OB00139_22T0000_000/JJT_20230418_OGH0002_0060OB00139_22T0000_000.pdf.

by both parties in equal parts (unless a different solution was agreed upon by the parties for such case).

Each depositor has a legal claim of its own against the deposit guarantee scheme. That both of the depositors are trustors in regard to a deposit on an escrow account does not change this.

Liquidator of *bank * Aktiengesellschaft v Republic of Austria

The main legal question underlying this case was whether the Republic of Austria, as the legal entity behind the Financial Market Authority (*Finanzmarktaufsichtsbehörde* – FMA) and the Austrian National Bank (*Österreichische Nationalbank* – OeNB), is liable for damages due to deficient supervision over the bank's operations and, as the legal entity behind the public prosecutor's office, due to omitted investigations of misconduct by the bank's management bodies under provisions of criminal and banking supervision law.

1. Keywords and summary

*Liquidator of *bank * Aktiengesellschaft v Republic of Austria*

Oberster Gerichtshof, Judgment of 25 April 2023, 1 Ob 223/22h[4]

Judgment on the Republic of Austria's public liability for deficient banking supervision as legal entity behind the Financial Market Authority and behind the public prosecutor's office

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

§ 3(1) (2nd sentence) Financial Market Authority Act (*Finanzmarktaufsichtsbehördengesetz*) did not change the previously existing legal situation regarding the public liability (of the Federation) vis-à-vis the supervised legal entity. Accordingly, it is not the purpose of banking supervision law to protect the credit institution itself, by means of certain supervisory measures, from the occurrence of a pecuniary loss as a result of its own incorrect management.

Damages occurring due to undetected self-harm of the credit institution are not compensable. The possibility of public liability for damages of the credit institution due to unlawful supervisory interventions remains intact.

Public liability for deficient banking supervision – Liability of the public prosecutor's office – Acts of Austrian National Bank attributed to the Financial Market Authority

The public prosecutor's office relied on information from the FMA when investigating allegations of bank malfeasance by an anonymous whistleblower.

[4] Available at https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20230425_OGH0002_0010OB00223_22H0000_000/JJT_20230425_OGH0002_0010OB00223_22H0000_000.pdf.

The initial communication between the FMA and the public prosecutor's office took place via telephone. The FMA informed the public prosecutor's office that the allegations had not been confirmed during an on-site examination by the OeNB (attributed to the FMA). On this basis, they chose not to pursue further investigations. This information was subsequently substantiated in written form. Given the congruity of the information, the legitimacy of the public prosecutor's decision on the basis of mere telephonic notification was not impeded.

The provisions on the initiation of criminal investigations are not intended to prevent damages caused by criminal offences completely different from those for which investigation proceedings are to be conducted, even if these (other) criminal offences would – by chance – have been discovered in such investigation proceedings.

Belgium

by Thibault Martinelli (*)

[.] v Banque nationale de Belgique

Article 19 of the Belgian law on credit institutions (the so-called banking law), which transposes Articles 13(1), para 2, and 91 of Directive 2013/36/UE, requires that members of the management bodies of credit institutions be of sufficiently good repute.[1] Pursuant to Article 212 of the same law, Article 19 – and thus the requirement of good repute – is also applicable to members of the management bodies of financial holdings". This reputation requirement is part of the so-called fit and proper assessment to which members of management bodies are subject. Under Articles 212 and 234 §1 of the banking law, the BNB (*Banque nationale de Belgique/Nationale Bank van België - BNB*) may adopt decisions requiring credit institutions and financial holdings that do not operate in accordance with the provisions of the banking law to remedy this situation within a certain deadline, for instance, by revoking members of their management body that no longer fulfil the reputation requirement.

Based on this set of provisions of the banking law, the BNB found in 2020 that a member of the management bodies of two entities of the same banking group directly supervised by the BNB was no longer of sufficiently good repute to sit on those bodies. The BNB adopted two decisions requiring said entities to revoke that member. The latter first applied for the suspension of both BNB's decisions. The Council of State (*Conseil d'État/Raad van State*) denied his application in two judgements of 1 July 2020 (No 247.987 and No 247.988). In the cases at hand the revoked member sought the annulment of the BNB's decisions before the Council of State. In two judgements almost identically worded, the Council of State confirmed the validity of both BNB's decisions.[2]

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* Postdoctoral researcher, Salzburg Center of European Union Studies and Law Faculty, University of Salzburg. *The author gratefully acknowledges suggestions from Marijke Dreesen, legal advisor at Nationale Bank van België.*

1 *Loi du 25 avril 2014 relative au statut et au contrôle des établissement de crédit /Wet van 25 april 2014 op het statuut van en het toezicht op kredietinstellingen.* French and Dutch versions available at https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2014042508&table_name=wet.

2 The judgements of the Belgian Council of State are available at: http://www.raadvst-consetat.be.

1. Keywords and summary

[.] v Banque nationale de Belgique

Conseil d'État, Section du contentieux administrative / Raad van State, Afdeling Bestuursrechtspraak, Judgements of 11 January 2023 No 255.468[3] and No 255.469.[4]

The Belgian Council of State clarifies the standard of judicial review applicable to a decision of the National Bank of Belgium finding that the member of a supervised entity's management body should be revoked because he is no longer of a sufficiently good repute

Fit and proper assessment – Members of the management body of a supervised entity – "Good repute" requirement – Decision of the BNB – Duty to state reasons – Judicial review

Under Articles 2 and 3 of the Belgian law of 29 July 1991 on the formal motivation of administrative acts, a decision of the BNB, which holds that a supervised entity's board member is no longer of a sufficiently good repute, should contain an explanation of the factual and legal reasons backing it.[5] This motivation must allow the addressee of the decision to understand the reasons behind it and to verify whether all the circumstances at hand have been taken into account. In its examination of the legality of such a BNB decision, the Council of State ensures compliance with these provisions of the law of 29 July 1991.

The Council of State's judicial review covers the materiality of the facts underlying the BNB's decision, as well as the legal qualification of those facts. The decision of the BNB as to whether a supervised entity's board member still fulfils the "good repute" requirement entails some degree of discretion on its part. For those aspects of the decision, the judicial review carried out by the Council of State is limited to the manifest error of appreciation.

Fit and proper assessment – Members of the management body of a supervised entity – "Good repute" requirement – Decision of the BNB – No

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[3] French version available at http://www.raadvst-consetat.be/Arrets/255000/400/255468.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=41802&Index=c%3a%5csoftware%5cdtsearch%5cindex%5carrets%5ffr%5c&HitCount=2&hits=16+17+&08155120231716.

[4] French version available at http://www.raadvst-consetat.be/Arrets/255000/400/255469.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=41803&Index=c%3a%5csoftware%5cdtsearch%5cindex%5carrets%5ffr%5c&HitCount=2&hits=16+17+&08195220231716.

[5] *Loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs / Wet van 29 Juli 1991 betreffende de uitdrukkelijke motivering van de bestuurshandelingen.* French and Dutch versions available at https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1991072936&table_name=loi.

disciplinary nature – No application of the principle of respect for defence rights – Application of the principle *audi alteram partem*

The BNB's decision based on Articles 234 and 19 of the banking law, which requires a supervised entity to remove a board member who no longer satisfies the "good repute" requirement, does not qualify as a disciplinary decision against the board member.

