BANCA D'ITALIA
EUROSISTEMA

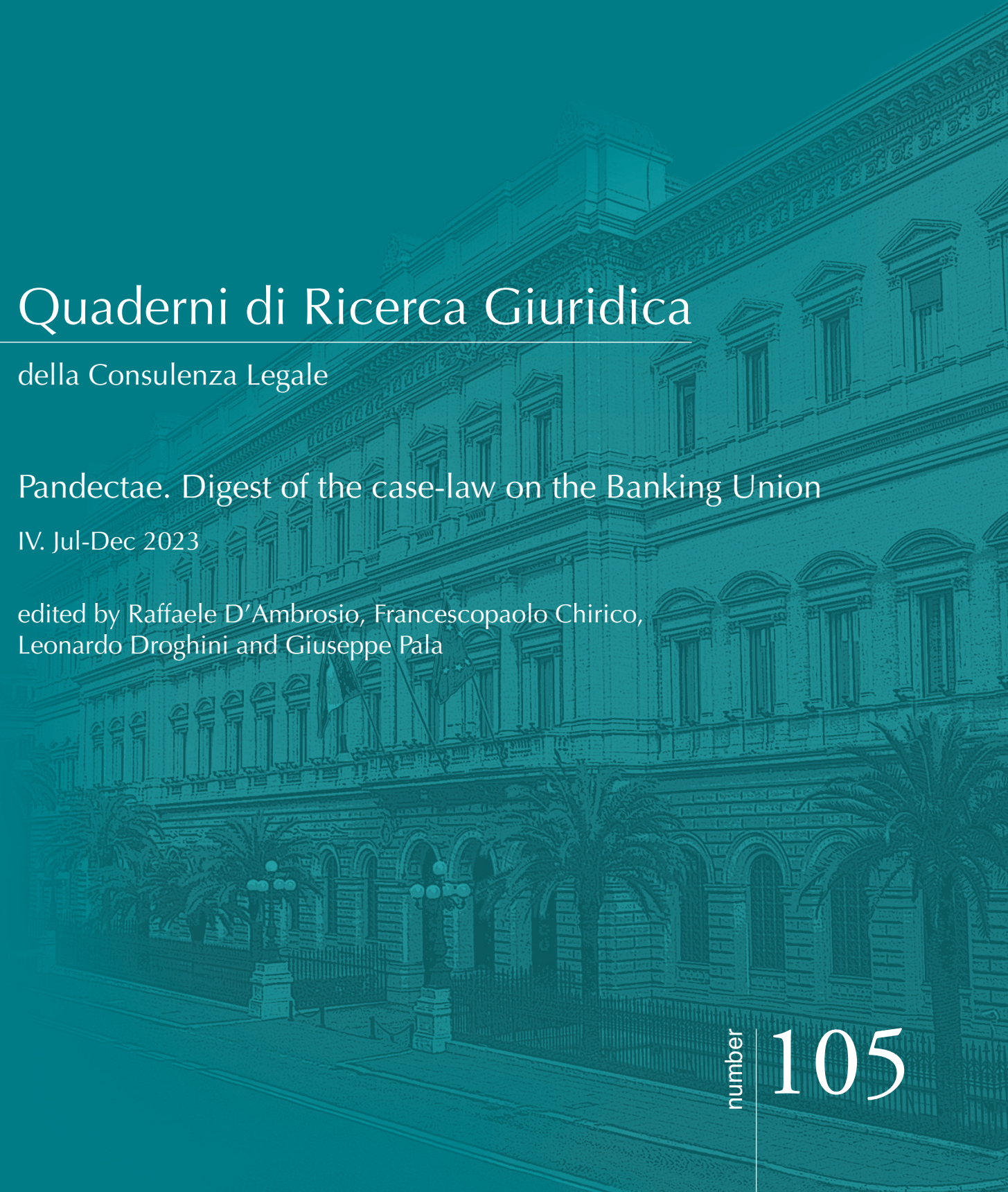
Quaderni di Ricerca Giuridica

della Consulenza Legale

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

IV. Jul-Dec 2023

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



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Introduction

1. This issue of Pandectae sees a preponderance of judgments of the General Court of the Court of Justice, which touch upon a wide variety of important topics of the Banking Union: the strict conditions of the non-contractual liability of the ECB in its supervisory function (*D'Agostino and Dafin v ECB*, case T-424/22; *D'Agostino v ECB*, case T-90/23; *Nardi v ECB*, case T-131/23); cancellation of irrevocable payment commitments entered into for the contributions to the Single Resolution Fund (*BNP Paribas Public Sector v SRB*, case T-688/21); the duty to state reasons of the SRB in its decisions on *ex ante* contributions to the Single Resolution Fund (*Banque Postale v SRB*, case T-383/21, *et al.*); exceptions to the right to access to the documents of the SRB (*OCU v SRB*, case T-496/18).

The judgments of the General Court that arguably stand out are those further delineating the perimeter of the right of defence and the right of recourse to the courts of the entities involved in a resolution proceeding and of their shareholders.

In this regard, in the case T-525/22, *Sberbank v Commission and SRB*, the Court of first instance held that an action brought only against the valuation report is inadmissible, as such a preparatory act is an integral part of the decision on the application of a resolution tool or on the exercise of a resolution power, and therefore can only be subject to an appeal together with the subsequent decision of the SRB.

Moreover, the General Court stated that indirect shareholders of an entity placed under resolution lack *locus standi* in respect to the challenging of the resolution scheme, because their legal situation is not affected by it and, therefore, it does not directly concern them. This holds true even considering the decisions taken by the national resolution authority following the adoption of the resolution scheme (such as the prohibition from continuing business operations, the appointment of a government commissioner, and the request to take the decision to place a credit institution in liquidation), because such national decisions cannot be considered as been requested by the SRB nor, consequently, as an implementation of the resolution scheme, the efficacy of which is "*purely automatic and resulting from EU rules alone*" (*Sberbank of Russia v Commission and SRB*, case T-526/22).

In the case T-527/22, *Sberbank of Russia v SRB*, the General Court held that the SRB's decision not to place an entity under resolution cannot be challenged by the shareholders of that entity, as that decision does not affect their legal situation (their right to receive dividends and to participate in the management of the entity is not directly harmed by the decision in itself). Their lack of legal interest is not called into question by the fact that, following the recalled decision, the national resolution authority adopted decisions that may have had an impact on the interests of the shareholders, because those national decisions are not, strictly speaking, implementing the SRB's decision not to place the entity under resolution.

Differently, in the case T-732/19, *PNB Banka and Others v SRB*, the General Court stated that the entity itself is indeed entitled to challenge the SRB's decision

not to place it under resolution: on the one hand, that decision individually and directly affects that entity's legal situation in so far as the SRB states that it is failing or likely to fail and decides not to apply resolution tools, some of which may enable the entity concerned to continue part of its activities; on the other hand, the entity has a legal interest in bringing proceedings against the recalled SRB's decision, if it purports to contest that it was failing or likely to fail and that there was no reasonable prospect that alternative measures would prevent that failure.

In the same case, the General Court also specified that, following the ECB's conclusion that a credit institution is failing or is likely to fail, the resolution procedure is initiated and the SRB is required to verify whether the conditions referred to in Article 18(1) of the SRM Regulation are met in order to decide whether to adopt a resolution scheme and, as a consequence, is also required to take a positive or negative decision, among other things to prevent a lacuna in the judicial protection of the entity concerned, especially with regard to the assessment of failing or likely to fail of it, which cannot be challenged singularly but only together with the decision to place (or not to place) that entity under resolution.

Moreover, the Court's decision clarified that the procedure provided for in Article 18 of the SRM Regulation, aimed at an efficient resolution mechanism, presupposes a prompt decision-making process, often in emergency circumstances, so that financial stability is not jeopardised. Therefore, although it is necessary to reconcile the need for speed with the right to be heard of the entity concerned by the resolution decisions, it is not required that such an entity is allowed to be heard at each stage of the procedure by the ECB and the SRB separately. With regard to the assessment of failing or likely to fail and that there are no alternative measures capable of preventing that failure, it is sufficient that the same entity is heard by the ECB before the latter reaches its conclusion.

The General Court, additionally, stated that an early intervention measure granting a time limit for a credit institution to comply with certain prudential requirements does not, in itself, give rise to the legitimate expectation on the part of that entity that, during that time limit, the ECB will refrain from adopting other supervisory measures or from concluding that that entity is failing or likely to fail.

Finally, in joined cases T-302/20 and T-307/20, *Del Valle Ruíz and Others v SRB*, *et al.*, the Court of first instance faced the very delicate and sensitive issue of the application of the principle of no creditor worse off by the SRB in relation to the resolution of *Banco Popular Español*, coming to the conclusion that, in the specific case, the Union agency did not err in law.

In the rulings, the General Court reiterated that, in general terms, where the EU authorities have broad discretion, in particular as to the assessment of highly complex scientific and technical facts, the review by the judicature is limited to verifying whether there has been a manifest error of assessment or a misuse of

powers, or whether those authorities have manifestly exceeded the limits of their discretion, considering also if the rules on procedure and the duty to state reasons have been complied with. The Court, nonetheless, cannot substitute its assessment of scientific and technical facts for that of those authorities. On the basis of these principles, EU Courts have jurisdiction to review the SRB's interpretation of the economic data on which its decision not to grant compensation to shareholders of a resolved entity for the alleged breach of the no creditor worse off rule is based: the EU judicature must assess whether the evidence relied on by the SRB is factually accurate, reliable, consistent, contains all the information that was needed, and is capable of supporting the conclusions drawn from it. Nonetheless, it is for those who allege that the SRB made a manifest error to provide the Court with the relevant evidence.

In the same rulings, the Court also underlined that, in the resolution proceedings, valuations 2 and 3 are conducted for different purposes and, therefore, use different approaches: valuation 2 aims to inform the resolution action by estimating the economic value of the assets and liabilities of the credit institution concerned at the resolution date; valuation 3 is meant to estimate the treatment of the affected shareholders and creditors in hypothetical alternative insolvency proceedings. No provision of law precludes those valuations from being carried out by the same valuer.

2. This issue of Pandectae summarizes also three important judgments by the Court of Justice.

In the first one (case C-803/21 P, *Versobank v ECB*), the Court confirms that the ECB's exclusive competence to withdraw a credit institution's authorisation, regardless of its significance, fully comprises the competence to withdraw that license where the entity concerned seriously breached national provisions transposing Union law on AML/CFT.

In the second and third rulings, the Court had the opportunity to set out the autonomous interpretation of the concept of "financial institution", "credit institution" and "authorisation" in the Union law and, specifically, for the purposes of the uniform application of the CRD and the CRR.

In the joined cases C-207/22, C-267/22 and C-290/22, *Lineas - Concessões de Transportes*, the Court stated that, according to the CRR and the CRD (in their versions preceding Regulation (EU) No 2019/876), a 'financial institution' is an undertaking the principal activity of which is to acquire holdings or to pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I to the CRD, including a financial holding company, a mixed financial holding company, a payment institution and an asset management company. Considering (i) the use of the conjunction 'or', which indicates that the carrying out of one or more of the activities listed in the mentioned Annex is not a criterion to define the concept of 'financial institution', and (ii) that the list of financial institutions set out in point 26 of Article 4(1) of the CRR is not exhaustive, the Court concluded that it cannot be inferred from the reference to financial holding companies and

to mixed financial holding companies in that provision that the lack of certain specific links with a credit institution, an insurance undertaking or an investment firm necessarily precludes a classification as a 'financial institution' for the purposes of that regulation.

At the same time, the Court of Justice noted that the EU legislature defined the provisions of the CRD and the CRR assuming that financial institutions are connected to certain activities involving the financial sector: for instance, rules concerning the consolidation and prudential requirements for credit institutions and investment firms, to the extent that they are specific to holdings in financial institutions or other financial sector entities, are based on the specific nature of that sector's activities. It follows that an undertaking that does not carry out, either directly or through holdings, one or more of the activities referred to in Annex I to the CRD, cannot be regarded as being a financial institution within the meaning of the CRD and the CRR.

In the case C-427/22, *BG (Octroi de prêts sans autorisation)*, the Court of Justice observed that point 1(a) of Article 4(1) of the CRR provides a functional definition of the concept of 'credit institution', i.e. based on the function performed by such entities, to act as a link between savings and investments, in other words to receive monies and grant loans. As a consequence, an undertaking falls within the concept of 'credit institution' only where its activity consists, cumulatively, of taking deposits or other repayable funds from the public and of granting credits for its own account, it being specified that those deposits or other funds taken from the public are intended for granting credits, although credits may also be granted even from funds from other sources.

As regards the concept of 'authorisation' within the meaning of point 42 of Article 4(1) of the CRR, the Court held that Article 8(1) of the CRD provides that Member States are to require (only) credit institutions to obtain authorisation before commencing their activities, while financial institutions (which as seen above include undertakings other than credit institutions whose principal activity is to grant loans), that directive merely lays down the provisions concerning the freedom of establishment and the freedom to provide services. Therefore, the conditions for obtaining a license as a financial institution are regulated only at national level.

3. Only one but remarkable decision of the Appeal Panel of the Single Resolution Board (case 6/2023) is comprised in this issue. Indeed, the Appeal Panel was confronted with a case in which the applicant appealed the SRB's decision amended after the remittal to the same body by the Appeal Panel itself in a previous instance.

The Panel confirmed that the amended decision, under Article 85(8) of the SRM Regulation, is a new and different decision that must be in full compliance with the Appeal Panel's ruling and, as such, can be challenged before the Appeal Panel to point to non-compliance of the SRB when implementing the previous decision of the Appeal Panel, or to clarify the Appeal Panel's view as regards the

nature of the revision requested of the SRB. Therefore, the appellant is granted, with respect to the amended decision, the same procedural guarantees, as those provided for in Article 90(3) of SRMR for the original decision.

This notwithstanding, the grounds for such an appeal must strictly concern the way in which the SRB complied with the decision of remittal by the Appeal Panel, thus narrowing any hypothetical subsequent cases. For example, if the Appeal Panel, in the first instance, remits the case to the SRB only in part because it upholds only one or more grounds of appeal and the SRB subsequently adopts an amended decision, any appeal against the amended decision must be limited to the new parts of that decision; any plea based on the same grounds already dismissed in the first instance is inadmissible.

4. As usual, the last part of Pandectae offers a review of the case-law of the national apical Courts concerning Banking Union matters. As no significant national rulings were found in the evidence of foreign contributors with regard to the six-month reporting period, this issue is limited to the case-law of the Italian courts.

In particular, two similar judgments by the Italian Corte di Cassazione are analysed as they concern sanctioning proceedings carried out by Banca d'Italia, as the national competent authority, against members of the management bodies of credit institutions as a consequence of the breach of their prudential obligations. The Corte di Cassazione reaffirms its well-established findings: (i) the limitation period for the imposition of the administrative sanction starts to run when the offence is fully ascertained, not merely when the authority gains mere knowledge of the facts in their materiality; (ii) the right of appeal before the Court of Appeal of Rome, with full jurisdiction, deprives of relevance any hypothetical shortcoming in the administrative sanctioning proceedings as regards the safeguards enshrined in Article 6 of the European Convention on Human Rights; (iii) the duty to act in an informed manner requires that all members of the board of directors of a credit institution keep themselves informed of all the activities of that entity, in order to ensure its safe and sound governance; (iv) the sort tenure of a member of the management body of a credit institution does not per se exclude its liability.

Finally, there was an interesting judgment of the Corte di Cassazione concerning the transfer of contingent liabilities in resolution proceedings involving the set up of a bridge bank. Before summarising its content, it is nonetheless important to underline that that judgment has been already completely and expressly overturned by the same Corte di Cassazione in a subsequent ruling of August 2024, which will be an integral part of the relevant issue of Pandectae.

Bearing this in mind, the aforementioned judgment of the Corte di Cassazione affirmed that a bank's obligation to compensate third parties for damages must be considered a contingent liability, included within those transferred to the bridge bank in the context of a resolution action, unless otherwise provided in the resolution decision. Indeed, since that liability arises when the illegal conduct is realised (i.e. before the resolution), it is not relevant that the action for

damages has been brought only after the relevant transfer of assets and liabilities. Accordingly, the bridge bank which purchased the business of a credit institution placed in resolution has passive legal standing in actions for damages brought by former shareholders and creditors of the resolved entity, given that such a liability has not been expressly excluded by Banca d'Italia from the scope of such a sale pursuant to Article 43(4) of the Legislative Decree No 180/2015, transposing the BRRD. This conclusion, the Corte di Cassazione explained, is compliant with Article 58 of the Italian Consolidate law on banking, which – differently from Article 2560(2) of the Italian Civil Code – provides that the purchaser of a banking business is liable for the its liabilities even if they do not appear in the financial statements, such as liabilities that arise from the seller's conducts prior to the transfer but are first asserted by the (alleged) damaged party after that transfer.

At the same time, the judgment underlined that, under Articles 23 and 24 of the recalled Legislative Decree No 180/2015, the valuation of liabilities must be prudent and related to evidence in the accounting records. Therefore, contingent liabilities must be adequately disclosed in the notes to the financial statements. In particular, these notes must explain the nature of those liabilities, their financial effects (if possible), the reasons for the uncertainty of their amount or time of occurrence and the likelihood of disbursement in the event of their subsequent confirmation.

The case-law of the CJEU

D'Agostino and Dafin v ECB, D'Agostino v ECB, Nardi v ECB

1. Keywords and summary

D'Agostino and Dafin v ECB, D'Agostino v ECB, Nardi v ECB

General Court – Case T-424/22 – Judgment of 25 July 2023 – ECLI:EU:T:2023:443

General Court – Case T-90/23 – Judgment of 25 July 2023 – ECLI:EU:T:2023:445

General Court – Case T-131/23 – Judgment of 25 July 2023 – ECLI:EU:T:2023:444

Actions for non-contractual liability of the ECB for a statement of its President dismissed by the General Court

Liability of the ECB – Non-contractual liability

Under the third paragraph of Article 340 TFEU, the non-contractual liability of the ECB arises if three conditions are cumulatively met, namely the unlawfulness of the conduct imputed to it; the actual existence of the damage; and the existence of a causal link between the alleged conduct and the damage alleged. Given the cumulative nature of these conditions, the action must be dismissed as a whole where even only one of them is not satisfied (Judgments of 24 January 2017, T-749/15, paragraph 68, and of 23 May 2019, T-107/17, paragraphs 52 and 143).