The principle of respect for defence rights only applies to judicial, quasi-judicial and disciplinary proceedings, or when the challenged decision qualifies as a sanction. The BNB's decision qualifies as an act of administrative police (*acte de police administrative/handeling van bestuurlijke politie*). While this act may certainly have serious consequences for the supervised entity's board member, it does not have a punitive character. It is a preventive measure aiming to maintain public order in the economic field. Therefore, the principle of respect for defence rights does not apply prior to the adoption of such decision. Under the principle of *audi alteram partem*, the board member has the right to be heard before the BNB adopts a decision finding that he no longer fulfils the "good repute" requirements. This right to be heard is less extensive than the one granted by the principle of respect for defence rights. To comply with the *audi alteram partem* principle, it is enough for the BNB to provide the board member with the opportunity to submit his observations to express his or her views regarding the contemplated measure before the decision is taken. In addition, the BNB does not have to provide the board member with a right to be heard in cases of such urgency that a hearing would jeopardise the public interests that the BNB is tasked with protecting.

Notification to the ECB – Material NCA supervisory procedure – Timing of the notification – *Ex post* notification – No sufficient ground for annulment

The procedure launched by the BNB to assess whether a board member of a supervised entity fulfils the good repute requirement is a 'material NCA supervisory procedure' within the meaning of Article 97 of ECB Regulation (EU) 468/2014. Under that provision, an NCA, such as the BNB, must provide the ECB with the information related to this procedure before its opening or, in duly justified cases of urgency, simultaneously to its opening. Article 97 of ECB Regulation (EU) 468/2014 does not provide that the acts adopted by the NCA should necessarily be annulled if an NCA fails to notify the required information to the ECB prior to the adoption of those acts. In the case at hand, the notification of the required information took place ex post, namely two days after the official opening of the procedure. However, this notification was not deprived of its *effet utile* since the ECB could make its observations on the procedure in a timely fashion. Therefore the fact that the information was notified later is not, in and of itself, a reason to annul the BNB's decision adopted at the end of this procedure.

Notification to the ECB – Material NCA supervisory procedure – Duty of loyal cooperation – No general criteria provided by the ECB as regards the information to be notified by NCAs

Article 97(1) of ECB Regulation (EU) 468/2014 provides that the ECB defines general criteria to determine for which credit institution which information must be notified by the NCAs. In the absence of specific guidance provided by the ECB in this respect, it is up to NCAs, in line with their duty of loyal cooperation, to determine which pieces of information should be brought to the attention of the ECB, to enable the latter to fulfil its mission to supervise the functioning of the SSM. In any case, NCAs should communicate to the ECB all pieces of information that the ECB requests.

France

by Thibault Martinelli (*)

[.] and others v Autorité de contrôle prudentiel et de résolution

In December 2020, the French NCA (*Autorité de contrôle prudentiel et de résolution – ACPR*) published on its website a notice communicating its intent to partially comply with EBA Guidelines on loan origination and monitoring (EBA/GL/2020/06).[1] The notice states that the ACPR expects credit institutions, investment firms and financing companies (*sociétés de financement*) to implement these EBA Guidelines. Under French law, financing companies are nonbank undertakings that are licensed by the ACPR to make credit transactions, but do not qualify as credit institutions because they are not allowed to take deposits.[2] Financing companies do not qualify as "financial institutions" within the meaning of Regulation (EU) 1093/2010 establishing EBA. However, the good governance requirements laid down in Directive CRD IV apply to them.

In *[.] and others v ACPR*, the claimants sought the annulment of the notice published by the ACPR, *inter alia* because it extends the application of some sections of EBA Guidelines to financing companies. The applicants also asked the French Council of State (*Conseil d'État)* to refer several questions to the CJEU on the validity of those EBA Guidelines.

The French Council of State confirmed the validity of the ACPR's notice and declined to make a preliminary ruling request to the CJEU on the ground that there was no reasonable doubt as to the correct interpretation of EU law on the issues raised by the applicants.[3]

1. Keywords and summary

[.] and others v Autorité de contrôle prudentiel et de résolution

Conseil d'État, Judgement of 22 July 2022, No 449898[4]

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* Postdoctoral researcher, Salzburg Center of European Union Studies and Law Faculty, University of Salzburg. The author gratefully acknowledges suggestions from Diane Fromage, Professor of European Law at the University of Salzburg.

1 ACPR, *Notice de conformité aux orientations de l'Autorité Bancaire Européenne relatives à l'octroi et au suivi des prêts (EBA/GL/2020/06)*, available at https://acpr.banque-france.fr/sites/default/files/media/2020/12/18/20201218_notice_de_conformite_orientations_abe_prets.pdf.

2 *Article L511-1, Code monétaire et financier*, available at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072026/LEGISCTA000006170506/.

3 The judgement of the French Council of State is available at: https://www.conseil-etat.fr.

4 French version available at https://www.legifrance.gouv.fr/ceta/id/CETATEXT000046082431?init=true&page=1&query=+449898&searchField=ALL&tab_selection=all.

The French Council of State confirms the legality of the ACPR's notice on partial compliance with EBA Guidelines on loan origination and monitoring

FINANCING COMPANIES (*SOCIÉTÉS DE FINANCEMENT*) – Concepts of "credit institutions" and "financial institutions" under Regulation (EU) 575/2013 – Concept of "creditor" under Directive 2008/48/EC and Directive 2014/17/EU – Scope of EBA Guidelines EBA/GL/2020/06 – Scope of ACPR's competence

Financing companies (*sociétés de financement*) do not qualify as "credit institutions" within the meaning of Article 4(3), point 3 of Regulation (EU) 575/2013. However, they qualify as "financial institutions" within the meaning of Article 4(1), point 26 of the same Regulation. When financing companies conclude credit transactions with consumers, they qualify as "creditors" within the meaning of Directive 2008/48/EC on credit agreements for consumers and Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property. Several sections of EBA Guidelines EBA/GL/2020/06 apply to creditors as defined in Directive 2008/48/EC and Directive 2014/17/EU. The *ACPR* may thus provide in its notice that it expects financing companies to implement the sections of those EBA Guidelines that apply to creditors within the meaning of those two Directives.

According to the French Decree of 23 December 2013 on the prudential regime of financing companies, financing companies are subject to the rules on good governance and prudential control laid down in Regulation (EU) 575/2013 and the national law transposing Directive 2013/36/EU.[5] Therefore, they should also make every effort to comply with the guidelines issued by EBA that are necessary to ensure the consistent and coherent application of those two EU law instruments. The ACPR may thus lawfully state in its notice that it expects financing companies to comply with the sections of Guidelines EBA/GL/2020/06 that relate to good governance issues and prudential supervision.

EBA Guidelines – Article 16, Regulation 1093/2010 – Financial institutions as direct addressees of EBA Guidelines – Distinction between EBA Guidelines pertaining to prudential supervision from EBA Guidelines falling within the exclusive competence of national authorities

EBA Guidelines EBA/GL/2020/06 includes sections that pertain to prudential supervision as well as sections on anti-money laundering, on countering the financing of terrorism, and on clients' protection. The sections that relate to prudential supervision are to be implemented by the ECB and national authorities, whereas the other sections fall within the exclusive competence of national

[5] *Arrêté du 23 décembre 2013 relatif au régime prudentiel des sociétés de financement, JORF n°0301 du 28 décembre 2013*, available at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000028396367.

authorities. There is no reasonable doubt that this lack of clear distinction between the two types of sections does not affect the legality of the EBA Guidelines. This is so because, under Article 16 of Regulation 1093/2010 establishing the EBA, financial institutions are direct addressees of EBA Guidelines and must make every effort to comply with them, even though the competent regulatory authority – be it the ECB or a national authority – decides to comply only with parts of those Guidelines.

EBA Competence – Credit agreements for consumers relating to residential immovable property – Directive 2014/17/EU

In Case C-911/19 (*FBF v ACPR*), the CJEU held that Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property should be considered as one of the legal acts listed in Article 1(2) of Regulation 1093/2010.[6] Therefore, there is no reasonable doubt that EBA is entitled to issue guidelines falling within the scope of that Directive.

Section 4 of EBA Guidelines EBA/GL/2020/06 – Fight against anti-money laundering and terrorism financing – Legal bases of EBA Guidelines – Validity of ACPR's notice of conformity – No conflict with national law

The Paragraph 44 of Section 4 of EBA Guidelines EBA/GL/2020/06, which pertains to policies and procedures to fight anti-money laundering and terrorism financing, fall within the scope of Articles 8 and 13 of Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorism financing. Paragraphs 70 and 71 of the Guidelines on objectivity and impartiality in credit decision-making fall within the scope of Articles 74 and 88 of Directive 2013/36/EU on the access to the activity of credit institutions. Therefore, it is clear, beyond any reasonable doubt, that Paragraphs 44, 70 and 71 of Section 4 of EBA Guidelines EBA/GL/2020/06 have a sound legal base in EU law.

According to Paragraph 44 (b)(i) of the Guidelines, institutions should consider the purpose of the credits that they grant when they assess and manage the money laundering and terrorist financing risks to which they are exposed. This Paragraph does not conflict with Article L. 311-1 of the French Consumer Code on consumer credits that are used exclusively to finance the purchase of specific goods or services.[7] This is so because Paragraph 44 does not require institutions to requalify this specific type of consumer credit in

[6] Case C-911/19, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)*, EU:C:2021:599, para. 101.

[7] Article *L. 311-1 du Code de la consommation*, available at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000034072668/.

violation of the French Consumer Code. Therefore, the ACPR may provide, in its compliance notice, that it will comply with this Paragraph of the EBA Guidelines.

SECTION 5 OF EBA GUIDELINES EBA/GL/2020/06 – Loan origination procedures – Legal bases of EBA Guidelines – No conflict with Directive 2008/48/CE

Paragraph 111 of EBA Guidelines EBA/GL/2020/06, which pertains to the valuation of the borrower's creditworthiness within the framework of loan agreements secured by immovable property, has a valid legal base in EU law since it falls within the scope of Article 79 of Directive 2013/36/EU. The implementation of this Paragraph does not require institutions to interfere with the operations that they finance. In any case, the Guidelines have no legally binding effect and must be implemented in a manner that is proportionate to the size, nature, and complexity of the credit facility.

Paragraphs 84 to 86 of EBA Guidelines EBA/GL/2020/06, which pertain to the valuation of consumers' creditworthiness, have valid legal bases in EU law since they fall within the scope of Article 8 of Directive 2008/48/CE, Article 79 of Directive 2013/36/EU and Article 18 of Directive 2014/17/EU. Those Paragraphs do not conflict with Article 8 of Directive 2008/48/CE as interpreted by the CJEU in Case C-449/13 (*CA Consumer Finance SA v Ingrid Bakkaus*).[8]

SECTIONS 4 AND 5 OF EBA GUIDELINES EBA/GL/2020/06 – Environmental, Social and Governance (ESG) factors – Validity of EBA Guidelines' legal bases – EBA competence – No conflict with EU law

The Paragraphs of Sections 4 and 5 of EBA Guidelines EBA/GL/2020/06 that encourage institutions to take ESG factors into account in their credit risks policies go beyond the requirements laid down in EU law. However, those Paragraphs fall within the scope of EBA's competence, since, under Article 79 of Directive 2013/36/EU, EBA is entitled to clarify how ESG factors should be considered in credit risks matters. Those Paragraphs do not conflict Article 98 of Directive 2013/36/EU since that provision relates to the integration of ESG factors into the prudential supervision carried out by the competent authorities (the ECB or the NCAs) but does not relate to the integration of those factors in the procedures of the institutions themselves.

[8] Case C-449/13, *CA Consumer Finance SA v Ingrid Bakkaus*, EU:C:2014:2464.

Section 7 of EBA Guidelines EBA/GL/2020/06 – Valuation of movable and immovable properties – Validity of EBA Guidelines' legal bases

Section 7 of EBA Guidelines EBA/GL/2020/06 encourages institutions to ensure that, when a credit facility is secured by a movable or immovable collateral, an accurate valuation of that collateral takes place at the point of origination as well as later, in the framework of the credit facility's monitoring (Paragraphs 209, 210, 215 and 227). In this respect, the Guidelines may indeed go beyond the obligations placed upon institutions by the provisions of Regulation (EU) 575/2013. However, Section 7 should be implemented in a manner that is proportionate to the size, nature, and complexity of the credit facility in question, in accordance with the principle of proportionality. In any case, those parts of Section 7 that relate to the valuation of collaterals fall within the scope of Article 79 of Directive 2013/36/EU. They have thus a valid legal base in EU law.

Italy

[.] v Ministero dell’economia e delle finanze, Banca d’Italia

1. Keywords and summary

[.] v Ministero dell’economia e delle finanze, Banca d’Italia

Consiglio di Stato, sez. VII, Judgment of 11 January 2023 No 407[1]

Decision to extend the special administration of a credit institution to the parent undertaking exercising de facto control

Special administration – Early intervention measure – Banking group – Extension of measures to the parent undertaking – De facto control

When Banca d’Italia sets up the special administration of a credit institution (i.e. it removes the governing bodies of the credit institution and appoints special administrators) pursuant to Articles 70 et seq. of the Italian Consolidated law on banking (legislative decree No 385/1993), the same authority may, under Article 98 of the same law, extend the special administration to the parent undertaking of the credit institution concerned, if specific conditions stipulated therein occur.

Given that, pursuant to Article 105 of the Italian Consolidated law on banking, rules on banking groups formally registered as such under Article 64 of the same law apply also to banking groups not formally registered as such, Banca d’Italia may decide to extend the special administration of a credit institution also to the undertaking that exercises the de facto control of the same credit institution and, thus, has to be deemed the parent undertaking, even if the group has not been formally registered as such.

Control over a credit institution – De facto control – Financial intermediaries

The purposes of the prudential framework and, specifically, of the rules on the exercise of control of credit institutions require to take into consideration the concrete activities carried out by the entities involved and the reality of the existing relationships among them. It follows that formal aspects are less important than factual ones.

[1] Italian version available at https://www.giustizia-amministrativa.it/provvedimenti-cds.

Therefore, notwithstanding its formal statutory object of business and the absence of a formally registered banking group, a financial intermediary may be deemed to be the de facto controller of a credit institution.

Special administration – Retroactive effects of the decision – Admissibility

Where the competent authority's decision setting up the special administration of a credit institution is annulled by the judicial authority due to procedural issues, the competent authority is allowed to determine that its new decision, correcting those issues and setting up the special administration of the same credit institution, have retroactive effects starting from the day in which the first decision entered into force before being annulled.