Liability of the ECB – Non-contractual liability – Breach of a rule conferring rights on individuals – Provisions of an institutional nature

As regards the condition relating to the unlawfulness of the conduct imputed to the ECB, the case-law requires the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals to be established (see Judgment of 7 October 2015, T-79/13, paragraph 67). In that regard, a rule of law is intended to confer rights on individuals if it generates an advantage that can be described as a vested right, is intended to protect the interests of individuals or entails the attribution of rights to individuals, whose content is to be adequately identified (see Case T-107/17, paragraph 140).

Rules of institutional nature cannot be intended as rules conferring rights on individuals (see Order of 27 October 2008, T-375/07, paragraph 19, and of 10 December 2021, T-626/21, paragraph 16).

Similarly, case-law has held that failure to respect the system of allocation of competences among institutions of the European Union, which aims to ensure respect for the institutional balance envisaged by the Treaties and not the

protection of individuals, cannot, in itself, be sufficient to give rise to the liability of the Union under the second paragraph of Article 340 TFEU.

The provisions invoked by the applicant in support of the claim for a finding of liability of the ECB, among them Article 127 TFEU on the ECB's monetary policy competences and Articles 12 and 13 of the ECB Statute on the competences of its decision-making bodies, are all institutional in nature and, therefore, are not intended to confer rights on individuals.

Liability of the ECB – Non-contractual liability – Causal link

As regards the requirement of a causal link, it concerns the existence of a sufficiently direct casual nexus between the complained conduct and the damage, the burden of proof of which rests on the applicant, so that the complained conduct must be the determining cause of the damage (see Judgment of 13 December 2018, C-174/17 P and C-222/17 P, paragraph 23). Against this background, there is no evidence that the fall in value of the concerned securities was directly caused by the contested statement made by the ECB President.

2. Non-existence of non-contractual liability of the European Central Bank for a statement of its President

by Carmine De Vito

The cases concern two identical (but for some factual differences) actions for non-contractual liability under Article 340 of the Treaty on the Functioning of the European Union (TFEU), resulting from a statement (hereinafter 'the contested statement') made on 12 March 2020 by the ECB President in which she stated '*we are not here to close spreads. This is not the function … of the ECB*'.

According to the applicant (Mr D'Agostino), the statement by the ECB President signalled a massive change in the direction of the ECB's monetary policy, thereby causing a significant reduction in the value of certain securities owned by him. More in detail, according to the applicant's pleas, the ECB was to be found non-contractually liable for having caused a collapse in the value of certain securities owned by him (with a depreciation such as to register a loss of 90,84 % in the overall value of the capital invested), because the contested statement by the ECB President had allegedly caused a significant fall in the value of securities in all markets worldwide, including a fall by 16,92 % at the Milan Stock Exchange index ("Borsa di Milano"), such fall being quantified in a percentage unprecedented in the history of this institution.

The applicant argued that the contested statement, pronounced at a press conference, had been tantamount to conveying to the whole of the world financial markets that the ECB would no longer support the value of securities

issued by distressed countries; this, in the applicant's line of reasoning, implied communicating a complete change in the ECB's monetary policy vis-à-vis the course of action set and followed until then by the ECB headed by the previous president.

The applicant claimed that as a consequence of the contested statement he had suffered both material damage (as consequential damage and loss of profit) and non-material damage (in the form of psychological harm, damage to honour and reputation and to personal and professional identity).

The Court dismissed the actions ruling that there was no non-contractual liability on the part of the ECB. In its reasoning the Court recalls settled case-law according to which the non-contractual liability of the ECB provided for in the third paragraph of Article 340 TFEU requires three cumulative requirements to be satisfied: the rule of law infringed must be intended to confer rights on individuals; actual damage must be demonstrated to have occurred; there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage suffered by the injured party.

As to the first requirement, a rule of law which does not confer rights on the person invoking the infringement thereof cannot form the basis of a claim for damages. Accordingly, a rule which does not protect the person against the unlawfulness invoked by that person cannot be accepted. The breach of a rule of law can be considered to confer rights on individuals where it creates an advantage which could be defined as a vested right, is designed for the protection of the interests of individuals or entails granting rights to individuals, the content of those rights having to be sufficiently identifiable.

The Court states that rules of institutional nature cannot be intended as rules conferring rights on individuals, in line with previous (unpublished though) rulings it quotes.

The same applies, in the Court's reasoning, to pleas of mere breach of allocation of competences among EU institutions as such (i.e., unless, in addition to the breach of competence, there is a substantive infringement of a provision conferring rights on individuals), drawing also in this respect on settled case-law concerning EU institutions under Article 340(2) TFEU, which the Court rightly declares applicable to the ECB pursuant to paragraph 3 of the same Article 340.

Against this background, the Court highlights that the applicant had not pleaded that he had rights stemming from those provisions or that the latter are liable to confer rights on individuals.

In fact, the claimant had pleaded that by her statement the President had in her unilateral capacity determined a shift in the ECB monetary policy thereby unlawfully encroaching upon competence vested with the Governing council.

In that respect the Court states that the institutional framework laid down by the provisions allegedly infringed by the ECB President are not intended to

confer rights on individuals as in fact they are exclusively aimed at respectively establishing the ESCB objective and the instruments to pursue it (Articles 127 TFEU and 3 ESCB Statute), the composition of decision making bodies and the respective decision making process (Articles 10 and 11 ESCB Statute), the allocation of tasks among the ECB governing bodies and the powers of the ECB's President (Articles 12 and 13 ESCB Statute), the identification of signatories for the ECB to be legally committed to third parties (Article 38 ESCB Statute).

With regard to the plea specifically concerning the abuse of power by the ECB President, the Court observes that since such plea had simply been put forward as a consequence of the alleged infringement of the institutional provisions referred to above, also this plea is consequently not grounded.

As to the second and third requirements (damage and causal link), the Court observes that the investment in securities is as such an operation involving financial risk (even more so in the case at hand, those securities being highly risky assets) and highlights that from the evidentiary elements submitted to it emerged that the relevant securities had in fact started depreciating several days before the contested statement, depreciation having kept on materialising also after the contested statement.

For this reason, the Court finds that the applicant had failed to demonstrate the causal link between the contested statement and the fall in value of the securities and thus, by the same token, between the contested statement and the damages claimed (economic as well as non-economic).

In that regard, in line with its precedents, the Court also states that the sworn technical evaluation produced by the applicant could only be given severely limited probative value having been drawn up at the applicant's request.

VERSOBANK v ECB

1. Keywords and summary

Versobank v ECB

Court of Justice – Case C-803/21 P – Judgment of 7 September 2023 – ECLI:EU:C:2023:630

European Central Bank's decision withdrawing a credit institution's authorisation based on anti-money laundering grounds

WITHDRAWAL OF A CREDIT INSTITUTION'S AUTHORISATION – ECB's competence and powers – Information and consultation procedures of the national competent authorities

Under Article 4(1)(a) of the SSM Regulation, the ECB has the exclusive competence to withdraw a credit institution's authorisation.

Such an exclusive competence is not impacted by distinction between the prudential supervision of "significant" entities and of "less significant" entities under Article 6(4) to (6) of the SSM Regulation, as it falls only to the ECB the task under Article 4(1)(a) of the SSM Regulation concerning the authorisation and withdrawal of authorisation of credit institutions, even "less significant" ones.

Furthermore, Article 4(3) provides that the ECB, or the purpose of carrying out the tasks conferred on it by that regulation, and with the objective of ensuring high standards of supervision, is to apply all relevant EU law, and where the EU law is composed of directives, the national legislation transposing them.

In addition, Article 14(5) of the SSM Regulation provides that the ECB may withdraw the authorisation in the cases set out in relevant EU law on its own initiative, following consultations with the national competent authority of the participating Member State where the credit institution is established, or on a proposal from such a national competent authority.

In the proceedings for the withdrawal of the authorisation, the cooperation between the ECB and the national competent authorities is expressed, in accordance with Article 14(5) of the SSM regulation, first, by the obligation to consult those authorities, in the event that the ECB withdraws the authorisation on its own initiative and, secondly, in the possibility that those authorities have to propose such a withdrawal to the ECB.

Withdrawal of a credit institution's authorisation – Serious breach of national law on anti-money laundering and countering the financing of terrorism

Among the circumstances justifying the withdrawal of a banking authorisation, first, Article 18(f) of the CRD mentions the breaches referred to in Article 67(1) of that directive, which include serious breaches of the national provisions adopted pursuant to Directive 2005/60 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing. Secondly, Article 18(e) of the CRD mentions the other cases in which national law provides for withdrawal of authorisation.

Although Member States remain competent to implement the AML/CFT provisions, as expressly provided for in recital 28 of the SSM Regulation, the ECB has exclusive competence to withdraw the authorisation for all credit institutions, irrespective of their significance, even where such competence is based on the grounds set out in Article 67(1)(d), (e) and (o) of the CRD, to which Article 18 of the same directive refers, since Article 14(5) of that Regulation lays down, as a condition for the withdrawal of the authorisation, the existence of one or more grounds justifying withdrawal under Article 18 of the CRD.

It follows that the legal assessment intended to determine whether the facts constituting breaches of the AML/CFT legislation established by the national competent authority justified withdrawal of authorisation is reserved for the ECB.

2. The Versobank case: the ECB may withdraw the authorisation of a bank also on grounds of anti-money laundering

by Enrica Consigliere

1. Versobank AS (hereinafter, only "Versobank") was a less significant Estonian credit institution placed under the prudential supervision of the national financial supervisory authority, Finantsinspektsioon (FSA).

On March 26, 2018, the European Central Bank (ECB) adopted a license withdrawal decision ("first decision"), upon the FSA's proposal, mainly due to the serious breaches in the area of anti-money laundering and counter-terrorist financing (AML/CTF) detected by FSA since 2015 and most recently confirmed by a 2017 on-site inspection. After review by the Administrative Board of Review (ABoR), this first decision was repealed and replaced on July 17, 2018 by another decision ("second decision") of identical content.

Versobank sought the annulment of both ECB decisions before the General Court of the European Union (T-351/18 and T-548/18).[1] The General Court

[1] Action for annulment was brought also by Versobank's major shareholder, which – by the way – had already filed the request for review to the ABoR.

held that the action brought against the first decision had become devoid of purpose because that decision had been in the meantime completely replaced by the second one. The appeal against the second decision was declared admissible; nevertheless, all the complaints were deemed to be unfounded and the action was completely dismissed.

2. Versobank appealed the judgment of the General Court to the Court of Justice (ECJ), putting forward several grounds for annulment (Case C-803/21).[2]

Among other things, the bank held that ECB wouldn't be competent to withdraw the authorization of a credit institutions due to alleged violations of national AML/CFT provisions. Indeed, AML/CFT matters would fall under the exclusive competence of the national competent authorities (NCAs), as they are outside the scope of the Single Supervisory Mechanism. As a consequence, NCAs would not be entitled to submit to the ECB, for adoption, any proposal on these matters. If this were the case, there would be "*a paradoxical effect*":[3] these NCAs proposals would create, *ex novo*, additional legal powers for the ECB with no legal basis.

The ECJ finds the plea unfounded. On this, it fully upholds the General Court's view on the "*link between AML/CFT and prudential supervision*".[4]

The relationships between the ECB and the NCAs – *i.e.*, between the European and national levels of banking supervision – must be reconstructed on the basis of the Regulation (EU) No 1024/2013 (SSMR). Moving from this premise, it is crystal clear[5] that the ECB – in addition to its exclusive competence for the prudential supervision of significant credit institutions with respect to *all* tasks set out in Article 4 SSMR – also has exclusive competence for less significant institutions with respect to the task of the granting and the withdrawal of the authorisation, set out in Article 4(1)(a) SSMR.[6] In other words, the ECB – and only the ECB – has the power to withdraw the authorisation with respect to all banks, whether significant or not.

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2 More in detail, Versobank complained that the General Court had erred in law: first, by finding that there was no need to adjudicate on the action for annulment of the first decision; second, by rejecting the pleas related to a number of alleged infringements of essential procedural requirements; third, in finding that the ECB had competence to withdraw the appellant's authorisation due to alleged breaches of AML/CFT provisions (on this, further details are provided in the text); fourth, by failing to recognise that the infringement of a Latvian law – relating to banks' branches – could not serve as a basis for the withdrawal of authorisation, since it had already been settled with the competent Latvian authority before the competent national court; fifth, by considering, *inter alia*, that the resolution matters of the case at hand were governed by the SRM Regulation; and, sixth, by disregarding certain procedural rules. The ECJ deemed most of the pleas inadmissible, either because they were formulated in excessively general terms or because they had not been raised before the General Court.

3 C-803/21, paragraph 88.

4 C-803/21, paragraph 96.

5 This conclusion is grounded on the combined provisions of Article 4 (1) and Article 6 (4) - (6) SSMR.

6 C-803/21, paragraph 94.

Once this point is clarified, it is necessary to consider Article 14 (5) SSMR. According to this provision, ECB has the power to withdraw the authorisation: *i*) in cases provided for in the relevant Union law; *ii*) but also in cases provided for in the "*relevant national law*", based on the relevant NCA's proposal.[7]

Well, as the ECJ points out, the serious violations of national AML/CFT provisions by Versobank are undoubtedly to be considered as cases of withdrawal under "*relevant national law*" referred to in Article 14 (5) SSMR.

It is true – so continues the Court's reasoning – that the withdrawal for AML/CFT violations is provided for by Article 18 of Directive 2013/36 (CRDIV); and that this Article, in its literal wording, envisages it as a power of the competent *national* authority.[8] However, this provision has to be read in the light of the allocation of tasks between the ECB and the NCAs provided for by the SSMR; which means, bearing in mind that – today – the power to withdraw the authorization has become an exclusive competence of the ECB, which the latter may exercise (also) on a proposal from a NCA. To sum up, the ECJ concludes that Article 18 CRD "*must now be understood as referring to the power to propose the withdrawal of the authorization*", a power of proposal "*which remains with the competent national authorities*".[9]

The ECB's acknowledged competence to withdraw the authorisation (also) on AML/CFT grounds has very precise procedural implications. It entails the jurisdiction of the European Court of Justice to review such a decision pursuant to Article 263 TFEU.[10]

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7 Pursuant to Article 14 (5) SSMR "*[…] the ECB may withdraw the authorisation in the cases set out in relevant Union law on its own initiative, following consultations with the national competent […] or on a proposal from such national competent authority […] Where the national competent authority which has proposed the authorisation in accordance with paragraph 1 considers that the authorisation must be withdrawn in accordance with the relevant national law, it shall submit a proposal to the ECB to that end. In that case, the ECB shall take a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the national competent authority*".

8 More in detail, pursuant to Article 18 "*competent authorities may only withdraw the authorisation granted to a credit institution where such a credit institution: […] commits one of the breaches referred to in Article 67(1)*" which, in turn, refers, under letter (o) to a "*serious breach of the national provisions adopted pursuant to Directive 2005/60/EC*" on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

9 Paragraph 98. As clearly stated by the General Court in its judgement "*compliance with such obligations* [related to AML/CTF matters, ed.] *is clearly relevant in the context of prudential supervision, since, as underlined in recitals 1 and 2 of Directive 2005/60, the use of the financial system for money laundering purposes is likely to threaten the stability, integrity and reputation of the financial system and of the single market. The fact that*" – the General Court goes on – "*the wording of Article 18 of Directive 2013/36 also mentions the power of national supervisory authorities to withdraw authorisation cannot call into question the intention of the EU legislature as reflected in the provisions of the Basic SSM Regulation currently in force*" without any prejudice to the competence of the Member States for the implementation of the provisions on AML/CFT, expressly provided for in recital 28 SSMR (T-351/18 and T-548/18, paragraphs 185 – 187).

10 The ECJ therefore rejects the appellant's argument that the General Court defined matters which, being governed by national law, fall within the exclusive jurisdiction of national courts.

3. Thus, both the General Court and the ECJ confirm the strong connection between AML/CFT compliance and ECB supervisory tasks. Even if AML/CFT-related supervisory tasks are not among those transferred to the ECB,[11] it is far too clear that breaches of AML/CFT provisions can be symptoms of unsound governance and internal control mechanism. Therefore they could very well trigger the exercise of prudential supervisory powers, including the withdrawal of a bank's licence, which is a task of the ECB for both significant and less significant banks.[12]

Looking to the future, the need to address interpretative issues similar to those dealt with by the ECJ in the Versobank's case cannot be excluded, due to the increasing complexity of the whole supervisory system, also in AML/CFT matters. As is well known, the so-called AML package[13] – currently under negotiation – foresees, among other things, the establishment of an European Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA), which is intended to become the centrepiece of an integrated supervisory system, consisting of the Authority itself and the national authorities with an AML/CFT mandate. The AMLA will be vested with both regulatory and supervisory powers on a number of obliged entities.

Well, according to the proposal submitted by the Commission, the AMLA will have "*the power to propose the withdrawal of licence of a obliged entity*

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11 Recital 28 SSMR.

12 As underlined by the ECB on its website, "*it is clear that breaches of AML or CTF provisions can be symptoms of unsound governance and internal control mechanisms, the supervision of which is a task of the ECB for significant banks. Breaches in those supervisory areas can be a ground for the withdrawal of a bank's licence, which is a task of the ECB for both significant and less significant banks. Points of contact therefore exist between AML/CTF supervision and ECB competences*" ("*The ECB and anti-money laundering: what we can and cannot do*"). Obviously, on these matters the ECB has to rely on the information provided for by AML/CFT national competent authorities.

13 The package consists of four legislative proposals: *i*) a Regulation establishing a new EU AML/CFT Authority (AMLAR); *ii*) a Regulation on AML/CFT, containing directly-applicable rules, including in the areas of Customer Due Diligence and Beneficial Ownership (AMLR); *iii*) a sixth Directive on AML/CFT (AMLD6), replacing the existing Directive 2015/849/EU (the fourth AML directive as amended by the fifth AML directive), containing provisions that will be transposed into national law, such as rules on national supervisors and Financial Intelligence Units in Member States; *iv*) a revision of the 2015 Regulation 2015/847/EU on Transfers of Funds to trace transfers of crypto-assets, (https://finance.ec.europa.eu/publications/anti-money-laundering-and-countering-financing-terrorism-legislative-package_en). See also on this Newsletter: *La proposta della Commissione europea per una riforma del sistema antiriciclaggio e lotta al finanziamento del terrorismo e la costituzione di una nuova autorità dell'UE* by Paola Battistini (no 7-8, July-August 2021) and *Key takeaways from the "The Proposed Anti-Money Laundering, FIU cooperation, Powers and Exchanges of information" report* by Emanuele Abbate and Giuseppe Calarco (no 21, October 2022).