Special administration – Right to be heard – Restrictions

In order to protect the secrecy of the competent authority's decision setting up the special administration of a bank, that is necessary due to its impact on the market and to prevent speculative manoeuvres, Article 70(3) of the Italian Consolidated law on banking (legislative decree No 385/1993) stipulates that the aforementioned decision is to be notified to the parties concerned only after its adoption and entry into force, when the special administrators have taken office. For the same reasons, the parties concerned may exercise their right to be heard only after such moment.

[.] AND OTHERS V BANCA D'ITALIA

1. Keywords and summary

[.] and others v Banca d'Italia

Consiglio di Stato, sez. VI, Judgment of 26 April 2023 No 4171[1]

Bank of Italy's decision to place a credit institution under temporary administration

TEMPORARY ADMINISTRATION – Conditions – Significant deterioration

For the purpose of adopting the measure of temporary administration, a particularly significant deterioration of the credit institution's financial situation constitutes a relevant and appreciable element pursuant to Article 69-octiesdecies, paragraph 1, letter b), of the Italian Consolidated Law on Banking.

TEMPORARY ADMINISTRATION – Sound and prudent management – Technical discretion – Complex technical assessments

The appreciation remitted by the law to the Bank of Italy regarding the undetermined legal concept of "sound and prudent management" falls into the category of complex technical assessments, that is to say, that particular type of judgments involving the appreciation of a series of factual elements with each other and on the basis of rules that do not have the nature of "scientific" laws, meaning exact and not debatable, being, on the contrary, the result of inexact and debatable sciences, mainly economic in nature.

[1] Italian version available at https://www.giustizia-amministrativa.it/provvedimenti-cds.

Portugal

by Martinho Lucas Pires (*)

[.] and others v Bank of Portugal and Portuguese Resolution Fund

1. Keywords and summary

[.] and others v Bank of Portugal and Portuguese Resolution Fund

Portuguese Supreme Administrative Court, Judgment of 9 March 2023 No 02586/14.3BELSB[1]

Appeal *per saltum* on the legality of the measure requesting the constitution of enhanced provisions, of the resolution measure applied to Banco Espírito Santo S.A. by the Bank of Portugal, and of the Portuguese legal regime of banking resolution

Procedural vices of request for enhanced provisions – Absolute lack of procedure – Lack of reasoning

There were no formal vices in the measures enacted by the Bank of Portugal when deciding, three weeks before the application of the resolution measure, that Banco Espírito Santo had to incorporate new provisions in the amount of 2 billion euros. Although the procedure for enacting the measure was compressed, it included all essential legal guarantees. The Court also found that the measure did not violate the principle of equality, given Banco Espírito Santo's specific situation in comparison with the rest of its competitors.

Formal validity of the resolution measure – Legality of the resolution measure – Competence of national law rules regarding resolution measures

The resolution measure applied to Banco Espírito Santo was not a consequence of the request for enhancing provisions, but an autonomous measure, and its legality must be assessed separately. The Portuguese rules on banking resolution were enacted by a competent institution (the Government) and followed the correct procedure for enactment according to the constitution.

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* Lecturer at Católica School of Law Lisbon. The author gratefully acknowledges suggestions from Luís Barroso, Legal Department, Banco de Portugal.

[1] Portuguese version available at http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/fdafd3367f41d29980258989003b48d0?OpenDocument&ExpandSection=1#_Section1.

Constitutional validity of Portuguese law rules on banking resolution – Compatibility with fundamental rights – Right to equal treatment – Right to private property

The Portuguese rules on banking resolution do not violate the right to equal treatment nor the right to private property since it provides for an exceptional measure applicable to safeguard the financial system, and differentiations of treatment of creditors are common in insolvency procedures.

Proportionality of Portuguese law rules on banking resolution – Proportionality of the resolution applied to Banco Espírito Santo – Proportionality of the Portuguese legal regime for banking resolution

The Portuguese rules on banking resolution are proportional and not excessive, while the resolution measure was also proportional considering the options available for the situation at stake, since the criteria for applying the resolution measure were all fulfilled.

Compatibility of the Portuguese rules of banking resolution with EU law and ECHR rules – Respect for the right of private property – Respect for rules on the transposition of EU Directives

Following a referral for preliminary ruling to the Court of Justice of the European Union (Case C-83/20 of 5/5/2022) the Portuguese rules on banking resolution were found to be compatible with the right of private property established in Article 17(1) of the Charter of Fundamental of Rights. The transposition of the Banking Recovery and Resolution Directive to Portuguese law was also compatible with EU law.

2. Portugal's Supreme Administrative Court rules on the legitimacy of Banco Espírito Santo's resolution measure

by Francesca Chiarelli[*]

The case originates from the lawsuit filed before the Portuguese administrative courts by some owners of subordinate bonds issued by Banco Espírito Santo ('BES') and Massa Insolvente, who possessed shares in the share capital of BES. They requested the nullification of the measure requiring the establishment of

[*] The author gratefully acknowledges review by Martinho Lucas Pires, Lecturer at Católica School of Law Lisbon.

increased provisions in the amount of two billion euros as well as of the resolution measure applied by Banco de Portugal to BES in 2014.

The Supreme Administrative Court ruling raises interesting questions regarding the compatibility of the national legislation under which the BES resolution measure was taken with EU law, in particular with Directive 2014/59/EU and Article 17 of the Charter of Fundamental Rights of the European Union.

Resolution decision

BES was a primary credit institution in the Portuguese banking system. It faced a severe financial crisis, which led to Banco de Portugal adopting a resolution decision on 3 August 2014. The decision was adopted because BES was at significant risk of defaulting on its obligations. Without the urgent approval of the resolution action, BES would have faced payment suspensions and the revocation of its authorisation to carry out credit institution activities. This would have put the institution at risk of being liquidated, which would have sparked a huge risk of financial stability to the system.

The resolution measure was preceded by Banco de Portugal's decision of 22 July 2014, which required BES to set up enhanced provisions in the amount of EUR 2 billion.

The resolution decision resulted in the establishment of Novo Banco SA, a bridge bank to which specific assets, liabilities, off-balance sheet items and assets managed by BES were assigned.

The Portuguese resolution framework

The BES Resolution Decision was adopted on the basis of the national regulation on the reorganisation and resolution of credit institutions, introduced under the Regime Geral das Instituições de Crédito e Sociedades Financeiras (hereinafter 'RGICSF') by Decree-Law No 31-A/2012 of 10 February 2012. This Decree-Law was intended to implement one of the commitments entered into by the Portuguese Republic in the context of a Memorandum of Understanding on economic policy conditionality concluded with the joint mission of the European Commission, the International Monetary Fund and the European Central Bank.

The 2012 regulations were amended by Decree-Law No 114-A/2014 of 1 August 2014, which only partially transposed Directive 2014/59/EU, by implementing specific aspects of it. The transposition of Directive 2014/59/EU into Portuguese law was completed with the adoption of Law No 23-A/2015 of March 26th.

To note, Decree-Law No 114-A/2014 amended, among others, Article 145-B of the RGICSF, which provides for that the application of resolution measures is aimed at ensuring that: a) the shareholders of the credit institution bear the

losses of the institution concerned on a priority basis; b) the creditors of the credit institution bear the remaining losses of the institution concerned on a secondary basis and on equitable terms, according to the hierarchical order of the different classes of creditors; c) no creditor of the credit institution bears a greater loss than it would bear in the event of liquidation of the institution.

The grounds of appeal and the decision of the Supremo Tribunal Administrativo

The applicants lodged an appeal *per saltum* with the Supremo Tribunal Administrativo against the judgment of the Administrative Court of First Instance, which had upheld the lawfulness of the BES's resolution measure.

The resolution decision is challenged in several respects. The applicants allege breaches of procedure in the adoption of the law on the basis of which the resolution decision was adopted; breach of procedure in the adoption of the decision to request the establishment of an enhanced provision; breach of the principle of proportionality by the resolution decision; breach of the constitutional rules on the right to property and breach of EU law and ECHR rules on the right to property.

First, the applicants challenge the constitutionality of Decree-Law No 114-A/2014 on the ground that it infringes the **principle of parliamentary reservation of legislation**. According to them, the Portuguese rules on bank resolution, adopted by Decree-Law No 114-A/2014 of 1 August 2014, were enacted by an incompetent body: to the extent that they contain provisions that affect the core of a fundamental right, such as the right to property, the legislation should have been adopted by Parliament and not by the Government.[2]

On this point, the judgment under review states: that the regulatory changes introduced by the 2014 Decree are not innovative, as they do not affect the essential content of a fundamental right and therefore did not require new approval by Parliament; and that Decree No 114/2014 merely clarified the regulatory scope of the previous 2012 Decree, with reference to the protection of the property rights of creditors affected by the application of resolution measures. Pursuant to the judgment, the regulatory amendment as a matter of fact merely confirms expressly the natural priority of shareholders' losses over creditors, in application of the "no creditor worse off" principle, what was already provided for in the 2012 Decree.[3]

Therefore – the Supremo Tribunal Administrativo concludes – the matter is not covered by a reservation of legislation in favour of Parliament.

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2 The applicants point out that Decree-Law No 31-A/2012 of 10 February 2012 – which introduced the resolution mechanism into the Portuguese legal system – was accompanied by a law of legislative authorisation by the Parliament.

3 Decree-Law No 31-A/2012 2012 provided that shareholders and creditors are primarily liable for losses according to their respective hierarchy and on equal terms within each class of creditors.

The Supreme Court then addresses the claimants' complaints about **procedural breaches** in the measures taken by Banco de Portugal when it decided, three weeks before the application of the resolution measure, that Banco Espírito Santo had to establish new provisions in the amount of EUR 2 billion. The applicants complained that Banco de Portugal had failed to initiate a proper administrative procedure, to ensure the participation of the interested party and to justify the decision, and violated the principle of equality.

The ruling states that the decision to impose the provision on BES in July 2014 was not flawed: the measure was taken in the context of an inspection and as a matter of urgency. This justifies the compression of certain procedural formalities such as the prior notice of the initiation of the proceeding. Moreover, although the procedure for issuing the measure was compressed, it included all essential legal safeguards.

With regard to the duty to state reasons, the Court states that the statement of reasons for an administrative measure is a relative concept, adaptable to the specific procedure, its subject matter and the addressees. In the case of BES, the decision imposing the provisions was objectively comprehensible as its purpose of containing the risks was clear in view of the credit exposure of the bank.

Finally, Banco de Portugal did not violate the principle of equality by ordering BES to establish a provision corresponding to 77% of its exposure, as opposed to the 50% imposed on the other banks: the greater size of BES's exposure – which was even greater than the total exposure of all the remaining institutions of the Portuguese banking system – justified, according to the Tribunal, the different treatment complained of by the applicants.

Another profile examined by the Supremo Tribunal Administrativo concerns the claim by the applicants that Banco de Portugal did not assess alternative options to the resolution that would have been less burdensome for the shareholders, thereby breaching the **principle of proportionality.**

According to the Tribunal, the resolution measure adopted by Banco de Portugal is proportionate. Having regard to the objectives pursued – to ensure financial stability and to guarantee the safety of depositors without using public taxpayers' money – the measure is, on the one hand, proportionate to the objectives pursued; on the other hand, it has not been established that there was another measure which, by comparison, would be equally effective in achieving those objectives and less restrictive of the fundamental rights.

The Supreme Tribunal Administrativo then considered the challenge relating to the alleged **violation of the right to equal treatment and the right to property** by the 2012 and 2014 decree-laws, on the basis of which the measure to resolve the BES was adopted. The applicants argue, also in light of the principles recognised by EU law, that any restriction on the right to property: must be justified on grounds of public interest; be adopted in the cases and under the conditions provided for by law; be compensated by fair compensation for the loss in due time; and respect the principle of proportionality.

It should be noted that the Portuguese Tribunal had doubts as to the compatibility of the national legislation under which the BES resolution action was taken with EU law, in particular with Article 17 of the Charter of Fundamental Rights of the European Union.

Following a preliminary reference to the Court of Justice of the European Union (Case C-83/20 of 5 May 2002), the Portuguese bank resolution legislation was found to be compatible with the right to private property enshrined in Article 17(1) of the Charter of Fundamental Rights. In the case of the BES's resolution, the Court states that the resolution measure adopted did not provide for formal expropriation of the shareholders and holders of subordinated bonds: the resolution measure did not in fact forcibly, integrally and definitively deprive the holders of the rights deriving from those shares or bonds.[4]

Referring to the conclusions of the ECJ, the Portuguese administrative judge states that the Portuguese bank resolution legislation does not violate the right to equal treatment or the right to private property. The right to free private economic initiative is not an absolute right, but may be subject to limits and regulation by the legislator. In that context, and in accordance with the principle of the financial responsibility of the shareholders, the capital sacrifice imposed on them appears fair, balanced and proportionate.

Finally, the Tribunal considers that the alleged infringement of the shareholders' right to property was not a consequence of the resolution measure, as claimed by the applicants, but had been caused by the actions and omissions of the shareholders themselves, which had led to, or contributed to, the state of risk of insolvency of the bank, a state which constitutes a precondition for the resolution of BES.

The Portuguese Court's decision is in line with consistent European case law, which has confirmed that, in an area as "sensitive" as the stability of the banking system, national authorities have a "wider margin of appreciation" regarding the proportionality of restructuring measures. Any exceptions to shareholders' rights are therefore justified on the basis of the "public interest", and thus do not entail a violation of the ECHR.

The last profile addressed by the Portuguese administrative judge – also the subject of the request for a preliminary ruling – concerns the **partial transposition**

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[4] See judgment of 5 May 2022, *BPC Lux 2 and Others*, C 83/20, EU:C:2022:346, paragraph 45 and, on this Newsletter, "Portuguese national resolution legislation: partial implementation of Directive 2014/59/EU (BRRD) and protection of shareholders of the institution under resolution" (no 17, May 2022). By its judgment, the Court considers that a resolution action taken under national legislation does not constitute a deprivation of property within the meaning of the second sentence of Article 17(1) of the Charter. After examining in turn the conditions laid down in that provision, the Court holds that, in the light of the discretion enjoyed by the Member States when adopting decisions on economic matters, Article 17(1) of the Charter does not preclude national legislation which does not contain any express provision ensuring that shareholders do not bear greater losses than they would have incurred if the institution had gone into liquidation at the date on which the resolution action was taken (the no creditor worse off principle).

of Directive 2014/59/EU into Portuguese law by Decree-Law No 114-A/2014. The applicants complain about a failure to transpose the BRRD: the Portuguese State decided to transpose it, even before the deadline, but did so in a deficient manner, thereby undermining the result prescribed by the Directive, in breach of its Community obligations under Articles 4(3) and 288 TFEU.