[under its direct supervision, ed.] *to the authority that has granted such license*"; meaning, where the obliged entity is a credit institution, the ECB.[14]

However, a look at the text of the proposal of the AML Directive – which is also part of the package – reveals a possible inconsistency. Indeed, according to the proposal, where an obliged entity is subject to an authorisation "*Member States shall ensure that the* [national] *supervisors are able at least to […] withdraw […] the authorisation*".[15] Here, apparently, the ECB would not seem to have room.

As mentioned, negotiations are still ongoing, and the texts of the Commission's proposals will undoubtedly undergo changes and benefit from further refinements. What is important to highlight here is that, in an increasingly complex context of supervision, there is a growing need for an integrated and systemic interpretation of the different regulatory systems, also in light of the keys to interpreting offered by European case-law.

4. Lastly, the ruling suggests a final observation. As already mentioned Versobank challenged, among other things, the deemed inadmissibility of the action for annulment brought against ECB's first decision. In its view, the conclusion that the second decision supersedes the first one with effect from the date of notification of the first decision – thus retroactively – would be contrary to Article 24 SSMR; moreover, it claimed to retain an interest in obtaining the annulment of the first decision.

On this point, the ECJ rests on its consistent case-law : the appellant's interest in the action must exist at the time the appeal is lodged and until the final decision is taken: that is, it is necessary that the appeal and the following judgment are likely, if successful, to provide an advantage to the appellant. In the case at hand – given the identity of the two ECB contested decisions and the identity of the grounds of appeal – the ECJ fails to see what advantage the appellant may derive from a further decision which – as it can be read between the lines – would have been identical to the one actually obtained; that is, a decision of dismissal of the appeal.

For this procedural reason, the plea is also rejected. The ECJ therefore does not consider it necessary to take a position on the alleged retroactive effect of the decision taken by the ECB adopted on the basis of an opinion rendered by the ABoR.

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[14] Article 20 (2) (i) of the AMLAR proposal. On the contrary, as regards other supervisory powers, there is a risk of partial overlapping with the powers of the ECB. As underlined by the ECB in its Opinion on the proposal (2022/C 210/05) AMLA powers, this risk involves "*the power to restrict or limit the business, operations or network of supervised entities, or the power to require changes in the management body of the supervised entity*" (Article 20 (2)(d) and (f) AMLAR proposal); this overlap in supervisory powers requires, according to the ECB, a very close cooperation between prudential and AML/CFT supervisors, to avoid conflicts and unintended consequences, "*including the uncoordinated cumulation of supervisory measures addressed to the same credit institution*".

[15] Article 41 (1) (e) AMLD6 proposal.

SBERBANK v COMMISSION AND SRB, SBERBANK OF RUSSIA v COMMISSION AND SRB

1. Keywords and summary

Sberbank v Commission and SRB, Sberbank of Russia v Commission and SRB

General Court – Case T-525/22 – Judgment of 10 October 2023 – ECLI:EU:T:2023:633

General Court – Case T-526/22 – Judgment of 10 October 2023 – ECLI:EU:T:2023:628

The indirect shareholder lacks *locus standi* to challenge the resolution decision

VALUATION FOR THE PURPOSE OF RESOLUTION – Challengeability – Preparatory nature – Action for annulment – Inadmissibility

Pursuant to Article 20(15) of Regulation No 806/2014, the valuation for the purposes of resolution, since its preparatory nature, has to be considered an integral part of the decision on the application of a resolution tool or on the exercise of a resolution power. So, it is not subject to a separate right of appeal, but may be subject to an appeal together with the decision of the SRB.

It follows that the valuation report is not a challengeable act and that, consequently, an action for annulment brought against it is inadmissible.

RESOLUTION SCHEME – Challengeability – Indirect shareholder – Lack of direct concern – Action for annulment – Inadmissibility

With respect to an indirect shareholder (i.e., the shareholder of an entity owning a credit institution), the resolution scheme brings about only economic effects, consisting of the fall in the value of the shares it holds, without affecting its legal situation. It follows that the indirect shareholder lacks direct concern with respect to the resolution decision and, therefore, they have no locus standi to challenge it.

Sberbank of Russia v SRB

1. Keywords and summary

Sberbank of Russia v SRB

General Court – Case T-527/22 – Judgment of 10 October 2023 – ECLI:EU:T:2023:629

The shareholder lacks *locus standi* to challenge the SRB's decision not to place an entity under resolution

Decision not to place a credit institution under resolution – Challengeability – *Locus standi* – Shareholders – Action for annulment – Inadmissibility

The SRB's decision not to place an entity under resolution does not directly affect the legal position of the entity's shareholders, as their right to receive dividends and to participate in the management of the entity is not harmed by the decision in itself, which only provides that the said bank is not to be subject to resolution. So, any influence the applicant could have by such a decision was merely the result of a de facto situation not relevant from a legal standpoint.

Decision not to place a credit institution under resolution – Action for annulment – Conditions of admissibility – National Resolution Authority measures following the SRB's decision – Lack of direct concern – Inadmissibility

In case of a SRB's decision not to adopt a resolution scheme, the subsequent decisions adopted by the competent National Resolution Authority – such as the prohibition from continuing business operations, the appointment of a government commissioner, and the request to take the decision to place a credit institution in liquidation – may not be considered as been requested to the NRA by the SRB. Therefore, such measures do not constitute an implementation of the contested decision that is "purely automatic and resulting from EU rules alone" in the meaning of the case-law on standing.

It follows that the measures adopted at the national level following the no-resolution decision adopted by the SRB fall outside resolution mechanism's framework and are incapable of showing a direct interest of the shareholder in bringing an action for annulment against the SRB's decision.

2. Sberbank group's crisis: no *locus standi* for Sberbank of Russia

by Francescopaolo Chirico

At the time of the facts of the case, Sberbank Europe AG (hereinafter "Sberbank Europe") was a credit institution established in Austria, holding all of the shares in its subsidiaries based in Croatia and Slovenia (hereinafter "Sberbank Croatia" and "Sberbank Slovenia").

The shares of Sberbank Europe were entirely owned by Sberbank Russia, the largest bank in the Russian Federation.

As a result of the geopolitical tensions deriving from the Russian invasion of Ukraine, the Sberbank group's liquidity situation deteriorated due to, inter alia, a wave of significant withdrawals of deposits and difficulties in gaining access to the wholesale funding market.

Following the ECB failing or likely to fail declaration under Article 18(1) of Regulation (EU) No 806/2014 (hereinafter "SRM Regulation"), the SRB determined (i) with respect to Sberbank Croatia and Sberbank Slovenia, that the conditions for resolution were met, consequently adopting the resolution schemes and providing for the application of the sale of business tool under Article 24 of the SRM Regulation; (ii) as for Sberbank Europe, that the condition of the public interest, under Article 18(1)(c) of the SRM Regulation, was not satisfied, therefore leaving the entity's winding up to the national insolvency procedure.

Sberbank Russia, as a shareholder of Sberbank Europe, brought three separate actions for annulment against the decisions adopted by the SRB (case T-525/22, related to the resolution of Sberbank Croatia; case T-526/22, related to the resolution of Sberbank Slovenia; case T-527/22, related to the decision adopted with respect Sberbank Europe AG).

In its orders of 10th October 2023, the General Court found these actions inadmissible, based on the lack of direct concern to the applicant.[1]

The Court starts by considering that, under Article 263(4) TFUE, decisions not directly addressed to the applicant (like, in the case at hand, the decisions providing for the resolution of the Croatian and Slovenian subsidiaries and the no-resolution decision adopted with respect to the EU parent company) may be challenged to the extent that they are of direct and individual concern to the applicant.

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[1] Being the lack of direct concern a reason autonomously capable of determining the dismissal of the action, the General Court did not examine the Commission's plea that the resolution scheme is not open to challenge because it constitutes a preparatory act leading to the endorsement decision. The General Court also ruled that the Valuation Reports 1 and 2, adopted by the SRB, constitute an integral part of the decision on the application of a resolution tool and, therefore, are not subject to a separate right of appeal.

According to the settled case-law of the Court of Justice, the condition of direct concern requires two cumulative criteria to be met. First, the contested measure must directly affect the person's legal situation, and second, it must leave no discretion to its addressees entrusted with implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules.

As for Sberbank Croatia and Sberbank Slovenia, the resolution decisions provided for the application of the sale of business tool to the resolved entities and the replacement of their management body by a special administrator.

The Court highlights that Sberbank Russia is not a (direct) shareholder of the resolved entities. Therefore, it has no right to dispose of the assets of those credit institutions, to receive dividends, and to participate in their management (since those rights belong to the sole shareholder of that institution, namely Sberbank Europe). Moreover, the resolution decisions do not concern Sberbank Europe, which is a separate legal person from the resolved entities, and, therefore, they do not affect any right available to the applicant in its capacity as a shareholder of that entity.

According to the Court, the applicant may not validly claim that being the sole shareholder of Sberbank Europe, which owns entirely its subsidiaries, it holds property rights in respect of the resolved entities and that those property rights have been affected by the resolution decisions. From a legal standpoint, those property rights belong only to Sberbank Europe, a separate legal person from the applicant. Contrary to what the applicant claims, it is not able to participate, in legal terms, in the management of the resolved entities, belonging the relevant rights only to Sberbank Europe, as confirmed by the articles of association. Any influence the applicant could have was merely the result of a *de facto* situation not relevant from a legal standpoint.

From this perspective, it is also irrelevant that the sales of Sberbank Croatia and Sberbank Slovenia resulted in a decrease in the assets of Sberbank Europe, which led to a fall in the value of the shares owned by the applicant. According to the Court, such a fall may only demonstrate the existence of economic effects stemming from the resolution decisions. However, in line with the case-law of the Court of Justice, economic effects are not relevant when it comes to the proof of the direct interest (see judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others*, C-663/17 P, C-665/17 P and C-669/17 P, par. 109 to 111).

It follows that Sberbank Russia has no legal standing in bringing an action for annulment against the resolution decisions adopted with respect to Sberbank Europe's subsidiaries.

A similar conclusion applies to the action brought against the decision not to place Sberbank Europe under resolution, although under a different line

of reasoning, which confirms the case-law of the Court of Justice developed with regard to the ABLV crisis.[2]

According to the Court, such a decision affects the legal position of the entity concerned (namely Sberbank Europe) but not the one of its shareholder, Sberbank Russia, which again suffers only economic, and not legal, prejudice. Indeed, the right of the shareholder to receive dividends and to participate in the management of the credit institution has not been affected by the no-resolution decision in itself.

The subsequent decisions adopted by the Austrian NRA – such as the prohibition from continuing business operations, the appointment of a government commissioner, and the request to take the decision to place Sberbank Europe in liquidation – may not be considered has been requested to the NRA by the SRB. Therefore, such measures do not constitute an implementation of the contested decision that is "*purely automatic and resulting from EU rules alone*" in the meaning of the case-law on standing.

Indeed, in the opinion of the Court, the SRM Regulation makes no provision for an NRA to adopt measures in relation to a credit institution not placed under resolution. It follows that the measures adopted at the national level following the no-resolution decision adopted by the SRB fall outside resolution mechanism's framework and are incapable of showing a direct interest of the shareholder in bringing an action for annulment against the SRB's decision.

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[2] Court of Justice, judgment of 24 February 2022, C-364/20 P, *Ernests Bernis and Others v SRB*, see on this Newsletter "Decisione di non risoluzione da parte del CRU: carenza di legittimazione attiva degli azionisti dell'ente creditizio ad agire in giudizio per il suo annullamento" by Edoardo Muratori (no 14, February 2022).

3. Keywords and summary

BNP Paribas Public Sector v SRB

General Court – Case T-688/21 – Judgment of 25 October 2023 – ECLI:EU:T:2023:675

Non-reimbursement rule applying to irrevocable payment commitments entered into to comply with the obligation to pay the ordinary contribution to the Single Resolution Fund

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

Pursuant to Articles 69(1) and 70(1) of SRMR, for each contribution year, credit institutions established in participating Member States are required to pay the ordinary contribution to the Single Resolution Fund, in order to ensure that, at the end of the initial period (eight years from 1st January 2016), the available financial means of the same fund reach the target level of at least 1% of the amount of covered deposits of all credit institutions authorised in all of the participating Member States.

In this context, the EU legislature specified, in Article 70(4) of SRMR, that 'duly received' *ex ante* contributions are not to be reimbursed. By that wording, the EU legislature laid down a rule without exceptions. That is why no mention is made in that provision of the possibility of adjusting *ex ante* contributions *a posteriori* (see Court of Justice, judgment of 29 September 2022, ABLV Bank v SRB, C-202/21 P, EU:C:2022:734, para. 56).

Credit institutions that have chosen to fulfil their obligation to contribute to the Single Resolution Fund by entering into irrevocable payment commitments in accordance with Article 70(3) SRMR are also subject to this non-reimbursement rule.

Agreements between the Single Resolution Board and a credit institution relating to the irrevocable payment commitments entered into by the latter could not derogate the non-reimbursement rule, considering that the SRMR and Council Implementing Regulation (EU) 2015/81 specifying uniform conditions for ex ante contributions to the Single Resolution Fund are of general application, are binding in their entirety and are directly applicable in all the Member States concerned.

Ex ante contributions to the Single Resolution Fund – Irrelevance of the change of status of the credit institution during the contribution period – Institutions falling outside the scope of the Single Resolution Mechanism – Irrevocable payment commitments

Pursuant to Article 70(4) of SRMR, 'duly received' *ex ante* contributions to the Single Resolution Fund cannot be reimbursed. It follows that a change in the status of an institution during the contribution period has no effect on the amount of the contribution due for the year in question by that institution and by other institutions. That rule is, moreover, reproduced in Article 12(2) of Commission Delegated Regulation (EU) 2015/63 supplementing the BRRD, which is applicable also to the Single Resolution Board.

Accordingly, the General Court has already held that the fact that an entity ceased to carry on the business of a credit institution during the contribution period, as a result of the withdrawal of its licence, does not affect its obligation to pay the full ex ante contribution due in respect of that contribution period (judgment of 20 January 2021, *ABLV Bank v SRB*, case T-758/18, ECLI:EU:T:2021:28, para. 85).

Considering also that Article 7(1) of Council Implementing Regulation 2015/81 expressly provides that recourse to irrevocable payment commitments must in no manner affect the financial capacity or the liquidity of the Single Resolution Fund, the obligation to pay the contribution in full even if the contributing institution has fallen out of the scope of the SRMR during the contribution period does not refer solely to the part of the payment immediately made, but also to the other part provided by means of irrevocable payment commitments.

Ex ante contributions to the Single Resolution Fund – Cancellation of irrevocable payment commitments pursuant to Article 7(3) of Council Implementing Regulation 2015/81 – Institutions falling outside the scope of the Single Resolution Mechanism

Article 7(3) of Council Implementing Regulation 2015/81, according to which "*The irrevocable payment commitments of an institution that no longer falls within the scope of* [SRMR] *are cancelled and collateral backing these commitments is returned*", must be interpreted in the light of Article 7(1) of that Implementing Regulation, which provides that recourse to irrevocable payment commitments must in no manner affect the financial capacity or the liquidity of the Single Resolution Fund, and in the light of Articles 69 and 70 of SRMR, which establish the general obligation for the credit institutions to contribute to the Single Resolution Fund in order to ensure that, at the end of the initial period (eight years from 1° January 2016), the available financial means of the same fund reach the target level of at least 1% of the amount of covered deposits of all credit institutions authorised in all of the participating Member States.

Therefore, the purpose of Article 7(3) of Council Implementing Regulation 2015/81 is not to enable institutions to avoid their obligation to pay in full the contribution due to the Single Resolution Fund on account of the fact that the irrevocable payment commitments they entered into were not yet called upon by the Single Resolution Board in the context of a resolution action before they fell outside the scope of the Single Resolution Mechanism. Rather, the purpose

of Article 7(3) of Council Implementing Regulation 2015/81 is to put an end to irrevocable payment commitments when it is not desirable that they should live on, because the entity that entered into them has fallen outside the scope of the Single Resolution Mechanism.

As a consequence, the cancellation of the irrevocable payment commitment and the return of the collateral provided for in Article 7(3) of Council Implementing Regulation 2015/81 cannot mean that the part of the *ex ante* contribution for which an irrevocable payment commitment has been entered into does not have to be provided where the contributing institution falls outside the scope of the Single Resolution Mechanism. That institution remains liable to pay the full individual contribution regularly calculated by the Single Resolution Board for the period in question and is not authorised to pay only a fraction thereof.

It follows that, to safeguard the financial capacity and liquidity of the Single Resolution Fund, the cancellation of the irrevocable payment commitments and the correlated return of the collateral foreseen in Article 7(3) of Council Implementing Regulation 2015/81 may occur only after the credit institution concerned has payed in full its contribution.

Indeed, if the collateral backing an irrevocable payment commitment were to be returned without prior receipt of the contribution in respect of which that commitment was entered into, not only the institution would not fulfil its obligation to pay the entire contribution due in respect of the period in which it fell within the scope of the Single Resolution Mechanism, but the *ex ante* contribution in the form of an irrevocable payment commitment would not achieve the objective of providing the Single Resolution Fund with financial means corresponding to the level provided for by the EU legislature

Ex ante contributions to the Single Resolution Fund – Irrelevance of the change of status of the credit institution during the contribution period – Institutions falling outside the scope of the Single Resolution Mechanism – Irrevocable payment commitments – No right to a new calculation of the *ex ante* contribution – Principle of legal certainty

The departure of an institution from the scope of the Single Resolution Mechanism does not entitle it to a new calculation of the *ex ante* contribution considering that, if the Single Resolution Board had to take into account the evolution of the legal and financial situation of credit institutions during the contribution period concerned, it would be difficult for it to calculate reliably and stably the contributions due by each of them and to pursue the objective of reaching the target level (see General Court, judgment of 20 January 2021, *ABLV Bank v SRB*, T-758/18, EU:T:2021:28, para. 75 and 76).

Moreover, in accordance with Article 70(2) of SRMR, the Single Resolution Board calculates the individual contributions on the basis, *inter alia*, of its projection, for the year in question, of the target level to be reached at the end of the initial period. Therefore, the fact that the target level may change as a consequence of a credit institution's exit from the scope of the Single Resolution Mechanism, cannot have any effect on the calculation, and therefore on the amount, of the contributions due for the period prior to its departure from the system nor can it justify the repayment of the collateral backing the irrevocable payment commitments entered into by such a credit institution without the prior payment of the contributions in respect of which those commitments were entered into. Indeed, the fact that the departure of an institution reduces the total amount of covered deposits, and therefore the target level, does not relieve that institution of paying in full the *ex ante* contribution due in respect of the contribution period.