The Supremo Tribunal asked the European Court of Justice if the Portuguese legislature had seriously undermined the result prescribed by Directive 2014/59 by adopting the Decree-Law of 1 August 2014, which only partially transposed that directive, before the expiry of the period for transposition of that directive, which was set at 31 December 2014.[5]

In that regard, the Court of Justice held that the period for transposition of Directive 2014/59 expired on 31 December 2014, so that the Portuguese Republic cannot be criticised for not having adopted the measures transposing that directive into its legal system on the date of adoption of the BES resolution measure, namely 3 August 2014. Moreover, where the adoption by a Member State of a measure is intended to transpose, even if only in part, an EU directive, and that transposition is correct, the adoption of such a partial transposition measure cannot be regarded as capable of having such an adverse effect, since it necessarily brings national legislation into line with the directive which that legislation transposes, thereby contributing to the achievement of the objectives of that directive.

On the basis of the Court's findings, the Supremo Tribunal Administrativo considers that the national legislation on bank resolution not only does not conflict in the slightest with Directive 2014/59/EU, but has provided solutions which, although aimed at a partial transposition of the BRRD Directive, constitute a development of it and are consistent with it, anticipating the production of certain effects in the national legal framework, in particular with regard to the principle that "*no creditor is worse off*".

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[5] According to the settled case-law of the European Court of Justice that can be traced back to the Inter-Environnement Wallonie judgment of 18 December 1997 (C 129/96, EU:C:1997:628) during the period for transposition of a directive, Member States to which a directive is addressed must refrain from adopting provisions that might seriously jeopardise the attainment of the result prescribed by the directive.

Spain

by Lucía Arranz (*)

No breach of the Mexico - Spain Investments Protection Treaty due to the resolution of Banco Popular Español

1. Keywords and summary

Award of the international arbitration tribunal – Resolution of Banco Popular Español – Jurisdiction of the Court – No breach of the Investments Protection Treaty

On 13 March 2023, an Arbitral Tribunal constituted under UNCITRAL rules issued its award[1] on a claim filed by several Mexican investors against Spain for certain acts and omissions of different Spanish institutions which allegedly precipitated the resolution of Banco Popular Español, S.A. ("BPE") and led to the destruction of their investment in BPE. The Tribunal ruled that Spain did not breach the Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain of 2006 (the "Treaty") and, thus, dismissed the claim and imposed on the claimants the obligation to contribute to the legal fees and expenses incurred by Spain in connection with the arbitration.

In particular, the acts and omissions of Spanish authorities which the claimants presented and considered to be in breach of the Treaty, which have been analyzed by the Tribunal, comprise the "massive" withdrawal of deposits by public administrations from BPE, the public statements (and non-statements) made by Spanish officials regarding the situation of BPE, the "insufficient" provision of emergency liquidity assistance (ELA) by Banco de España to BPE, the non-adoption of a short-selling ban over BPE's shares by the CNMV (Spanish markets authority) and the resolution actions carried out by the FROB in the context of the SRM, including the "pre-conceived" and "non-transparent" sale of BPE to Banco Santander, S.A. ("Santander").

2. No breach of the Treaty due to the resolution of BPE

In 2018 several Mexican investors in BPE initiated two arbitrations against Spain (one under UNCITRAL rules and the other one under the ICSID Convention) which, upon agreement of all the parties involved, were consolidated into a single

* Director of Banco de España's Legal Department.

1 Spanish and English versions available at https://pca-cpa.org/en/cases/211/.

arbitration to be conducted under the UNCITRAL rules. The claimants requested, among others, that the Tribunal ordered Spain to pay them a compensation of approximately €647 million plus interests.

On 13 March 2023, the Tribunal ruled that Spain did not breach the Treaty and, thus, dismissed the claim and imposed on the claimants the obligations to pay to Spain the amounts of (i) approximately €0.7 million as reimbursement of the costs of the arbitration and (ii) approximately €7.2 million as contribution to legal fees and other expenses.

This award is not subject to appeal, but the claimants have three months to seek its annulment –based on limited grounds– before Dutch courts, as the seat of the Tribunal was The Hague.

The main issues addressed in the final award are summarized below.

The Tribunal's jurisdiction

The Tribunal asserted its jurisdiction –with some limited exceptions – to rule on this dispute and rejected most of the jurisdictional objections raised by Spain:

1. The Treaty prohibited the claimants to bring proceedings in other fora in relation to the same measures challenged in the arbitration (the so-called "fork-in-the-road provision"). The Tribunal considers that there is no identity of the parties involved in these arbitration proceedings and in the proceedings brought before the CJEU by some claimants against EU authorities (i.e. the SRB and the European Commission) in connection with BPE's resolution, nor are the same the alleged violations of the law. Therefore, the claimants did not breach this provision of the Treaty.

2. The acts of the EU authorities do not fall within the scope of the Treaty and, therefore, the Tribunal has no jurisdiction over them. The award states that by examining facts which involve the acts of EU institutions as factual background of the case, the Tribunal is not asserting jurisdiction over EU authorities or their conduct.

3. Several claimants have dual nationality (Spanish and Mexican). This situation is not expressly addressed in the Treaty. In order to decide if dual nationals shall be excluded from the arbitration, the Tribunal applies the criterion of "predominant nationality" and considers that the claimants have established (inter alia, by their habitual residence, tax residence and family ties) that their nationality is predominantly Mexican.

The Tribunal does partially admit other jurisdictional objections raised by Spain regarding: (i) the need for the claimants to prove ownership and control

of their investments in BPE, which were not proven in respect of four of the claimants; (ii) the absence of jurisdiction over contested acts which took place prior to 2017, i.e. before the time when a large part of the claimants' investments were made, (iii) contested acts of commercial nature which were not carried out in the exercise of the sovereign authority of the Kingdom of Spain, with the Tribunal excluding from its jurisdiction the withdrawals of deposits made in exercise of the contractually agreed terms between the depositors and BPE. However, the Tribunal notes that it does have jurisdiction in relation to deposit withdrawals, acts or omissions of the respondent that concern the exercise of its sovereign powers, such as the protection of financial stability.

The merits of the case

The Tribunal concludes that Spain has not breached its obligations under the Treaty, in particular those relating to the fair and equitable treatment of foreign investors and non-discrimination and expropriation standards. The Tribunal finds that none of the challenged acts can be considered arbitrary, unfair, grossly negligent or lacking in transparency. The main conclusions of the Tribunal are the following:

1. Withdrawals of deposits by public authorities from BPE: The Ministry of Economy, Banco de España or other Spanish authorities had no obligation to prevent the withdrawal of deposits by other public entities from BPE. The claimants were not able to establish the existence of any legal provision or established practice which would have permitted (let alone obliged) the authorities to take such action. The Tribunal also confirms that there is no indication of any concerted action to withdraw deposits with the aim of destroying BPE.