Considering that, as stated in recital 11 of Council Implementing Regulation 2015/81, the individual contribution of each credit institution depends decisively on the one of each of the others, the adjustment *a posteriori* of the contribution of a credit institution due to a change of its status would always require a correction of the contributions of the others: it would be impossible to determine with legal certainty the individual contributions of all the institutions.

Ex ante contributions to the Single Resolution Fund – Objectives of the Single Resolution Fund – Irrelevance of the change of status of the credit institution during the contribution period – Institutions falling outside the scope of the Single Resolution Mechanism – Irrevocable payment commitments

In accordance with Article 18(1) of SRMR, a resolution is to be carried out solely in the public interest. The Single Resolution Fund, therefore, serves to safeguard the financial stability of the Banking Union as such. It is not intended to be a rescue fund for individual banks. Consequently, there is no automatic link between the payment of the *ex ante* contribution and the possibility of benefiting from the Single Resolution Fund.

It follows that the fact that a credit institution, as a result of its departure from the scope of the Single Resolution Mechanism, can no longer benefit from the Single Resolution Fund, does not release that institution from its obligation to pay a sum corresponding to the full amount of the contributions due in respect of the contribution period during which it was still covered by the SRMR.

Ex ante contributions to the Single Resolution Fund – Unjust enrichment – Cancellation of irrevocable payment commitments pursuant to Article 7(3) of Council Implementing Regulation 2015/81

A claim of unjust enrichment based on Article 340(2) TFEU cannot be brought to obtain the return of a collateral backing an irrevocable payment

commitment without the prior payment of the contributions for which those instruments were used. The action, in order to be admissible, requires by the applicant the proof of enrichment by the other party without a valid legal basis and of an impoverishment of the applicant himself connected with that enrichment; the first condition is not satisfied when the enrichment is justified by contractual obligations, as in the case of the signing of the irrevocable payment commitments between a credit institution and the Single Resolution Board (see General Court, judgment of 6 October 2015, *Technion v Commission*, case T-216/12, para. 104).

4. Contributions to the Single Resolution Fund previously fulfilled via irrevocable payment commitments to be payed in full in cash when the credit institution has its banking license withdrawn

by Giuseppe Pala

1. Between 2015 and 2021, BNP Paribas Public Sector S.A., a French credit institution, provided in part its *ex ante* contributions to the Single Resolution Fund ('SRF') in the form of irrevocable payment commitments ('IPCs') under Article 70(3) of the Single Resolution Mechanism Regulation ('SRM Regulation'), *i.e.* commitments fully backed by collateral of low-risk assets unencumbered by any third-party rights, at the free disposal of and earmarked for the exclusive use by the Single Resolution Board ('SRB') for the purpose of the effective application of the resolution tools.

Such commitments took the form of contractual arrangements stipulated by BNP Paribas Public Sector, the SRB and, with regard to the contribution period of 2015, the *Autorité de contrôle prudentiel et de resolution* and the *Fonds de garantie des dépôts etde resolution*.

In 2021, after it requested and obtained from the European Central Bank the withdrawal of its banking license, the former credit institution notified to the SRB that it had terminated its mentioned IPCs and asked for the reimbursement of the linked collateral.

The SRB replied that the cancellation of the IPCs and the subsequent return of the collateral could take place only after the payment in cash of the part of the *ex ante* contributions that was originally covered with the IPCs.

BNP Paribas Public Sector, supported by the French Republic and the *Fédération bancaire française*, filed a suit before the General Court, alleging, in substance, that the SRB's refusal to reimburse the collateral was in breach of the contractual arrangements related to the IPCs (which conferred on the Court the jurisdiction to rule on any dispute concerning them, pursuant to Article 272 TFEU) and, in particular, of the clause of such arrangements that referenced Article 7(3) of Council Implementing Regulation (EU) 2015/81 on *ex ante contributions* to the SRF. Indeed, such provision states that "*The*

irrevocable payment commitments of an institution that no longer falls within the scope of [SRM Regulation] *are cancelled and collateral backing these commitments is returned*".

The former bank also alleged that the SRB's refusal to pay constituted an unjust enrichment of the same Board and, therefore, it asked the Court to annul the letter with which the reimbursement was denied and to order the SRB to pay the sums by way of damages under Article 340(1) TFEU.

2. With its judgment of 25 October 2023, the Seventh Chamber of the General Court fully dismissed the action brought by BNP Paribas Public Sector.

First, the Court recalled that the obligation of the credit institutions to pay their *ex ante* contribution to the SRF stems directly from the SRM Regulation and is regulated by such Regulation and by Council Implementing Regulation (EU) 2015/81. It follows that no contractual arrangement between the credit institutions and the SRB could affect the full application of the relevant provisions of those Regulations.

Second, the General Court underlined that Article 70(1) of the SRM Regulation requires credit institutions of the Member States participating in the SRM to pay the ordinary contribution to the SRF in order to ensure that, after an initial period of eight years from 1 January 2016, the available financial means of the Fund reach at least 1% of the amount of covered deposits of all credit institutions authorised in all of the participating Member States ('target level'). Coherently, Article 70(4) of the SRM Regulation states that 'duly received' *ex ante* contributions are not to be reimbursed, without exceptions. In line with this, the Court of Justice already excluded the possibility of adjusting *ex ante* contributions *a posteriori* (see judgment of 29 September 2022, *ABLV Bank v SRB*, C-202/21 P, EU:C:2022:734, para. 56) and maintained that the circumstance that an entity ceased to carry on the business of a credit institution during the contribution period does not affect its obligation to pay the full *ex ante* contribution due in respect of that period (see judgment of 20 January 2021, *ABLV Bank v SRB*, T-758/18, EU:T:2021:28, para. 85).

Resting on these premises, the General Court rejected the interpretation of Article 7(3) of Implementing Regulation 2015/81 brought forward by the applicant, according to which such provision means that the part of the *ex ante* contribution for which an IPC was entered into does not have to be provided if the entity subsequently falls outside the scope of the SRM and that commitment was not yet called upon by the SRB in the context of a resolution action.

Indeed, on the one hand, according to its ordinary meaning, the 'irrevocable' quality of the IPC implies an obligation, which cannot be called into question, to pay the sum in respect of which that commitment is entered into at the request of the SRB. On the other hand, albeit Article 7(3) of Implementing Regulation 2015/81 does not expressly state that institutions that no longer fall within the

scope of the SRM must first pay their full contribution in order for their collateral to be subsequently returned to them, such an obligation follows directly from the fact that credit institutions must provide the SRF with an annual contribution so that the latter reaches the target level at the end of the eight-year initial period. Therefore, "*if the collateral backing an irrevocable payment commitment were returned without prior receipt of the contribution in respect of which that commitment was entered into, not only would the institution not fulfil its obligation to pay the entire contribution due in respect of the period in which it fell within the scope of* [the SRM Regulation]*, but the* ex ante *contribution in the form of an irrevocable payment commitment would not achieve the objective of providing the SRF with financial means corresponding to the level provided for by the EU legislature*".

In this regard, the Court stressed, the obligation to pay that contribution in full does not refer solely to the part of the payment immediately made, but also to the other part provided by means of an IPC, considering that the recourse to such commitment must in no manner affect the financial capacity or the liquidity of the SRF, as per Article 7(1) of Implementing Regulation 2015/81.

In light of this, the purpose of the cancellation of the IPC provided for in Article 7(3) of Implementing Regulation 2015/81 is to put an end to that commitment when it is not desirable that it should live on, due to the fact that the entity has ceased its activities as a credit institution and thus has fallen outside the scope of the SRM. The purpose of said provision is not, on the contrary, to enable institutions which fall outside the scope of the SRM to avoid their obligation to pay in full the contribution due for the period during which they were within such scope.

This interpretation of the applicable provisions is also aligned with the functioning of the contribution mechanism. Indeed, in accordance with Article 70(2) of the SRM Regulation, the SRB calculates the individual contribution on the basis, *inter alia*, of its projection, the year in question, of the target level to be reached at the end of the initial period. Therefore, the fact that the target level may change, after a credit institution's exit from the scope of the SRM, cannot have any effect on the amount of the contributions due for the period prior to such exit, not only because Article 70(4) of the SRM Regulation expressly excludes such possibility, but also because, otherwise, the Board would not be able to reliably carry on its task of calculating the individual contributions and pursue the target level of the SRF.

Nor, in the Court's view, it is possible to argue, as BNP Paribas Public Sector and the interveners did, that the SRB should return the collateral backing the 2016-2021 IPCs without prior receipt of the contributions for which those commitments were entered into and then adjust the future individual contributions of the other institutions to ensure that the target level is reached.

Similarly, considering that, as stated in recital 11 of Implementing Regulation 2015/81, the individual contribution of each credit institution depends decisively

on the one of each of the others, the adjustment *a posteriori* of the contribution of a bank due to a change of its status would always require a correction of the contributions of the others: it would be impossible to determine with legal certainty the individual contributions of all the institutions.

Moreover, considering that the contribution to the SRF does not give the relevant bank any right to benefit from the same fund (in accordance with Article 18(1) of the SRM Regulation, a resolution is to be carried out solely in thepublic interest), the impossibility, for the applicant, of benefiting from the SRF after its departure from the scope of the SRM cannot, in any event, have any effect on its obligation to pay the individual contribution due in full in respect of the period during which it was within such scope.

Finally, the Court held that the fact that the EU legislature had considered it necessary to subject IPCs to a 'specific regime' does not, in itself, make it possible to distinguish institutions which chose to pay their contributions immediately from those which have entered into IPCs. On the contrary, all institutions are subject to the obligation to contribute, regardless of the way they choose to fulfil it.

In light of all the above, the Court stated that "*the cancellation of the irrevocable payment commitment and the return of the collateral provided for in Article 7(3) of Implementing Regulation 2015/81 cannot mean that the part of the ex ante contribution for which an irrevocable payment commitment has been entered into does not have to be provided where the contributing institution falls outside the scope of Regulation No 806/2014 […]. That institution remains liable to pay the full individual contribution regularly calculated by the SRB for the period in question and is not authorised to pay only a fraction thereof*".

3. As regards the request for damages brought forward by the applicant on the basis of an alleged unjust enrichment of the SRB, the Court, first, rejected the arguments of the latter according to which the same Court has no jurisdiction to hear and determine on the basis of the EU law non-contractual claims for unjust enrichment concerning the IPCs. The SRB maintained that such claims have, on the contrary, contractual nature and, therefore, fall under the provisions of the agreements relating to the IPC according to which all tortious claims should be governed by the Luxembourg law and be subject to the competence of national courts.

The Court recalled that, under Article 268 TFEU, it has jurisdiction to hear and determine disputes relating to compensation for damage provided for in the second paragraph of Article 340 TFEU relating to 'non-contractual liability' of the Union, which encompass also claims seeking to establish the liability of the Union for unjust enrichment.

Having clarified this, the General Court rejected the claims of BNP Paribas Public Sector, considering that the applicant did not provide any proof that the so-called enrichment of the SRB (i.e. the retention of the sum corresponding to the cash collateral linked to the IPCs) has no legal basis. On the contrary, it is

apparent that such retention is founded on a valid legal basis (the contractual arrangements entered into by BPN Paribas Public Sector and the Board and, above all, the applicable provisions of the SRM Regulation and of Implementing Regulation 2015/81) and, therefore, cannot constitute unjust enrichment.

4. The judgment of the Court appears to be well-founded and its reasoning hardly refutable. Indeed, following the arguments of the (former) French bank, the IPCs would not be a form of actual contribution to the SRF (as was intended and established by the legislature – see Article 70(3) of the SRM Regulation, according to which "[t]*he available financial means to be taken into account in order to reach the target level specified in Article 69 may include irrevocable payment commitments*"), but rather a convenient bet: if the entity ceases to carry on the activity of a credit institution before the SRB has had the chance to require it to actually pay in cash the sums which are the object of the IPCs it has stipulated, then such an entity is freed *a posteriori* of its obligation towards the SRF, creating an unjustifiable worse treatment of the banks that chose to pay directly their contributions, and notwithstanding the fact that such 'lucky' entity was fully within the scope of the SRM when its obligation to contribute in full accrued.

Lineas - Concessões de Transportes

1. Keywords and summary

Lineas - Concessões de Transportes

Court of Justice – Joined Cases C-207/22, C-267/22 and C-290/22 – Judgment of 26 October 2023 – ECLI:EU:C:2023:810

Interpretation of the concept of "financial institution" under Regulation No 575/2013 and Directive No 2013/36/EU

Concept of financial institution – Interpretation of EU law – Undertaking whose activity is the acquisition of holdings

According to settled case-law, it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account not only its wording, but also its context and the objective pursued by the legislation in question (see, to that effect, judgment of 30 March 2023, case C 651/21, paragraph 41 and the case-law cited).

Considering point 22 of Article 3(1) of Directive 2013/36 and the wording of point 26 of Article 4(1) of Regulation No 575/2013, in the version applicable ratione temporis to the main proceedings (i.e. prior to Regulation No 2019/876), a 'financial institution' is an undertaking the principal activity of which is to acquire holdings or to pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I to Directive 2013/36, including a financial holding company, a mixed financial holding company, a payment institution and an asset management company. The use of the conjunction 'or' indicates that the EU legislature did not intend to make the carrying out of one or more the activities listed in the mentioned Annex a criterion for defining the concept of 'financial institution' for the purposes of Regulation No 575/2013. It is also apparent that the list of financial institutions set out in point 26 of Article 4(1) of Regulation No 575/2013 is not exhaustive. Therefore, it cannot be inferred from the reference to financial holding companies and to mixed financial holding companies in that provision that the lack of certain specific links with a credit institution, an insurance undertaking or an investment firm necessarily precludes classification as a 'financial institution' for the purposes of that regulation.

The context of Point 22 of Article 3(1) of Directive No 2013/36 and of Point 26 of Article 4(1) of Regulation No 575/2013 shows that the EU legislature defined the scheme applicable to financial institutions on the basis that those institutions were connected to certain activities involving the financial sector. Indeed, the main aspect of the scheme relevant to financial institutions established by Article 34 of Directive No 2013/36 concerns their option to carry out activities involving the financial sector of another Member State in line with the freedom of establishment and the freedom to provide services.

Finally, with regard to the objectives of these provisions, Regulation No 575/2013 establishes rules concerning the consolidation and prudential requirements for credit institutions and investment firms which, to the extent that they are specific to holdings in financial institutions or other financial sector entities and differ from the rules applicable to holdings outside the financial sector, may be regarded as being based on the specific nature of that sector's activities. Thus, the rationale underlying Regulation No 575/2013 would be undermined if these rules specific to holdings in financial sector entities were to be applied to holdings in entities outside that sector.

It follows from the foregoing that an undertaking whose principal activity is not linked to the financial sector, to the extent that it does not carry out, either directly or through holdings, one or more activities referred to in Annex I to Directive No 2013/36, cannot be regarded as being a financial institution within the meaning of Directive No 2013/36 and of Regulation No 575/2013. Consequently, point 22 of Article 3(1) of Directive No 2013/36 and point 26 of Article 4(1) of Regulation No 575/2013 must be interpreted as meaning that an undertaking, whose activity is to acquire holdings in companies which do not carry out activities in the financial sector, is not a "financial institution" within the meaning of that Directive and of that Regulation.

2. The ruling by the Court of Justice on the concept of "financial institutions" under Directive 2013/36 and Regulation No 575/2013

by Francesca Chiarelli

1. The Supremo Tribunal Administrativo has made references for a preliminary ruling in proceedings between Lineas – Concessões de Transportes SGPS (Case C-207/22), Global Roads Investimentos SGPS (Case C-267/22), NOS SGPS (Case C-290/22), and the Portuguese Autoridade Tributária e Aduaneira concerning the imposition of a tax on documented legal transactions imposed by Portuguese national law.

The applicants in the main proceedings are holding companies established in Portugal, set up to manage shares in other undertakings as an indirect form of economic activity. None of the activities of the companies in which they have shareholdings is part of the banking or financial sector.

The applicants carried out in credit and financial intermediation transactions with several credit institutions in order to obtain financing. These transactions were subject to the tax on documented legal transactions under the Código do Imposto do Selo. The tax liability was borne by the credit institutions as taxable entities and was subsequently passed on to the applicants. In the main proceedings, the applicants relied on the exemption provided for in the Portuguese tax legislation on the ground that they were holding companies which could be classified as "financial institutions" in accordance with the relevant EU law to which the national provision refers.

In the three cases, the Court of Justice is asked to clarify whether a holding company whose sole object is the management of shares in undertakings which do not carry on banking or financial activities and which are therefore not subject to the supervision and prudential requirements applicable to such activities can be regarded as a 'financial institution' within the meaning of EU law.

2. The Court's reasoning focuses on the definition of 'financial institution' in Article 3(1)(22) of Directive 2013/36 and Article 4(1)(26) of Regulation No 575/2013, and is developed according to a literal, contextual and teleological interpretation.[1]

With regard to the wording of Article 3(1)(22) of Directive 2013/36, this provision states that, for the purposes of that Directive, 'financial institution' must be understood as a financial institution as defined in Article 4(1)(26) of Regulation (EU) No 575/2013. The latter provision states that, for the purposes of that regulation, a 'financial institution' is defined as an undertaking other than a credit institution or an investment firm, the principal activity of which is to acquire holdings or to pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I to Directive 2013/36,[2] including a financial holding company, a mixed financial holding company, a payment institution and an asset management company.

Thus, in order to be considered a "financial institution" within the meaning of Article 4(1)(26) of Regulation No 575/2013, the main activity of an entity must be the acquisition of participations or the performance of one or more of the activities listed in points 2 to 12 and 15 of Annex I to Directive 2013/36. The wording suggests that these are alternative conditions, i.e. it is sufficient to comply with only one of them in order to fall within the definition.

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1 According to the Court's settled case-law, when interpreting a provision of EU law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. See judgment of 9 March 2023, European Union Agency for the Cooperation of Energy Regulators, C-46/21, EU:C:2023:182, paragraph 54; judgment of 8 September 2022, Ministerstvo životního prostředí, C-659/20, EU:C:2022:642, paragraph 33; judgment of 8 December 2020, Staatsanwaltschaft Wien, C-584/19, EU:C:2020:1002, paragraph 49.

2 The activities listed in the annex include lending, financial leasing, payment service, money broking, portfolio management and advice and issuing electronic money.

Article 4(1)(26) of Regulation No 575/2013 contains a list of holding companies that are considered to be financial institutions. These are, inter alia, "financial holding companies" and "mixed financial holding companies". In this regard, a "financial holding company" is defined in Article 4(1)(20) of Regulation No 575/2013 as a financial institution whose subsidiaries are exclusively or primarily financial institutions or institutions,[3] at least one of which is an institution, and which is not a mixed financial holding company.

The Court of Justice, recalling the Opinion of Advocate General Medina, observes that in the present case, financial holding companies are characterised both by the fact that their principal activity is the acquisition of holdings and by the existence of specific links with a credit institution, insurance undertaking or investment firm.

Therefore, the Court concludes that a literal interpretation of Article 4(1)(26) of Regulation No 575/2013 suggests that, in order for a holding company to be considered a financial institution within the meaning of the latter provision, such a company must acquire holdings in companies that carry out banking or financial activities. Conversely, holding companies whose sole purpose is to manage holdings in companies other than those engaged in banking or financial activities do not appear to fall within the concept of 'financial institution' within the meaning of these two provisions.

3. The literal interpretation is in accordance with the interpretation of the context surrounding Article 3(1)(22) of Directive 2013/36 and Article 4(1)(26) of Regulation No 575/2013.

The European legislator has defined a regulatory framework for financial institutions based on specific activities within the financial sector.

In detail, as to the contextual interpretation, the ECJ argues that "*Article 34 of that directive, which is entitled 'Financial institutions' and is the only article in that directive that relates solely to financial institutions, permits, under certain conditions, such institutions to carry out the activities referred to in Annex I to that directive in another Member State. That article thus gives concrete expression to the principle set out in recital 20 of that directive, according to which it is appropriate to extend mutual recognition to certain financial activities under certain conditions when they are carried out by financial institutions which are subsidiaries of credit institutions*".

Therefore, a company can qualify as a 'financial institution' if it carries out activities falling within the financial sector.

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[3] According to Article 4(1)(3) of Regulation No 575/2013, an "institution" refers to a credit institution or an investment firm.

Next, the Court examines the purpose of Regulation No 575/2013 laying down rules on consolidation[4] and prudential requirements[5] for credit institutions and investment firms. The European legislator has adopted specific rules for shareholdings in financial institutions or other entities in the financial sector, which differ from the rules applicable to shareholdings outside the financial sector: the specificity of the rules derives from the specific nature of the activities carried out by undertakings in the financial sector.

From a review of the regulatory provisions' context, the Court confirms that a holding company solely engaged in share management, and whose subsidiaries or participations do not engage in banking or financial activities, is not subject to any of the aforementioned requirements, particularly in terms of prudential supervision. Furthermore, these holding companies cannot benefit from mutual recognition as outlined in Directive 2013/36. In light of these arguments, the Court of Justice concludes that these companies are not covered by Regulation No 575/2013 and Directive 2013/36.

4. Finally, the Court of Justice interprets the provisions at hand based on a teleological criterion to support its ruling. The Court notes that Directive 2013/36, Article 1 and Regulation No 575/2013, Article 1 are intended to establish the rules concerning access to the activity, supervising, and imposing requirements on credit institutions and investment firms.

It follows that the definition of 'financial institution' stated in Article 3(1)(22) of Directive 2013/36 and Article 4(1)(26) of Regulation No 575/2013 needs to be consistent with the intended objective and logically coherent.

Therefore, based on the aforementioned, the Court concludes that an entity whose main operation does not pertain to the financial sector and does not conduct any of the activities specified in Annex I of Directive 2013/36, either directly or through holdings, cannot be classified as a financial institution, as per the definition in Directive 2013/36 and Regulation No 575/2013.

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[4] See Article 18(1) of Regulation No 575/2013 that provides: '*The institutions that are required to comply with the requirements referred to in Section 1 on the basis of their consolidated situation shall carry out a full consolidation of all institutions and financial institutions that are its subsidiaries or, where relevant, the subsidiaries of the same parent financial holding company or mixed parent financial holding company*'. By contrast, that provision does not require a prudential consolidation including all the subsidiaries of the institutions and investment firms.

[5] The reference is to the rules on own funds requirements, liquidity requirements and large exposure requirements in Articles 93, 412-414 and 111 of the Regulation, respectively. On this point, see opinion of the Advocate General, para. 51: "… *prudential supervision rules, as described above, levy additional and burdensome regulatory requirements on undertakings beyond general matters such as taxation and financial consolidation. These provisions are inherently linked to banking and financial activities, and together form a management system to ensure the security of the European Union's financial interests*".

5. It should be noted that the Court's ruling appears to be in line with the Commission's answer to a European Banking Authority question raised in 2014.[6]

EBA had asked the Commission to clarify whether "*all 'undertakings other than institutions, the principal activity of which is to acquire holdings' – irrespective of whether the holdings in question relate to undertakings in- or outside of the financial sector – qualify as a financial institution (FI) (and accordingly as a financial sector entity (FSE) pursuant to Article 4(1)(27) of Regulation (EU) No 575/2013 (CRR)) for prudential consolidation purposes and also for purposes of capital deductions for investments in FSEs*".

The Commission stated that, based on the structure of definitions in Article 4(1)(26) and (27) of that regulation, as well as the aim of the deductions set out in Article 36 thereof, "*the part of the definition of 'financial institution' that refers to the principal activity of acquiring holdings does not include purely industrial holding companies*".

In keeping with this understanding, Regulation 2019/876, Article 3(3) has recently modified the definition of Article 4(1)(26) of Regulation No 575/2013, to expressly exclude 'pure industrial holding' companies from the scope of 'financial institution'.

It establishes that pure industrial holding companies have no connection with the financial or banking sectors due to them neither being an undertaking which performs as a principal activity any of the activities referred to in Article 4(1)(26) of Regulation No 575/2013 nor owning participations in undertakings which perform those activities as a principal activity. It follows that there needs to be a connection with the banking or financial sectors even for companies who acquire holdings.

This legislative change – not applicable to the current case *ratione temporis* – confirms that only companies with such a connection with the banking or financial sectors can be classified as financial entities.

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[6] Commission answer to question 2014_857 regarding the definition of a financial institution in Regulation No 575/2013, 18 July 2014, available at https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2014_857.

PNB Banka and Others v SRB

1. Keywords and summary

PNB Banka and Others v SRB

General Court – Case T-732/19 – Judgment of 15 November 2023 – ECLI:EU:T:2023:721

Action for annulment of the SRB's decision not to adopt a resolution scheme

Decision not to adopt a resolution scheme – Action for annulment – Action brought by shareholders – Lack of direct concern – Action brought by credit institution – Direct and individual concern – Absence of discretion for the addressee

According to Article 263(4) TFEU, any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, or against a regulatory act that directly affects them and does not entail implementing measures. Two cumulative criteria, therefore, must be met: first, the contested measure must directly and individually affect the legal situation of the applicant and, second, it must leave no discretion to the addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules.

In the light of the above, and in accordance with settled case-law, shareholders and potential shareholders of a credit institution are not directly concerned by the SRB's decision not to adopt a resolution scheme for that credit institution, given that their right to receive dividends and participate in the management of the same credit institution is not affected by that decision as such.

On the contrary, the credit institution is directly concerned by the same decision.

First, in accordance with Article 18 of the SRM Regulation, if the ECB considers, in its assessment, that the entity concerned is failing or is likely to fail within the meaning of Article 18(1)(a) of that regulation, this results in the initiation of the procedure provided for in that article. Accordingly, in so far as the SRB's decision not to adopt a resolution scheme states that the credit institution concerned is failing or is likely to fail, it directly affects that bank's legal situation.

Second, the decision to adopt resolution action entails the imposition of resolution tools as referred to in Article 18(6)(b) and (c) and Article 22 of the SRM Regulation, such as the sale of business tool, the bridge institution tool, the

asset separation tool and the bail-in tool, or even use of the Single Resolution Fund to support resolution action. As a consequence, the decision not to adopt such tools, some of which may enable the credit institution to continue part of its activities, directly affects its legal situation.

Furthermore, it is clear that the decision not to adopt a resolution scheme individually concerns the credit institution in respect of which the SRB does not adopt a resolution scheme and, thus, it distinguishes that credit institution individually.

Finally, the decision not to adopt a resolution scheme leaves no discretion to the addressee entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules. This conclusion is not called into question by the fact that that the national resolution authority may find it necessary to adopt measures implementing the aforementioned decision, in accordance with Article 29(1) of the SRM Regulation, since those measures fall outside the framework of the resolution mechanism. In particular, the opening of insolvency proceedings against the credit institution concerned by the SRB's decision not to adopt a resolution scheme in accordance with national law sits outside of any resolution scheme and does not flow from that decision.

DECISION NOT TO ADOPT A RESOLUTION SCHEME – Action for annulment – Action brought by credit institution – Interest in bringing proceedings

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

To determine if a credit institution does have a legal interest in bringing proceedings against the SRB's decision not to adopt a resolution scheme, it must be considered that that credit institution does not take issue with the refusal to put in place a resolution scheme, but disputes, in essence, the SRB's conclusions that it was failing or likely to fail and that there was no reasonable prospect that alternative measures would prevent that failure.

In this respect, it must be found that the credit institution concerned does have a legal interest in bringing proceedings.

First, the assessment by the ECB that the credit institution is failing or likely to fail results in the initiation of the procedure provided for in Article 18 of the SRM Regulation, and therefore if the Court were to conclude that that assessment was incorrect, the procedure which gave rise to the decision not to adopt a resolution scheme should not have been triggered in respect of that credit institution.

Second, with a view to carrying on its banking activities, the entity concerned has a legitimate interest in not being subject to an assessment which makes it clear that it is failing or is likely to fail, irrespective of the events that took place after the adoption of the contested decision.

DECISION NOT TO ADOPT A RESOLUTION SCHEME – Obligation of the SRB to take a decision following an assessment of failing or likely to fail – Assessment under Article 18(1) of the SRM Regulation

If the ECB comes to the conclusion that a credit institution is failing or is likely to fail, its assessment is sent to the SRB and the resolution procedure is initiated. Then, it is for the SRB to verify whether the conditions referred to in Article 18(1) of the SRM Regulation are met in order to decide whether to adopt a resolution scheme. At the same time, the failing or likely to fail assessment by the ECB or by the SRB can be subject to judicial review in the context of an action before the Courts of the European Union against the adoption by the SRB of a resolution scheme or against the decision not to adopt such a scheme. It follows that the SRB is required to take a positive or negative decision once it has examined the three conditions laid down in Article 18(1) of the SRM Regulation, if only to prevent a lacuna in the judicial protection of an entity, especially with regard to the assessment of failing or likely to fail of it.

That conclusion is supported by the broader regulatory context of Article 18 of the SRM Regulation. Indeed, Article 82(2) of Directive 2014/59/EU ('BRRD') expressly provides for the possibility of adopting a decision not to take resolution action. That provision may be regarded as the equivalent of Article 18 of the SRM Regulation, which applies to smaller credit institutions falling within the competence of national resolution authorities.

In order to take the decision to adopt or not to adopt a resolution scheme, the SRB has to ascertain whether the conditions referred to in Article 18(1)(a), (b) and (c) of the SRM Regulation are met. The SRB could, theoretically, examine first whether the condition laid down in Article 18(1)(c) of the SRM Regulation, namely that the resolution would be in the public interest, is met and, provided that that is not the case, it could refrain from examining the condition laid down in Article 18(1)(b) of that Regulation, namely the existence of alternative measures capable of preventing the entity's failure within a reasonable timeframe. However, the SRB does not err in law if it examines each of the three conditions laid down in Article 18(1) of that Regulation. That is all the more so given that the conditions laid down by Article 18(1)(a) and (b) of the regulation in question are closely linked. In particular, the SRB cannot be criticised for taking into account the ECB's assessment of failing or likely to fail in order to answer the question whether there are alternative measures to resolution, which means that the conditions laid down in Article 18(1)(a) and (b) of the SRM Regulation overlap.

DECISION NOT TO ADOPT A RESOLUTION SCHEME – Decision based on complex economic assessments – Scope of the assessment of the Courts – Burden of proof

The judicial review which the Courts of the European Union must carry out of the merits of the grounds of a decision such as the SRB's decision not to adopt a resolution scheme, in so far as it is based on complex economic assessments, must not lead those courts to substitute their own assessment for that of the competent institution or body, but seeks to ascertain that the appealed decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of powers.

Furthermore, in order to establish that the institution or administrative body concerned committed a manifest error in assessing the facts such as to justify the annulment of a decision based on complex economic or financial assessments, the evidence adduced by the applicant must be sufficient to make the factual assessments used in that decision implausible.

DECISION NOT TO ADOPT A RESOLUTION SCHEME – Assessment under Article 18(1)(a) of the SRM Regulation

As apparent from the case-law, the SRB is entitled to rely solely on the ECB's assessment of failing or likely to fail in its examination of the condition laid down in Article 18(1)(a) of the SRM Regulation (see, to that effect, judgment of 6 May 2021, *ABLV Bank and Others v ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraphs 62 to 65).

RIGHT TO GOOD ADMINISTRATION – Duty to state reasons

According to Article 41(2)(c) of the Charter of Fundamental Rights of the European Union the right to good administration includes, inter alia, the obligation of the administration to give reasons for its decisions.

Furthermore, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Courts of the European Union to exercise their power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements laid down in Article 296 TFEU must be assessed not only with regard to its wording but also to its context and to all the legal rules governing the matter in question.

It follows that a statement of reasons need not be exhaustive, but must be regarded as sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision.

RESOLUTION PROCEDURE – Right to be heard – Need for speed – No obligation for the ECB and the SRB to hear the credit institution at each phase of the resolution procedure

According to Article 41(2)(a) of the Charter, the right to good administration includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken. The right to be heard guarantees every person the opportunity to make known their views effectively during an administrative procedure and before the adoption of any decision liable to affect their interests adversely. The right to be heard pursues a dual objective: first, to enable the case to be examined and to establish the facts as precise and correct as possible, and, second, to ensure that the person concerned is protected. Observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement.

As regards the procedure provided for in Article 18 of the SRM Regulation, the objective to establish a more efficient resolution mechanism, as an essential instrument to avoid damages resulting from failures of banks, presupposes a speedy decision-making process, which often occurs in emergency circumstances so that financial stability is not jeopardised, as the short time limits laid down in that provision illustrate.

However, although it is necessary to take into account the need for speed, it must also be reconciled with the right to be heard.

In view of the complexity of the administrative procedure referred to in Article 18 of the SRM Regulation, conducted by the ECB and the SRB jointly and successively, and the necessity to balance the right to be heard with the need for speed inherent in that procedure, neither Article 41 of the Charter nor the provisions of that regulation require that the entity concerned by the decision on the adoption of a resolution scheme needs to be heard at each stage of the procedure by each of those two bodies separately. At least with regard to the assessment that the entity concerned is failing or likely to fail and that there are no alternative measures capable of preventing that entity's failure, it is sufficient that the same entity is heard by the ECB before the latter reaches its conclusion.

PRINCIPLE OF PROTECTION OF LEGITIMATE EXPECTATIONS – Banking sector – Early intervention measures

The right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances, originating

from authorised and reliable sources have been given to the person concerned by the competent authorities of the European Union. That right applies to any individual in a situation in which an institution, body or agency of the European Union, by giving that person precise assurances, has led them to entertain well-founded expectations.

While the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union, economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the EU institutions in the exercise of their discretion will be maintained, particularly in an area which requires intervention by public authorities as the banking sector, whose subject matter involves constant adjustment to reflect changes in the economic situation.

In particular, an early intervention measure granting a time limit for a credit institution to comply with certain prudential requirements does not, in itself, constitute precise, unconditional and consistent assurance such as to give rise to well-founded expectations on the part of that entity to the effect that, during that time limit, the ECB will refrain from adopting other supervisory measures or from concluding that that entity is failing or likely to fail.

2. General Court dismisses PNB Banka's action against the SRB's decision not to adopt a resolution scheme

by Leonardo Droghini

The Judgment of the General Court of 15 November 2023, in Case T-732/19, PNB Banka AS v Single Resolution Board (SRB), follows four recent rulings issued by EU Judges concerning PNB Banka, a former Latvian credit institution, which faced scrutiny from the ECB, was declared as failing or likely to fail, got its banking licence withdrawn and eventually was placed under insolvency proceedings.[1] In this case, the Court was asked to rule on the validity of the SRB's decision not to adopt a resolution scheme.

I. In 2019 PNB Banka was classified by the ECB as a significant supervised entity. The findings of an on-site inspection carried out by the latter revealed concerns about PNB Banka's capital, leading to an early intervention decision. The ECB also requested PNB Banka to submit an action plan to restore compliance with prudential requirements, however after a number of exchanges between PNB Banka and the ECB, the latter found the submitted plan inadequate to restore sustainable compliance with the capital requirements.

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[1] See Cases T-275/19, T-230/20, T-301/19, T-330/19. The General Court has dismissed all these actions brought against the ECB. On these cases, see the previous contributions published on No 23 (December 2022) and No 24 (January 2023) of this Newsletter.

In light of this, on 15 August 2019, the ECB concluded that PNB Banka was deemed to be failing or likely to fail (FOLTF) and, on the same date, the SRB adopted the contested decision not to place PNB Banka under resolution due to the absence of public interest.

II. In its decision, the General Court addresses as a first point the pleas of inadmissibility raised by the SRB, arguing that the applicants have no standing to bring proceedings in that they are not directly concerned by the contested decision, and that the applicants have no legal interest in bringing proceedings.

In what concerns legal standing, the Court clarifies that a distinction must be drawn between applicants who are shareholders and PNB Banka as a credit institution.

In accordance with settled case-law, shareholders are not directly concerned by the contested decision, given that their right to receive dividends and participate in the management of PNB Banka has not been affected by that decision as such.[2] Conversely, PNB Banka is directly concerned by the contested decision under two different perspectives: (i) first, in so far as the contested decision states that PNB Banka is failing or is likely to fail, it directly affects that bank's legal situation by triggering the resolution procedure; (ii) second, the decision not to adopt resolution action entails that resolution tools would not be applied, some of which may enable PNB Banka to continue part of its activities, thereby directly affecting its legal situation.