2. Spanish authorities' public statements regarding BPE: The Tribunal concludes that none of the Spanish authorities' public statements can be considered as discriminatory, lacking any rational basis or grossly negligent. On the contrary, it assesses them as generally positive or neutral. Moreover, with regard to the applicants' allegations that Spain should have made statements in support of BPE and corrected statements by other Union authorities, it considers that Spain was under no obligation to do so, particularly in the case of a significant institution such as BPE, relying for that purpose, inter alia, on the provisions of the MoU between the ECB and the SRB which provide for coordination between these two authorities as regards the public communication on the resolution of this type of institutions.

3. Non-imposition of a ban on short-selling on BPE's shares: The Tribunal confirms that this measure is of an exceptional nature and, according to the applicable regulations, the Spanish markets regulator (the CNMV) has a wide discretion in its application. BPE never requested the imposition of this measure, which suggests that the entity itself did

not consider it necessary. The Tribunal acknowledges that this case differs significantly from the case of Liberbank, where the CNMV did impose the prohibition shortly after the resolution of BPE.

4. <u>Provision of ELA</u>: The Tribunal considers that the provision of ELA is a discretionary power of the central bank and no institution has a right or should have an expectation to necessarily have access to ELA.

   The Tribunal considers that Banco de España's conduct in dealing with BPE's emergency liquidity requests was rather proactive, especially in the early phases, conducting dry run exercises and simulations beyond the requirements of the ELA framework. In the crucial days immediately before and after the ELA requests, email exchanges took place late at night and during weekends. The Tribunal recalls that BPE's last chairman later acknowledged: "*I think Banco de España did exactly what any custodian would have done. It was prudent and it did what it could*".

   The Tribunal also understands that the claimants' argument that Banco de España "abruptly" suspended the provision of ELA similarly lacks merits. In light of the events of 6 June 2017 (in particular, the written decision of BPE's board of directors confirming the assessment that BPE was failing or likely to fail), it is unsurprising that Banco de España postponed work on additional potential collateral to the following morning. At this point in time, it was evident that even BPE realized that its liquidity crisis had become existential and could not be overcome by additional liquidity assistance. It was that determination itself that in fact pre-empted any (further) disbursement of ELA. Moreover, on 7 June 2017, BPE itself requested the termination of the ELA process.

   Finally, the Tribunal concluded that Spain did not abuse the discretion it enjoyed under Spanish and EU law in not providing further ELA, in addition to the €3.8 billion in ELA which it did in fact grant BPE. Banco de España had approved ELA disbursements of up to a maximum of €9.5 billion subject to the condition that BPE would provide sufficient collateral to secure any further ELA disbursements, which BPE failed to do.

5. <u>Sale of BPE to Santander</u>: The Tribunal confirms that the decision to sell BPE falls outside its jurisdiction, being a matter for the Union authorities, and therefore limits its analysis to the claimants' allegations that the defendant took the predetermined decision to sell BPE to Santander in resolution instead of trying to solve a liquidity crisis. The Tribunal understands that it was the SRB, and not the FROB, who took the decision to use the sale tool as it considered it to be preferable from a financial stability standpoint, and there is no indication that the FROB exerted pressure to choose this tool over others. Likewise,

the Tribunal considers that the shortcomings alleged by the claimants with regard to the sale process and its lack of competitiveness must be placed in the factual context of the time, taking into account, among others, the private sale process that had taken place in the weeks prior to the resolution, in which no positive offers for BPE had been received, the urgency with which the sale had to be carried out and the need to preserve confidentiality. In the light of the above, the Tribunal concludes that it is clear that proceeding with the resolution of BPE in accordance with Santander's offer was almost inevitable in order to ensure the continuity of BPE's critical functions, to avoid the risk of contagion to other institutions and to protect the stability of the financial system.

6. The Tribunal considers that there has been no discriminatory treatment between BPE and other entities such as Catalunya Banc or BMN, as the legal framework applicable to the crisis of the latter (pre-BRRD) was different from that applicable to BPE, and as Catalunya Banc and BMN were both operating normally and had sufficient liquidity at the time of their sale or merger.

7. Furthermore, the Tribunal considers that the legitimate actions described above cannot, taken together, constitute an indirect expropriation of the claimants' investments. In particular, the resolution, coupled with the sale of business tool, constituted an exercise of regulatory powers for a legitimate and urgent purpose. If an administrative action like the resolution of BPE could, without more, be deemed a "measure equivalent to an expropriation", then the complex legal framework on the recovery and resolution of credit institutions would be undermined and resolution authorities would be precluded or severely limited in the exercise of their powers. In the Tribunal's view, nothing in the Treaty suggests any such unreasonable outcome.

Withheld documents

Several ECB and SRB documents could not be produced by Spain at the request of the claimants as its disclosure in the arbitration was not authorized by these institutions in application of the relevant confidentiality and public access regimes.

The ECB held that disclosure of ECB documents in the arbitration would adversely affect the smooth functioning of the system of prudential supervision and the trust that supervised entities have that the supervisor will treat information confidentially, as well as seriously undermine the preservation of a 'space to think' for the free and constructive exchange of views and information within the Eurosystem. This exchange is of the essence for the ECB's ability to effectively discharge its monetary policy tasks, and thus its disclosure would undermine the opinion-building process in formulating and adopting similar decisions in the future. The ECB also stressed that it was crucial for the ECB and the national

central banks and competent authorities to be able to deliberate candidly, without fearing the risk that such internal deliberations might be disclosed.

In turn, the SRB objected to the disclosure of the requested documents as they were either subject to on-going litigation before the EU Courts to determine the extent to which they may be disclosed or part of the SRB's administrative file related to BPE's resolution which is subject to a presumption of non-accessibility in conjunction with limitations regarding their disclosure.

The claimants requested the application of adverse inferences in connection with the withheld documents. The Tribunal rejects these requests as it considers that the respondent provided satisfactory explanation for not producing these documents.

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I – The case law of the CJEU

1. Synthesis

Decision of the European Commission not to raise objections to a state aid for a bank's restructuring

Case C-284/21 P

ECB's decision to deny access to documents related to an LSI

Case T-72/20

EDPS finding of breach of Regulation 2018/1725 by the SRB for providing third parties with personal data relating to shareholders and creditors of a bank in resolution

Case T-557/20

The European Commission is not liable for the losses incurred by former shareholders of Banca delle Marche

Case C-549/21 P

ECB's decision denying access to documents requested under the ECB Decision 2004/258 (ECB/2004/3)

Case C-782/21 P

Exclusion of certain exposures to public sector entities for the purposes of the calculation of the leverage ratio

Case C-389/21 P

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3. Series of legal provisions

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Council Regulation (EU) 1024/2013, art. 22	T-72/20
Regulation (EU) 468/2014, art. 2(24)	T-72/20
Regulation (EU) 468/2014, art. 32	T-72/20
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Council Regulation (EU) 2015/1589, art. 4(1)	C-549/21 P
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Council Regulation (EU) 2015/1589, art. 9(4)	C-284/21 P
Directive 2014/59, Art. 32	C-284/21 P
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Directive 2014/59, Art. 32(4)(d)(iii)	C-284/21 P
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II – The case-law of the EU administrative review bodies

1. Synthesis

SRB's decision setting the minimum requirement for own funds and eligible liabilities (MREL)

Appeal Panel SRB, Case 2/2022

SRB's technical discretion and its review by the Appeal Panel. Distribution of jurisdiction as for the fishing request under Article 12d(5) SRMR