Further, the General Court rejects the other plea of inadmissibility by simply noting that it is impossible to deny that PNB Banka does have a legal interest in bringing proceedings, which is substantiated in the legitimate interest in not being subject to an assessment which makes it clear that it is failing or is likely to fail, irrespective of the events that took place after the adoption of the contested decision.

III. On the substance, the General Court uphold the legality of the SRB's decision, dismissing all the pleas in law in support of the action, including in particular those related to the SRB's competence, the ECB's FOLTF assessment and the alleged infringement of the principle of proportionality and the duty to state reasons. Equally unsuccessful are declared the claims relating to the bank's right to be heard and the principle of legitimate expectation.

The key findings of the judgment can be summed up as follows.

In terms of competence, the Court recalls that the ECB classified PNB Banka as a significant supervised entity and that, consequently, from that moment on the SRB was responsible for drawing up the resolution plans and adopting all decisions relating to resolution. Even if the mentioned ECB decision is subject

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2 *Bernis and Others v SRB*, T-282/18 and *ECB and Others v Trasta Komercbanka and Others*, C-663/17 P, C-665/17 P and C-669/17 P.

to a separate action for annulment (which the Court dismissed by judgment of 7 December 2022, PNB Banka v ECB and now under appeal in Case C-100/23 P) and its alleged unlawfulness could vitiate the legality of the contested decision, its illegality has not been established so far. Therefore, the SRB was the resolution authority responsible for taking a decision on the basis of Article 18 of Regulation No 806/2014 (SRMR).

In rejecting the second and fourth pleas in law, alleging that under the circumstances of the case the SRB could not adopt the contested decision, the EU Judges point out that the SRB is required to take a positive or negative decision once it has examined the three conditions laid down in Article 18(1) SRMR, if only to prevent a lacuna in the judicial protection of an entity, especially with regard to the ECB's FOLTF assessment. That conclusion is supported by Article 82(2) of Directive 2014/59/EU, which expressly provides for the possibility of adopting a decision not to take resolution action.

In addition, contrary to PNB Banka's assertions, the SRB did not err in law in examining each of the three conditions laid down in Article 18(1) SRMR and, in particular, the condition referred to in letter b) of said Article. According to the Court, the conditions laid down by Article 18(1)(a) and (b) are closely linked and the SRB cannot be criticised for taking into account the ECB's assessment in order to answer the question whether there were alternative measures to resolution. Indeed, the ECB's FOLTF assessment of an entity generally takes into account the existence of alternative measures to prevent its failure, which means that the conditions laid down in Article 18(1)(a) and (b) SRMR overlap in practice.

With specific reference to the FOLTF assessment, the Court recalls that the scope of judicial review, in so far as the decision is based on complex economic assessments, is confined 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. Based on this premise, and after stating that the SRB is entitled to rely solely on the ECB's FOLTF assessment in its examination of the condition laid down in Article 18(1)(a) SRMR, the EU Judges confirm the lawfulness of the FOLTF assessment based on the fact that PNB Banka infringed the requirements for continuing authorisation (Article 18(4)(a)) and that PNB Banka's assets were less than its liabilities (Article 18(4)(b)).

The applicant was also unsuccessful when it contends violations, among other things, of the right to be heard.

In this respect, the Court notices that although it is necessary to take into account the need for speed in the procedure provided for in Article 18 SRMR, this need must be reconciled with the right to be heard, whose observance is required even where the applicable legislation does not expressly provide for such a procedural requirement.

In the Court's view, it must be excluded that Article 41 of the Charter requires that the entity concerned by the decision on the adoption of a resolution scheme

be heard at each stage of the procedure by both the ECB and the SRB separately. Even though PNB Banka was not heard by the SRB before the contested decision was adopted, it was, by contrast, heard on several occasions by the ECB prior to determining it to be FOLTF. In these circumstances, the Court deems that the discussions between the bank and the ECB were sufficient to respect the bank's right to be heard.

Lastly, the judgment deals with the principle of legitimate expectation, which, according to the applicant, was infringed in view of the fact that the deadline for the implementation of the action plan, drawn up in response to the early intervention decision, had not yet expired at the time of the adoption of the SRB's contested decision. In response to this argument, the Court underlines that the ECB's granting of time limits in order for PNB Banka to comply with certain prudential requirements does not constitute precise, unconditional and consistent assurances such as to give rise to well-founded expectations on the part of PNB Banka to the effect that, during those time limits, the ECB would refrain from concluding that the bank was failing or was likely to fail.

BG (Octroi de prêts sans autorisation)

1. Keywords and summary

BG (Octroi de prêts sans autorisation)

Court of Justice – Case C-427/22 – Judgment of 16 November 2023 – ECLI:EU:C:2023:877

Concepts of "credit institution" and "authorisation" under Regulation No 575/2013

Concept of credit institution – Interpretation of EU law

According to settled case-law, the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of its context, as well as the objectives and purpose pursued by the act of which it forms part. Its legislative history may also reveal elements that are relevant to its interpretation (judgment of 16 March 2023, case C 449/21, paragraph 31 and the case-law cited).

The objective of point 1(a) of Article 4(1) of Regulation No 575/2013 is to provide a functional definition of the concept of 'credit institution', meaning that the definition of the concept of 'credit institution' is based on the function performed by banks, their essential task being to act as a link between saving and investment, in other words to receive monies and grant loans.. It follows that an undertaking which does not take deposits or other repayable funds from the public and which therefore only grants credits from funds that come from other sources, falls outside the concept of 'credit institution'.

Therefore, point 1(a) of Article 4(1) of Regulation No 575/2013 must be interpreted as meaning that an undertaking falls within the concept of 'credit institution' only where its activity consists, cumulatively, of taking deposits or other repayable funds from the public and of granting credits for its own account, it being specified that those deposits or other funds taken from the public are intended for granting credits, although credits may also be granted even from funds from other sources.

Concept of authorisation – Interpretation of EU law – Financial institution

The concept of 'authorisation', within the meaning of point 42 of Article 4(1) of Regulation No 575/2013, must be understood in the context of that Regulation, which includes Directive 2013/36 on access to the activity of credit institutions.

Article 8(1) of that Directive provides that Member States are to require credit institutions to obtain authorisation before commencing their activities. By contrast, as regards financial institutions, which include, in accordance with the definition in point 26 of Article 4(1) of Regulation No 575/2013, undertakings other than credit institutions and whose principal activity is (solely or inter alia) to grant loans, Directive No 2013/36 merely lays down the provisions concerning the freedom of establishment and the freedom to provide services.

Therefore, the conditions for obtaining approval as a financial institution, within the meaning of Regulation No 575/2013, are regulated only at national level.

Del Valle Ruíz and Others v SRB
Molina Fernández v SRB
ACMO and Others v SRB
Galván Fernández-Guillén v SRB

2. Keywords and summary

Del Valle Ruíz and Others v SRB

General Court – Joined Cases T-302/20, T-303/20 and T-307/20 – Judgment of 22 November 2023 – ECLI:EU:T:2023:735

Molina Fernández v SRB

General Court – Case T-304/20 – Judgment of 22 November 2023 – ECLI:EU:T:2023:734

ACMO and Others v SRB

General Court – Case T-330/20 – Judgment of 22 November 2023 – ECLI:EU:T:2023:733

Galván Fernández-Guillén v SRB

General Court – Case T-340/20 – Judgment of 22 November 2023 – ECLI:EU:T:2023:732

Single Resolution Board's decision to deny compensation to the shareholders and creditors of Banco Popular with repect to its resolution

Scope of the assessment of the Courts – Administrative discretion – Technically complex assessment – Action for annulment – Resolution procedure – SRB's decision to deny compensation to shareholders and creditors

With regard to situations in which the EU authorities have broad discretion, in particular as to the assessment of highly complex scientific and technical facts, review by the EU judicature is limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. In such a context, the EU judicature cannot substitute its assessment of scientific and technical facts for that of the EU authorities entrusted with the task.

As regards complex economic assessments made by the EU authorities, review by the EU judicature is limited to verifying whether the rules on procedure and the statement of reasons have been complied with, whether the facts have been accurately stated, and whether there has been any manifest error of assessment or misuse of powers. When conducting such a review, the

EU judicature must not substitute its own economic assessment for that of the competent EU authority.

SCOPE OF THE ASSESSMENT OF THE COURTS – Economic and technical matters – Discretion – Burden of proof – SRB's decision to deny compensation to shareholders and creditors

Although the SRB enjoys a margin of discretion with regard to economic and technical matters, EU Courts have jurisdiction to review the SRB's interpretation of the economic data on which its decision is based. Even in the case of complex assessments, the EU judicature must not only establish whether the evidence relied on is factually accurate, reliable, and consistent but also ascertain whether that evidence contains all the information that must be taken into account in order to assess a complex situation and whether it is capable of supporting the conclusions drawn from it.

In order to establish that the SRB made a manifest error in assessing the facts such as to justify the annulment of a decision, the evidence adduced by the applicant must be sufficient to make the factual assessments used in that decision implausible. Consequently, a plea alleging a manifest error of assessment must be rejected if, despite the evidence adduced by the applicant, the contested assessment may still be accepted as true or valid.

RESOLUTION PROCEDURE – Valuation for the purposes of resolution – Valuation 2 – Valuation 3 – Valuation 2 and Valuation 3 carried out by the same valuer – Alleged lack of independence of the valuer – No breach

Valuations 2 and 3 are conducted for different purposes and, therefore, use different approaches. Pursuant to Article 20(5) of Regulation No 806/2014, Valuation 2 aims to inform the resolution action by estimating the economic value of the assets and liabilities of the credit institution concerned at the resolution date, while Valuation 3 aims to estimate the treatment of the affected shareholders and creditors in hypothetical insolvency proceedings. No provision of Regulation No 806/2014 or Delegated Regulation 2016/1075 expressly precludes Valuations 2 and 3 from being carried out by the same valuer, which is also not precluded from reaching the same conclusions in carrying the valuations, namely that the affected shareholders and creditors would not obtain any recovery in the event of the ordinary insolvency proceedings.

RESOLUTION PROCEDURE – Alleged lack of independence of the valuer – Material common or conflicting interests – Burden of proof

Pursuant to Article 41(4)(a) of Delegated Regulation No 2016/1075, to establish the existence of an actual or potential material interest in common or

in conflict within the meaning of paragraph 1 of that article, the provision by the independent valuer of services, including the past provision of services, to the relevant entity and the persons referred to in paragraph 3, and in particular the link between those services and the elements relevant for valuation, is relevant. However, whoever is interested in contesting that valuation has to prove the existence of that link by showing how the said services could have influenced or could reasonably have been perceived to influence the valuer in carrying out the valuation, pursuant to Article 41(2) of Delegated Regulation No 2016/1075.

Resolution procedure – SRB's competence and powers – Valuation 3 – Alleged improper delegation of decision-making powers – No breach

Article 76(1)(e) of Regulation No 806/2014 expressly provides that the SRB's decision as to whether the affected shareholders and creditors are eligible for compensation must be based on the results of an independent valuation provided for in Article 20(16) of that Regulation. In addition, the content of that valuation is governed by Article 20(17) and (18) of Regulation No 806/2014 and the criteria relating to the methodologies for valuation of differences in treatment are laid down in Delegated Regulation 2018/344. Thus, the fact that the SRB entrusted the Valuer with carrying out Valuation 3 cannot be construed as a delegation of its power to adopt the decision.

3. No creditor worse off valuation in Banco Popular's case: findings of the EU General Court

by Edoardo Muratori

I. Introduction

In these long-waited judgments, the General Court lives up to the expectations and covers a large array of legal matters related to the EU bank resolution framework, such as the right to property, the valuation methodology, the independence of the valuer, the right to good administration, the right to an effective remedy, and the right to be heard.

This brief article is meant just to provide a very high-level overview of the General Court's judgments and to illustrate their main findings.

II. Litigation context

Following the resolution of Banco Popular, a large number of Banco Popular's former shareholders and creditors took legal actions before the General Court against the SRB for damages and for the annulment of the resolution decision adopted in June 2017, the decision not to commission the

performance of a definitive valuation 2 taken in 2018, and the decision not to grant compensation to former shareholders and creditors adopted in March 2020 ('Contested Decision').

Therefore, the resolution of Banco Popular sparked three main families of litigation at EU level:

- Litigation concerning the resolution decision;
- Litigation concerning the decision on definitive valuation 2;
- Litigation concerning the no creditor worse off compensation decision.

The judgments rendered by the General Court on 22 November 2023 regard this last strand.

III. Main findings of the General Court

a) Valuation methodology and right to property

The General Court has firmly upheld the valuation methodology applied by the independent valuer, especially regarding the assessment of the relevant type and length of the insolvency proceedings in the counterfactual scenario, of the performing loans, of the non-performing loans, of the real estate assets and of the legal contingencies of Banco Popular.

Preliminary, the General Court has observed that repeatedly the applicants moaned about the assessments set out in Valuation 3, presenting analyses based on alternative assumptions, without, however, establishing that the Contested Decision and Valuation 3 are affected by manifest errors of assessment or are implausible (see sub-section c. below).

Then, the Court has confirmed the correctness of the valuation methodology, that the SRB did not make manifest errors of assessment when it endorsed Valuation 3 performed by the independent valuer, and that there was no undervaluation of the applicants' recovery estimates in the hypothetical insolvency proceedings.

The Court has also held that the SRB and the independent valuer, respectively for the adoption of the Contested Decision and for the performance of Valuation 3, validly relied upon the criteria set out in the Commission Delegated Regulation (EU) 2018/344, being irrelevant that this delegated regulation was not in force yet at the time of the adoption of the Resolution Decision or at the time when the independent valuer started Valuation 3.

With respect to the type of insolvency proceedings, the Court has ruled that the SRB correctly considered as counterfactual scenario the liquidation of Banco Popular, rather than a creditor agreement or a unified sale of the bank or of its business lines. The Court has taken the view that, according to the legal framework, normal insolvency proceedings to be considered for

the purposes of the counterfactual scenario assessment means the realisation of assets and thus the liquidation of the relevant entity. Moreover, the Court has considered that in the absence of the Resolution Decision, Banco Popular could not have maintained its banking license and could not have continued its operations.

With respect to the length of the hypothetical insolvency proceedings, the Court has noted that the maximisation of recoveries is not the only objective of the insolvency liquidator, and that this objective has to be balanced with other interests, such as the interest to conclude the liquidation proceedings within a reasonable time. The Court has observed that creditors, depending on their ranking in the hierarchy, can have diverging interests with respect to the duration of the liquidation proceedings. The Court has maintained that no valid arguments were provided to contest the considerations which led the valuer to conclude that the insolvency proceedings would not last longer than seven years, including higher liquidation and management costs, as well as increased uncertainty as regards the level of asset realisation in a longer period. Moreover, the Court has held that previous insolvency practice in Spain does not contradict the assessment of the insolvency procedure's duration made by the independent valuer, and that different views on the possible duration of a hypothetical insolvency are subjective and do not make the assessment by the independent valuer implausible.

With respect to the valuation of the performing loans, the Court has rejected all the allegations concerning the reclassification of performing loans as non-performing loans, the prepayment assumptions for performing loans, the new delinquencies relating to the remaining performing loans, and the discount rate on the sale of the remaining performing loans. The Court has noted that the reclassification concerned only a limited portion of performing loans held by borrowers who were already at risk of default before resolution, and that the consideration that an abrupt cessation of Banco Popular could have worsen the situation of those borrowers was not contested. The Court has reached the conclusion that the percentages of prepayment of performing corporate loans and mortgage loans upon the commencement of the hypothetical insolvency of Banco Popular, estimated by the valuer (of respectively 80.23% and 33.55%) were plausible. The Court has taken the view that the Contested Decision extensively justified the discount rates that would have applied in case of sale of the remaining performing loans.

With respect to the valuation of the non-performing loans, the Court has dismissed the arguments that a longer disposal period would have led to higher recoveries of non- performing loans and that the recovery estimates made by the valuer are inconsistent with the benchmark market data.

With respect to the valuation of the real estate assets, the Court has noted that it cannot be held that applying different disposal periods for two different asset classes, such as real estate subsidiaries as going concern and real estate assets directly owned by Banco Popular, is necessarily contradictory, and that

applying the same disposal period for the two asset classes would not have led to higher recoveries.

With respect to the valuation of the legal contingencies, the Court has taken the stance that there was no overestimation of the legal contingencies related to the floor clauses in mortgage loans, the mandatorily convertible notes, the mortgage loan expenses, the Banco Popular's capital increases in 2012 and 2016, and the real estate development bank guarantees (estimated in Valuation 3 in the range between EUR 1.8 billion in the best-case scenario and EUR 3.5 billion in the worst-case scenario).

Based on these considerations, the General Court has concluded that the right of property of Banco Popular's former shareholders and creditors was not infringed. The Court has further concluded that their treatment in insolvency would not have been better than resolution, in accordance with the no creditor worse off principle enshrined in Article 15(1)(g) of Regulation (EU) No 806/2014, and that no compensation from the Single Resolution Fund needed to be granted, in conformity with Article 17 of the Charter of Fundamental Rights of the EU ('Charter').

b) Independence of the valuer

The General Court has taken a clear stance on the independence of the valuer that performed Valuation 3 of Banco Popular and rejected the allegations raised by some applicants in this respect. The Court has excluded that the SRB made a manifest error of assessment or an error of law in appointing Deloitte as independent valuer.

The General Court has confirmed that the SRB carefully examined and ensured, throughout the resolution procedure, that Deloitte was independent in line with the Commission Delegated Regulation (EU) 2016/1075, and that the SRB provided sufficient information in the Contested Decision.

The General Court has dismissed the claims that Deloitte did not satisfy relevant independence requirements, and in particular the requirement for being considered as having no actual or potential material interest in common or in conflict with the relevant entity, because of the previous relationship between Deloitte and Banco Popular, the services previously provided to Banco Santander and the previous performance of Valuation 2 in Banco Popular's resolution.

With respect to the previous relationship between Deloitte and Banco Popular, the Court has observed that Deloitte did not provide auditing services to Banco Popular, and that no link was established between the services provided by Deloitte to Banco Popular, in connection with both the proposed sale of Banca Privada and the implementation of IFRS 9, and the work done for Valuation 3. The Court has concluded on this point that it was not established that the previous services provided to Banco Popular influenced the valuer's independent judgement in performing Valuation 3.