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III – The judgments of the national apical Courts

Austria

1. Synthesis

Judgment on public liability for deficient banking supervision and the obligation to draw up a prospectus

Oberster Gerichtshof (OGH), Judgment of 27 January 2023, 1 Ob 261/22x

Judgment on switches and reswitches regarding national deposit guarantee schemes

Oberster Gerichtshof (OGH), Judgment of 31 January 2023, 4 Ob 202/22t

Judgment on trusteeships within national deposit guarantee schemes

Oberster Gerichtshof (OGH), Judgment of 18 April 2023, 6 Ob 139/22t

Judgment on the Republic of Austria's public liability for deficient banking supervision as legal entity behind the Financial Market Authority and behind the public prosecutor's office

Oberster Gerichtshof (OGH), Judgment of 25 April 2023, 1 Ob 223/22h

2. Series of keywords

KEYWORDS	CASES
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ESAEG § 12[2]	4 Ob 202/22t
Finanzmarktaufsichtsbehördengesetz § 3(1)[3]	1 Ob 261/22x, 1 Ob 223/22h
Kapitalmarktgesetz	1 Ob 261/22x

1 German version available at https://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009251&Artikel=&Paragraf=11&Anlage=&Uebergangsrecht=.

2 German version available at https://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009251&FassungVom=2023-10-23&Artikel=&Paragraf=12&Anlage=&Uebergangsrecht=.

3 German version available at https://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001456&Artikel=&Paragraf=3&Anlage=&Uebergangsrecht=; translated English version available at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2001_1_97/ERV_2001_1_97.pdf.

Belgium

1. Synthesis

The Belgian Council of State clarifies the standard of judicial review applicable to a decision of the National Bank of Belgium finding that the member of a supervised entity's management body should be revoked because he is no longer of a sufficiently good repute

Conseil d'État, Section du contentieux administratif / Raad van State, Adfedeling Bestuurrechtspraak, Judgement of 11 January 2023 No 255.468 and No 255.469

2. Series of keywords

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Duty to state reasons
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Belgian law on the status and supervision of credit institutions, Article 234, § 1 *juncto* Article 212
Belgian law on the formal motivation of administrative acts, Articles 2 and 3[5]

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4 *Loi du 25 avril 2014 relative au statut et au contrôle des établissement de credit / Wet van 25 April 2014 op het statuut en het toezicht op kredietinstellingen*. French and Dutch versions available at https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2014042508&table_name=wet.

5 *Loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs / Wet van 29 Juli 1991 betreffende de uitdrukkelijke motivering van de bestuurshandelingen*. French and Dutch versions available at https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1991072936&table_name=loi.

France

1. Synthesis

The French Council of State confirms the legality of the ACPR's notice on partial compliance with EBA Guidelines on loan origination and monitoring

Conseil d'État, Judgement of 22 July 2023 No 449898

2. Series of keywords

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3. Series of legal provisions

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Directive 2015/849/EU, Articles 8 and 13

Directive 2014/49/EU, Article 6
EBA Guidelines EBA/GL/2020/06
French Monetary and Financial Code[6], Articles L. 612-2 and L. 511-21
French Decree of 23 December 2013 on the prudential regime of financing companies[7]
French Consumption Code[8], Article L. 311-1

6 French version available at https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072026/.

7 French version available at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000028396367.

8 French version available at https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069565/.

Italy

1. Synthesis

Decision to extend the special administration of a credit institution to the parent undertaking exercising de facto control

Consiglio di Stato, sez. VII, Judgment of 11 January 2023 No 407

Bank of Italy's decision to place a credit institution under temporary administration

Consiglio di Stato, sez. VI, Judgment of 26 April 2023 No 4171

2. Series of keywords

KEYWORDS	CASES
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Complex technical assessments	CdS 4171/2023
Conditions	CdS 4171/2023
Control over a credit institution	CdS 407/2023
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Early intervention measure	CdS 407/2023
Extension of measures to the parent undertaking	CdS 407/2023
Financial intermediaries	CdS 407/2023
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Significant deterioration	CdS 4171/2023
Sound and prudent management	CdS 4171/2023
Special administration	CdS 407/2023 (x3)
Technical discretion	CdS 4171/2023
Temporary administration	CdS 4171/2023 (x2)

3. Series of legal provisions

ARTICLES	CASES
Italian Legislative Decree 385/1993[9], Article 64	CdS 407/2023
Italian Legislative Decree 385/1993, Article 69-octiesdecies(1)(b)	CdS 4171/2023
Italian Legislative Decree 385/1993, Article 70	CdS 407/2023
Italian Legislative Decree 385/1993, Article 70(3)	CdS 407/2023
Italian Legislative Decree 385/1993, Article 105	CdS 407/2023

[9] Italian version available at https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1993-09-01;385!vig=.

Portugal

1. Synthesis

Appeal per saltum *on the legality of the measure requesting the constitution of enhanced provisions, of the resolution measure applied to Banco Espirito Santo S.A. by the Bank of Portugal, and of the Portuguese legal regime of banking resolution*

Portuguese Supreme Administrative Court, Judgement of 9 March 2023 No 02586/14.3BELSB

2. Series of keywords

KEYWORDS
Absolute lack of procedure
Compatibility of the Portuguese rules of banking resolution with EU law and ECHR rules
Compatibility with fundamental rights
Competence of national law rules regarding resolution measures
Constitutional validity of Portuguese law rules on banking resolution
Formal validity of the resolution measure
Lack of reasoning
Legality of the resolution measure
Procedural vices of request for enhanced provisions
Proportionality of Portuguese law rules on banking resolution
Proportionality of the Portuguese legal regime for banking resolution
Proportionality of the resolution applied to Banco Espírito Santo
Respect for rules on the transposition of EU Directives
Respect for the right of private property
Right to equal treatment
Right to private property

3. Series of legal provisions

ARTICLES
Directive 2014/59/EU, Articles 34, 36, 73 and 74
Charter of Fundamental Rights of the European Union, Article 17
Constitution of the Portuguese Republic, Articles 17, 61, 62, 83 e 165
Portuguese Law 58/2011 of 28 November 2011[10]
Portuguese Code of Administrative Procedure11, Article 55
Portuguese General Provisions governing Credit Institutions and Finance Companies[12]

10 Portuguese version available at https://diariodarepublica.pt/dr/detalhe/lei/58-2011-146188.

11 Portuguese version available at https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/2015-105602322.

12 Portuguese version available at https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/1992-70072322.

Portuguese Decree-Law 31-A/2012 of 10 February 2012[13]
Portuguese Decree-Law 114-A/2014 of 1 August 2014[14]

13 Portuguese version available at https://diariodarepublica.pt/dr/detalhe/decreto-lei/31-a-2012-314946.

14 Portuguese version available at https://diariodarepublica.pt/dr/detalhe/decreto-lei/114-a-2014-55068738.

SPAIN

1. Synthesis

No breach of the Mexico-Spain investments protection treaty due to the resolution of Banco Popular Español

Permanent Court of Arbitration, Judgment of 13 March 2023 No 2019-17

2. Series of keywords

KEYWORDS
Award of the international arbitration tribunal
Jurisdiction of the Court
No breach of the Investments Protection Treaty
Resolution of Banco Popular Español

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