With respect to the services previously provided by Deloitte to Banco Santander, the Court has noted that the applicants did not explain how the auditing and accounting services as well as the services relating to the integration of Banco Popular provided by Deloitte to Banco Santander could have influenced Deloitte's independent judgement when performing Valuation 3, which concerned only the valuation of Banco Popular and not that of Banco Santander. Furthermore, the Court has observed that (i) Valuation 3 is not capable of calling into question the legality of the Resolution Decision and its outcome, which in this specific case was the sale of Banco Popular to Banco Santander; (ii) the possible annulment of the Resolution Decision cannot change the conditions of the sale of Banco Popular to Banco Santander; and (iii) given the irrelevance of the outcome of Valuation 3 for Banco Santander, Deloitte had no interest in favouring Banco Santander.

With respect to the previous performance of Valuation 2, the Court has recalled that (i) no legal provision expressly precludes that Valuations 2 and Valuation 3 are performed by the same valuer; (ii) it cannot be maintained that Deloitte was not independent because allegedly it considered itself bound by the findings in Valuation 2; (iii) Valuation 2 and Valuation 3 pursue different objectives; (iv) Valuation 2 and Valuation 3 were based on data sets different in terms of granularity and reference period; and (v) actually in some instances the estimates made in Valuation 2 and Valuation 3 differ.

c) Standard of review

The General Court has considered that (i) SRB's decisions determining whether compensation needs to be granted to former shareholders and creditors of a resolved entity are based on highly complex economic and technical assessments; (ii) in the cases at stake, the judicial review is limited to the verification of the compliance with procedural rules and statement of reasons, of the absence of a manifest error of assessment, of a misuse of powers and of exceeding by the SRB of the limits of its discretion; and (iii) the Court cannot substitute the SRB's assessment of scientific and technical facts with its own, in line with settled case-law .

The Court has stated that the evidence submitted by the applicants was not sufficient to establish that the SRB made a manifest error of assessment, and to lead to the conclusion that the factual assessments in the Contested Decision are implausible.

d) Delegation of powers

The General Court has come to the conclusion that no breach of the principles on delegation of powers has taken place.

Preliminary, the Court has noted that any complaints related to the SRB conferring a decision-making power to the valuer cannot be based on the Meroni case-law , which concerns a situation different from that complained about by Banco Popular's former shareholders and creditors.

Moreover, the Court has stipulated that the SRB did not improperly delegate to the valuer the decision-making power bestowed on it by the legal framework. Quite the contrary, the SRB carefully reviewed the underlying assumptions, data and conclusions of Valuation 3, it meticulously scrutinised the observations made by Banco Popular's former shareholders and creditors in the context of the right to be heard process, and it provided comprehensive justification in the Contested Decision.

e) Right to be heard, right to an effective remedy and principle of equality of arms

The General Court has also excluded any violation by the SRB of Banco Popular former shareholders' and creditors' right to be heard and of the principle of equality of arms.

With respect to the right to be heard, first the Court has clarified that any alleged violation of such a right before the adoption of the Resolution Decision has no relevance for the Contested Decision. Second, the Court has confirmed that the modalities by means of which the SRB granted the right to be heard to Banco Popular's former shareholders and creditors before the adoption of the Contested Decision, are in compliance with the EU case-law .

With respect to the right to an effective remedy pursuant to Article 47 of the Charter, the Court has recalled that fundamental rights are not absolute and can be subject to limitations in case of other objectives of general interest, such as confidentiality interests. The Court has maintained that the SRB provided adequate justification for the partial disclosure of the information set out in the Contested Decision and Valuation 3, and that there was no breach of the principle of equality of arms.

IV. Conclusion

The judgments delivered by the General Court in the cases at stake are undoubtedly of seminal importance for the Banking Union, and they represent key precedents for future resolution cases in the EU.

Not only the General Court has wholly upheld the SRB's decision not to grant compensation to Banco Popular's former shareholders and creditors, but, in order to get there, it has provided extremely valuable insights on a plethora of thorny legal issues. The General Court has taken an additional crucial step in the process of progressively shedding light on the relatively novel and complex EU legal framework on bank crisis management and resolution.

Presumably these judgments will be subject to the further scrutiny of the European Court of Justice, but at least we now know where the General Court stands when it comes to the application of the no creditor worse off principle in the EU.

Banque postale v SRB
Confédération nationale du Crédit mutuel and Others v SRB
BPCE and Others v SRB
Société générale and Others v SRB
Crédit agricole and Others v SRB
Landesbank Baden-Württemberg v SRB
BNP Paribas v SRB

1. Keywords and summary

Banque postale v SRB

General Court – Case T-383/21 – Judgment of 20 December 2023 – ECLI:EU:T:2023:845

Confédération nationale du Crédit mutuel and Others v SRB

General Court – Case T-384/21 – Judgment of 20 December 2023 – ECLI:EU:T:2023:823

BPCE and Others v SRB

General Court – Case T-385/21 – Judgment of 20 December 2023 – ECLI:EU:T:2023:824

Société générale and Others v SRB

General Court – Case T-387/21 – Judgment of 20 December 2023 – ECLI:EU:T:2023:825

Crédit agricole and Others v SRB

General Court – Case T-388/21 – Judgment of 20 December 2023 – ECLI:EU:T:2023:826

Landesbank Baden-Württemberg v SRB

General Court – Case T-389/21 – Judgment of 20 December 2023 – ECLI:EU:T:2023:827

BNP Paribas v SRB

General Court – Case T-397/21 – Judgment of 20 December 2023 – ECLI:EU:T:2023:829

General Court annuls SRB Decision on 2021 *ex ante* contributions related to certain French and German banks due to a failure to provide adequate reasons in determining the annual target level

Ex ante contributions to the Single Resolution Fund – Right to effective judicial protection – Protection of business secrets

While in principle the person concerned must be able to ascertain, with full knowledge of the relevant facts, the reasons upon which the decision taken in relation to him or her is based, so as to make it possible for him or her to defend his or her rights in the best possible conditions, in certain exceptional cases, an EU authority may preclude the disclosure to the person concerned of the precise and full grounds which form the basis of a decision taken against that person, relying on reasons covered by the protection of confidential data.

In the light of the specific nature of the ex ante contributions, there is the need to reconcile respect for business secrets with the principle of effective judicial protection, such that data constituting business secrets cannot be disclosed to the persons concerned and those data cannot, inter alia, be included in the statement of reasons for the decisions determining the amount of ex ante contributions. It follows from the foregoing that the calculation of the ex ante contributions on the basis of data constituting business secrets, in accordance with Articles 4 to 9 of and Annex I to Delegated Regulation 2015/63, without those data being made available to the persons concerned, does not in itself mean that those provisions are incompatible with the principle of effective judicial protection.

Ex ante contributions to the Single Resolution Fund – Principle of legal certainty – SRB's discretion – Methodology for calculating *ex ante* contributions – Adjustment of the ex ante contribution according to the risk profile of a credit institution

In accordance with the principle of legal certainty, where a provision confers on the institutions or bodies of the Union the power to impose financial burdens, it must be ascertained, inter alia, whether, in the exercise of its discretion, the institution or body itself is guided by certain objective factors which enable the individual to foresee with sufficient precision the method of calculation and the scale of the charges to be imposed. Having regard to the applicable legislation on the methodology for calculating ex ante contributions to the SRF, it cannot be assumed that the scope and modalities of exercise of the discretion granted to the SRB by Article 6(5) to (7) and Article 7(4) of Delegated Regulation 2015/63 are insufficiently limited or not sufficiently clearly defined with regard to the legitimate objective at stake and therefore do not provide an adequate protection against arbitrariness.

Ex ante contributions to the Single Resolution Fund – Power conferred on the Commission to adopt delegated acts – Discretion – Adjustment of the ex ante contribution according to the risk profile of a credit institution – Credit institutions belonging to the same IPS – Principle of equal treatment

With regard to the method of adjustment of the basic annual contributions to the SRF, the differentiation between credit institutions belonging to the

same Institutional Protection Scheme (IPS) on the basis of the risk indicator 'trading activities and off-balance-sheet exposures, derivatives, complexity and resolvability', as provided for by the second subparagraph of Article 7(4) of Delegated Regulation 2015/63, doesn't contradict the principle of homogeneous and consistent treatment of all the members of such an IPS.

Taking into account the principles and objectives of the regulatory area of Delegated Regulation 2015/63, i.e. to ensure that the financial sector provides the SRM with adequate financial resources to enable it to perform its tasks, while creating incentives for the credit institutions to operate under a less risky model, it should be noted that not all institutions belonging to an IPS are necessarily in a comparable situation solely by virtue of that membership. In fact, the members of an IPS, such as that to which the applicant belongs, do not have an unconditional right to support from the IPS covering all their liabilities. In this context, the risk indicator "trading activities, off-balance sheet exposures, derivatives, complexity and resolvability" provides an objective criterion for assessing which institutions in an IPS are at risk of requiring support from the IPS that it could not provide. This indicator therefore represents an objective criterion for assessing which institutions are in a comparable situation with regard to such a risk.

Ex ante contributions to the Single Resolution Fund – Objective of *ex ante* contributions – Difference between the Single Resolution Mechanism and the Single Supervisory Mechanism – Complementarity

In view of the specific subject matter and objectives of the legislation on the SSM and of that on the SRM, as well as the comparative rationale of the legislation of the SRM, there cannot be a breach of the principle of equal treatment simply because the legal framework governing the calculation of the ex ante contributions to the SRM does not reproduce, as such, the risk assessment criteria laid down in the context of the SSM. While it is true that there is a complementary link between the rules established in the context of the SRM and those adopted under SSM, it should be noted that the objectives pursued by the SRM legislation as regards the resolution of credit institutions are different from those pursued by the SSM legislation as far as concerns supervisory requirements.

Risk assessment under SRM regulation and risk assessment under SSM fulfil different objectives. On the one hand, risk assessment in the context of pillar II of the SSM is carried out in order to meet the prudential requirements laid down by that mechanism with a view to ensuring that a given institution has sufficient own funds to face any specific risk which would not be covered by pillar I of the SSM. On the other hand, risk assessment in the context of the adjustment of the basic annual contribution in proportion to the risk profile, as provided for in point (b) of the second subparagraph of Article 70(2) of Regulation No 806/2014 and in Articles 5 to 9 of Delegated Regulation 2015/63, is performed with a view to apportioning the ex ante contributions between all of the institutions concerned. The outcome of such an assessment tends to evaluate not only the risk of a given

institution failing but also, in broader terms, the risk of the SRF being used by a failing institution.

Ex ante contributions to the Single Resolution Fund – Calculation of the basic annual contribution – Eligible liabilities – Principle of equal treatment

Article 70(1) and (2) of Regulation No 806/2014 and Articles 6 and 7, as well as Annex I of Delegated Regulation 2015/63 do not violate the principle of equal treatment due to the fact that neither Article 70(2), second subparagraph, point (a) of Regulation No 806/2014 nor Article 5(1) of Delegated Regulation 2015/63 provide for the deduction of eligible liabilities from the liabilities taken into account for the calculation of the basic annual contribution.

Taking into account the relevant provisions on bail-in and write-down and conversion powers (Articles 17(1) 21(1) and (7a) and 27(5) of Regulation No 806/2014 and Article 48(1) of Directive 2014/59) it is clear that eligible liabilities do not have the same capacity as own funds to absorb the losses of institutions. Therefore, the principle of equal treatment cannot justify the deduction of eligible liabilities from the liabilities serving as the basis for calculating the annual basic contribution, since Delegated Regulation 2015/63 intended to distinguish the situations presenting particularities directly linked to the risks of the liabilities in question.

Ex ante contributions to the Single Resolution Fund – Power conferred on the Commission to adopt delegated acts – Technically complex cases – Discretion – Criteria for adjusting *ex ante* contributions – Principle of proportionality

In determining the method of calculating ex ante contributions, the European Union legislature enjoys a wide discretionary power since it is called upon to intervene in an area which requires choices of a political and economic nature and complex assessments. Similarly, in the context of a delegated power under Article 290 TFEU, the Commission has, in the exercise of the powers conferred upon it, a wide margin of discretion when it is called upon to make complex assessments and evaluations. This applies, in particular, to Delegated Regulation 2015/63, by which the Commission specified the rules for adjusting ex ante contributions according to the risk profile, pursuant to Article 103(7) of Directive 2014/59.

Article 70(1) and points (a) and (b) of the second subparagraph of Article 70(2) of Regulation No. 806/2014 and Articles 6 and 7 and Annex I of Delegated Regulation 2015/63 do not infringe the principle of proportionality merely because the calculation of the ex ante contribution of each credit institution depends on the situation of other intermediaries; indeed, as already recognised by the case-law,

the Union legislature is able to opt, within the wide discretion available to it, for a method of calculating ex ante contributions based on a comparative assessment of the financial situation of each authorised institution. Nor does it infringe the principle of proportionality the fact that the amount of the ex ante contributions is determined almost exclusively by the basic annual contribution rather than the risk adjusting multiplier. The method of calculating the ex ante contributions provided for by the EU legislature and clarified by the Commission does not appear manifestly inappropriate, nor does it exceed what is necessary to achieve the objective to provide adequate financial resources for the efficient application of the resolution tools as well as to encourage the institutions to adopt less risky methods of operation by reducing, inter alia, their liabilities.

Ex ante contributions to the Single Resolution Fund – Objective of *ex ante* contributions – Discretion – Binning method – Principle of proportionality

Keeping in mind the the objectives of the SRM and, in particular, the objective of encouraging institutions to adopt less risky methods of operation, the 'binning' method, consisting of assigning certain institutions to the same bin, even though they have considerably different values from each other for the same risk indicator, does not infringe the principle of proportionality since those institutions have different characteristics with regard to the degree of risk measured by that indicator. In particular, this method is statistically recognised, uses objective criteria, makes it possible to compare data from a large number of institutions in a simple manner and to efficiently and objectively calculate the contributions collected in advance, allows the SRB to profitably process a variety of data, and avoids as far as possible the extreme values. Therefore, the binning method makes it possible to achieve the objective pursued by the SRM, does not exceed the limits of what is necessary to achieve it and cannot be regarded as entailing a disproportionate disadvantage for some institutions.

Ex ante contributions to the Single Resolution Fund – SRB's competence and powers – Discretion – Irrevocable payment commitments – Technically complex cases – Scope of the assessment of the Courts

Pursuant to Article 70(3) of Regulation 806/2014, Article 8(3) of Implementing Regulation 2015/81 and Article 13(3) of Delegated Regulation 2015/63, it is for the SRB to determine the exact share of irrevocable payment commitments (IPCs) granted to a credit institution in compliance with a minimum limit related to the total payment obligations of the institution concerned and a maximum limit related to the total of the ex ante contributions for the contribution period concerned. It is also up to the SRB to specify the nature of the collaterals acceptable to cover the IPCs, provided that such collaterals consist of low-risk assets unencumbered by third-party rights and of swift realisability.

The determination of the exact share of IPCs granted to an institution and the nature of the acceptable collaterals entail complex economic and technical assessments based on the specific situation of the institution concerned and the SRF. Therefore, the judicial review by the EU Courts must be limited to verify whether the exercise of the discretion by the SRB has been vitiated by a manifest error of assessment or a misuse of powers, or whether the SRB has manifestly exceeded the limits of that discretion.

Ex ante contributions to the Single Resolution Fund – Decision fixing the *ex ante* contribution to the Single Resolution Fund – Duty to state reasons – Duty to protect confidentiality and professional secrecy – Need of weighing up

The statement of reasons of any decision of an institution, body, office or agency of the European Union which imposes the payment of a sum of money on a private economic operator does not necessarily have to contain all the elements enabling its addressee to verify the correctness of the calculation of the amount of that sum of money.

The obligation to state reasons for a decision of the SRB fixing the amount of ex ante-contributions must be weighed, inter alia, against the SRB's obligation to preserve the business secrecy of the credit institutions concerned. The fact remains that the obligation to respect business secrets cannot be given so wide an interpretation that the obligation to provide a statement of reasons is thereby deprived of its essence. Ultimately, as far as concerns the SRB's decision fixing the ex ante contributions, the duty to state reasons must be regarded as fulfilled if the persons concerned by that decision, while not being sent data which are business secrets, are provided with the method of calculation used by the SRB and with sufficient information to enable them to understand how their individual situation has been taken into account in the calculation of their ex ante contribution in the light of the situation of all the other institutions concerned. In particular, it is the responsibility of the SRB to publish the information on the institutions concerned used for the calculation of the contribution in a generic and anonymous form or to transmit it to the institution concerned, provided that this information can be communicated without jeopardising commercial confidentiality. The information to be made available to the institutions includes, inter alia, the limits of each bin and the relevant risk indicators on the basis of which the institutions' ex ante contribution has been adjusted to their risk profile.

Ex ante contributions to the Single Resolution Fund – Decision fixing the *ex ante* contribution to the Single Resolution Fund – Duty to state reasons – Consistency of the statement of reasons with the explanations given in the judicial procedure – Failure to state reasons

The statement of reasons for a decision of an EU institution or body must not contain contradictions, so that the addressees are able to know the real reasons for that decision, with a view to defending their rights before the competent court, and so that the court can exercise its power of review. Where the author of the contested decision provides explanations concerning the reasons for that decision in the course of the procedure before the EU Courts, those explanations must be consistent with the considerations set out in the decision.

In the present cases the contested decisions set out a mathematical formula which was presented as forming the basis for the determination of the annual target level. However, that formula did not incorporate all the components of the methodology actually applied by the SRB, as explained at the hearing. Thus, the applied methodology does not correspond to that described in the contested decision and, as a result, neither the credit institution concerned nor the Court could identify the real reasons for the determination of the annual target level; therefore, the contested decision is vitiated by defects in the statement of reasons.

2. Reference to "notes de doctrine"

Barbora Budinska, *General Court finds that the SRB failed to fulfil its duty to state reasons as regards the calculation of the annual target level for the 2021 ex-ante contributions to the SRF*, EU Law Live, 1 February 2024.

Christy Ann Petit, *SRF ex ante contributions and statement of reasons in SRB decisions before the General Court – 2023*, EU Law Live, 2 April 2024.

OCU v SRB

1. Keywords and summary

OCU v SRB

General Court – Case T-496/18 – Judgment of 20 December 2023 – ECLI:EU:T:2023:857

Single Resolution Board's decision applying the exceptions to access to documents provided for by Article 4 of Regulation (EC) No 1049/2001

RIGHT TO ACCESS – Public access to documents – Application of exemptions under Regulation (EC) No 1049/2001 – Standard of review of the Appeal Panel

According to Articles 85(3) and 90(3) of SRMR, the Appeal Panel of the Single Resolution Board is competent to hear appeals against Single Resolution Board's decisions pursuant to Article 8 of Regulation (EC) No 1049/2001 on confirmatory applications for access to documents.

On the contrary, the Appeal Panel is not competent to decide on an appeal against a Single Resolution Board's decision refusing access to the file pursuant to Article 90(4) of SRMR.

RIGHT TO ACCESS – Access to the file – Resolution procedure – Shareholders and creditors

The right of access to the file enshrined in Article 41(2)(b) of the Charter of Fundamental Rights of the European Union concerns persons or undertakings which are the subject of proceedings instituted or decisions taken against them.

In accordance with the foregoing, pursuant to Article 90(4) of SRMR the right of access to the file is vested in the institution which is the subject of the resolution scheme and not in its shareholders or creditors.

Therefore, an association representing former shareholders of a bank under resolution does not have a right of access to the resolution file and, therefore, cannot invoke an infringement of that right.

RIGHT TO ACCESS – Public access to documents – Irrelevance of specific purposes for access of the applicant – Decision applying exceptions to the right to access

According to settled case-law, the purpose of Regulation (EC) No 1049/2001 is to guarantee the right of access by the general public to the documents of the

institutions and not to lay down rules designed to protect the specific interest which one or other particular person may have in having access to those documents. Moreover, according to Article 6(1) of Regulation (EC) No 1049/2001, the applicant for access is not required to justify his application and therefore does not have to demonstrate any interest in having access to the documents requested.

Therefore, when deciding on an application for access to documents submitted to it under Regulation (EC) No 1049/2001, the Single Resolution Board is not required to take account of the fact that the applicant for access may need those documents for the purposes of the preparation of legal proceedings, in particular an action for annulment.

In those circumstances, even assuming that the applicant had a right of access to a document in the possession of the Single Resolution Board in order to prepare an action for annulment, that right cannot be exercised by having recourse to the mechanisms for public access to documents laid down by Regulation (EC) No 1049/2001. It follows that any infringement of that right cannot result from a decision refusing access adopted pursuant to Regulation (EC) No 1049/2001 and, consequently, that such a decision cannot be subject to review by the European Union Courts by way of an action for annulment.

The case-law of the EU administrative review bodies

Case 6/2023, decision of 10 November 2023

1. Keywords and summary

[.], Appellant v the Single Resolution Board

Case 6/2023 – Final decision of 10 November 2023

Appeal against an amended decision adopted by the SRB following the remittal of the case by the Appeal Panel[1]

Proceeding before the appeal panel – SRB's amended decision following the remittal of the case by the Appeal Panel – Admissibility of the appeal before the Appeal Panel

As set out in Article 85(8) of SRMR, when the SRB's Appeal Panel remits the case to the SRB, "*the Board shall be bound by the decision of the Appeal Panel and it shall adopt an amended decision regarding the case concerned*". This indicates that the amended decision is a new decision that must be in full compliance with the Appeal Panel's decision and, as such, it can be challenged before the Appeal Panel.

The possibility to appeal the amended decision before the Appeal Panel is relevant to point to unintended non-compliance of the SRB when implementing the decision of the Appeal Panel, or to clarify the Appeal Panel's view as regards the nature of the revision requested of the SRB. In this way, the appellant is granted, with respect to the amended decision, the same procedural guarantees, as those provided for in Article 90(3) of SRMR for the original decision.

This interpretation is also in line with the wording of Article 90(3) of SRMR, which generally refers to "*decisions taken by the Board under Article 8 of Regulation (EC) No. 1049/2001*" and does not exclude those decisions which have been taken by the SRB in order to comply with a previous Appeal Panel's decision.

Proceeding before the appeal panel – Binding nature of Appeal Panel's decision – SRB's amended decision upon remittal by the Appeal Panel – Admissibility of the appeal before the Appeal Panel

The power of review conferred upon the SRB's Appeal Panel is different from the one conferred upon the Administrative Board of Review of the ECB by Article 24 of SSMR.

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[1] See Case 7/2022, decision of 10 May 2023 in "Pandectae III, Jan-Jun 2023" (Quaderno di ricerca giuridica No 98, December 2023).

In fact, pursuant to Article 24(7) of SSMR, the Supervisory Board, when preparing the new draft decision to be submitted to the Governing Council, is not bound by the ABoR's decision. Therefore, in the SSM context, it would be contradictory to allow for a further review by the ABoR of the new draft of a final decision prepared by the Supervisory Board, since such draft decision – as the final decision by the Governing Council – is legally free to derogate from the ABoR's opinion.

Conversely, in the SRM context, the SRB's amended decision following the remittal of the case by the Appeal Panel is, as such, a new decision that must be in full compliance with the Appeal Panel's decision, as it is also the case, '*mutatis mutandis*' when a decision of a Union agency is annulled by the CJEU and the Union agency wishes to replace such act which has been annulled with a new one in order to comply in good faith with the annulment judgment. Therefore, a review by the Appeal Panel of the SRB's amended decision following the remittal of the case by the Appeal Panel is the most efficient and timely way to ensure that the new decision is effectively compliant with the Appeal Panel's decision of remittal, as required by the binding nature of the latter decision.

PROCEEDING BEFORE THE APPEAL PANEL – SRB's amended decision following the remittal of the case by the Appeal Panel – Scope of the assessment of the Appeal Panel

The appeal before the Appeal Panel against an amended decision adopted by the SRB following remittal by the Appeal Panel is admissible in principle, but the grounds for such an appeal must be assessed separately and strictly in light of the specific manners in which the SRB complied with the decision of remittal by the Appeal Panel. This strict assessment of the grounds of appeal against the amended decision ensures a consistent narrowing of any hypothetical successive cases brought by an appellant and the corresponding closing of any litigation cycles.

If the SRB's decision is appealed before the Appeal Panel and this remits the case only in part because it upholds only one or more grounds of appeal and the SRB subsequently adopts an amended decision, any appeal against the amended decision must be limited to the new parts of that decision, in order to correct any unintended non-compliance of the SRB when implementing the decision of the Appeal Panel, or to clarify the Appeal Panel's view as regards the nature of the revision requested of the SRB. Therefore, an appeal against the amended decision, which is based on the same grounds already dismissed in the appeal against the original decision, is inadmissible as those grounds concern the parts of the amended decision which simply reiterate the parts of the original decision, and were not found unlawful.

Accordingly, the Appeal Panel does not decide the same issue twice, as it would happen if the Appeal Panel would determine again on the same grounds of appeal raised against the part of the original decision for which it already dismissed those grounds of appeal; any subsequent revision of those grounds is a matter for the European Courts.

The judgments of the national apical Courts

Italy

[.] v Banca d'Italia

1. Keywords and summary

[.] v Banca d'Italia

Corte di Cassazione, sect. II, Judgment of 5 September 2023, No 25844

Administrative pecuniary sanctions against a member of the management body of a credit institution

Administrative pecuniary sanctions – Limitation period for imposing administrative sanctions – Starting moment – Time reasonably necessary to ascertain the violation

With regard to administrative sanctions, the ascertainment of the existence of offences, incumbent on the public authority, does not require the mere knowledge of the facts in their materiality, but includes also the assessment of all the elements of the offence, in order to prepare the statement of objections to be notified to the person concerned. It is for the Court with full jurisdiction to establish the time reasonably necessary for such a comprehensive assessment on a case-by-case basis, drawing from the characteristics and complexity of the case, in order to identify the moment of time when the limitation period for the notification of the statement of objection pursuant to Article 14(2) of Law No 689/1981 began to run.

Administrative pecuniary sanctions – Procedural safeguards – Right to an effective judicial protection – Full jurisdiction of the Court of Appeal of Rome

It follows from Article 6 of the European Convention on Human Rights, as interpreted by the case-law of the European Court of Human Rights, that if the administrative sanctioning proceedings do not fully comply with all the safeguards enshrined therein, the person concerned must be able to bring action against the sanctioning decision before a judicial body with full jurisdiction (i.e. with the power to quash in all respects, on questions of fact and law, that decision).

The sanctioning procedure under Article 145 of Legislative Decree No 385/1993 provides for the right of appeal before the Court of Appeal of Rome, which has the power to examine the whole matter and to review both the formal legality and the substance of the sanctioning decision. Consequently, that procedure does not infringe Article 6 ECHR.

DUTIES OF MEMBERS OF CREDIT INSTITUTIONS' BODIES – Duty to act in an informed manner – Duty to exercise due care – Liability of members of credit institutions' bodies

The duty to act in an informed manner enshrined in Article 2381(6) of the Italian civil code requires that all members of the board of directors of a credit institution constantly pursue and achieve adequate knowledge of the activities of the bank, contribute to ensuring safe and sound governance of risks, and exercise a monitoring function on the choices made by the executive bodies, not only through the reports of the managing directors, but also by assessing whether to exercise the board's powers to issue instructions or take charge of any operation.

Consequently, pursuant to Article 2392(2) of the Italian civil code, all members of the board of directors of a credit institution are jointly liable for any infringement committed by the executive bodies, if they did not intervene to prevent it or to eliminate or mitigate the harmful consequences thereof, e.g. if they did not vote against the decisions of the executive bodies which gave rise to the infringement.

ADMINISTRATIVE PECUNIARY SANCTIONS – Irrelevance of the duration of the tenure as a member of a credit institution's board of directors – Irrelevance of the amount of the remuneration

The short tenure of a member of a credit institution's board of directors does not exclude per se his liability for infringements committed by the executive bodies. The amount of his remuneration is also irrelevant in this respect.

[.] v Banca d'Italia

1. Keywords and summary

[.] v Banca d'Italia

Corte di Cassazione, sect. II, Judgment of 25 October 2023, No 29594

Administrative pecuniary sanctions against a member of the management body of a credit institution

Administrative pecuniary sanctions – Limitation period for imposing administrative sanctions – Starting moment

As regards administrative pecuniary sanctions imposed by the Bank of Italy, the time limit of 90 days for the notification to the person concerned of the statement of objections, provided for by Article 14 of Law No 689 of 1981, begins to run on the day of the approval of the inspection report by the Head of the Directorate General for Financial Supervision and Regulation, which seals the conclusion of the phase of the assessment of the existence of possible offences.

[.] v Intesa Sanpaolo S.p.A.[1]

1. Keywords and summary

[.] v Intesa Sanpaolo S.p.A.

Corte di Cassazione, sect. I, Judgment of 30 November 2023, No 33416

Passive legal standing of the bridge bank in actions for damages for misselling conducts of the credit institution placed in resolution by the Bank of Italy

Effects of resolution – Bridge institution tool – Action brought by shareholders – Compensation for damage – Passive legal standing of the bridge institution

The obligation to compensate for damage must be considered a contingent liability included within the liabilities transferred to the bridge bank in the context of a resolution action, unless otherwise provided in the resolution decision. Since the compensatory obligation arises when the illegal conduct is realised, in order to determine the transfer of such an obligation it is not relevant that the action for damages has been brought after the transfer of assets and liabilities.

Accordingly, the bridge bank which, upon a decision of the Bank of Italy, purchased the banking businesses of a credit institution placed in resolution in 2015 (one of the so said "four banks") has passive legal standing in actions for damages brought by former shareholders and creditors of the resolved entity, given that such a liability has not been expressly excluded by the Bank of Italy from the scope of such sale, pursuant to Article 43(4) of Legislative Decree No 180/2015.

Effects of resolution – Bridge institution tool – Contingent liabilities

Article 2560(2) of the Italian Civil Code does not apply to transfers of banking businesses, but rather Article 58 of the Italian Consolidated Banking Law as a special rule. The latter provision provides that the purchaser of a banking business is exclusively liable for the liabilities of that business, even if they do not appear in the accounting entries: thus, liabilities that arise from seller's conducts prior to the transfer are included within the scope of the transfer, even if they did not appear in the accounting entries at the time of the transfer.

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[1] As mentioned in the introduction, this judgment, while relevant, has already been fully and expressly overturned by the same Corte di Cassazione in a judgment of August 2024, that will be an integral part of the relevant issue of Pandectae.

EFFECTS OF RESOLUTION – Bridge institution tool – Valuation – Contingent liabilities

Pursuant to Articles 23 and 24 of Legislative Decree No 180/2015, the valuation of liabilities must be prudent and related to evidence in the accounting records. In compliance with that duty, contingent liabilities must be adequately disclosed in the notes to the financial statements. In particular, this note must explain the nature of those liabilities, their financial effects if possible, the reasons for the uncertainty of their amount or time of occurrence and the likelihood of disbursement in the event of their subsequent confirmation.

Appendix

Text of the judgments of the national apical Courts

Corte di Cassazione, [.] v Banca d'Italia, 05/09/2023, No 25844

Svolgimento del processo – Motivi della decisione

L'avvocato M.M., componente del consiglio di amministrazione della Banca Intermobiliare di Investimenti e Gestione S.p.A., in sede di riassunzione dal TAR Lazio che aveva dichiarato il proprio difetto di giurisdizione, proponeva opposizione D.Lgs. n. 58 del 1998, ex art. 195 dinanzi alla Corte di appello di Roma avverso il provvedimento con il quale gli erano state irrogate dalla Banca d'Italia sanzioni pecuniarie per un ammontare di Euro 33.000, all'esito di accertamenti ispettivi D.Lgs. n. 385 del 1993, ex art. 54 (Tub). In particolare, l'organo ispettivo aveva constatato una serie di carenze nella strutturazione della governance e dei sistemi di controllo della Banca, nonché nella gestione dei rischi. La Banca d'Italia argomentava per il rigetto dell'opposizione. La Corte di appello ha rigettato l'opposizione.

Ricorre in cassazione l'avv. M. con quattordici motivi, illustrati da memoria. Resiste la Banca d'Italia con controricorso.

1. Con il primo motivo si censura che la Corte di appello abbia ritenuto che, in ipotesi di traslazione della causa per difetto di giurisdizione, si applicano esclusivamente le decadenze e le preclusioni del giudice fornito di giurisdizione, senza che rilevi l'attività svolta dinanzi al giudice privo di giurisdizione. Si deduce la violazione dell'art. 11 c.p.a.

Il primo motivo non è fondato.

Nel 2014 l'avv. M. aveva impugnato dinanzi al TAR del Lazio il provvedimento sanzionatorio. Dopo Corte Cost. 94/2014, dichiarativa della illegittimità costituzionale dell'attribuzione alla giurisdizione amministrativa della cognizione sulle sanzioni adottate dalla Banca d'Italia, il TAR dichiarava inammissibile il ricorso per difetto di giurisdizione. Il ricorrente riassumeva il giudizio dinanzi alla Corte di appello di Roma. Nel provvedimento impugnato si osserva che nell'ipotesi di riassunzione della causa per motivi di giurisdizione trovano applicazione esclusivamente le decadenze e le preclusioni del giudice correttamente adito, mentre non rileva l'atteggiamento processuale tenuto dalla parte dinanzi al giudice carente di giurisdizione.

L'art. 11 c.p.a., comma 2 di cui il ricorrente denuncia la violazione, dispone: "Quando la giurisdizione è declinata dal giudice amministrativo in favore di altro giudice nazionale o viceversa, ferme restando le preclusioni e le decadenze intervenute, sono fatti salvi gli effetti processuali e sostanziali della domanda se il processo è riproposto innanzi al giudice indicato nella pronuncia che declina la giurisdizione, entro il termine perentorio (…)". In altri termini, il ricorrente chiede che restino ferme le preclusioni e le preclusioni intervenute a carico della Banca d'Italia, che non ha depositato ex art. 73, comma 1 c.p.a. alcun documento o memoria dinanzi al giudice amministrativo.

L'art. 73, comma 1 c.p.a. dispone che le parti possano produrre documenti fino a quaranta giorni liberi prima dell'udienza, memorie fino a trenta giorni liberi e presentare repliche, ai nuovi documenti e alle nuove memorie depositate in vista dell'udienza, fino a venti giorni liberi.

Il ricorrente quindi non indica la disposizione che avrebbe determinato la preclusione (l'art. 73, comma 1 c.p.a. non la prevede espressamente e l'art. 54 c.p.a. consente al giudice di ammettere anche il deposito successivo, sebbene in casi eccezionali).

In ogni caso, l'interpretazione adottata dalla Corte di appello è conforme alla giurisprudenza di legittimità. Si veda in particolare Cass. SU 27163/2018, ove si è statuito che il D.Lgs. n. 104 del 2010, art. 11 (di cui si afferma il carattere di disposizione speciale rispetto alla L. n. 69 del 2009, art. 59) prevede lo strumento della riproposizione del processo dinanzi al giudice indicato nella declinatoria di giurisdizione (e non nella riassunzione come fa, a certe condizioni, la L. n. 69 del 2009, art. 59). Il concetto di riproposizione indica l'instaurazione di un nuovo giudizio dominato opportunamente dalla sua logica, con riferimento alla "ritualità del contraddittorio" e alla scansione delle decadenze e preclusioni endoprocessuali (salvo evidentemente che la domanda – proposta nuovamente e tempestivamente ai fini del mantenimento dei suoi effetti processuali e sostanziali – deve avere per contenuto una richiesta di tutela non diversa dalla precedente). Hanno dato continuità a questo indirizzo delle Sezioni Unite, tra le altre, Cass. 25791/2020.

Il primo motivo è rigettato.

2. Con il secondo motivo si censura che la Corte di appello abbia ritenuto che il dies a quo del termine di contestazione degli addebiti decorra non dalla data di conclusione dell'ispezione, bensì dalla data (25/1/2013) in cui il Capo del dipartimento ha apposto il visto nella nota di contestazione. Si deduce la violazione della L. n. 689 del 1981, art. 14 in combinato disposto con il par. 1.1. sez. II disp. vigilanza vigenti ratione temporis.

Il secondo motivo non è fondato.

Il ricorrente omette di rilevare che sono due cose diverse, da un lato, il constatare (attraverso strumenti conoscitivi come l'ispezione o altri) fatti che possono significare un'infrazione; dall'altro lato, l'accertare sulla base della constatazione che un'infrazione è stata commessa. L'attività con cui si accerta l'illecito (non sempre, ma comunque in questo caso) si svolge successivamente al momento in cui viene acquisito il nudo fatto o lo stato di cose e comprende il tempo necessario a svolgere le indagini per valutare se ciò che si è acquisito possa qualificarsi come infrazione e per formulare eventualmente una corretta contestazione. Ove sorga contrasto, compete al giudice di merito determinare il tempo ragionevolmente necessario all'amministrazione per compiere tali attività, individuando il dies a quo del termine di decadenza L. n. 689 del 1981, ex art. 14, comma 2. Il giudice di merito tiene conto del grado difficoltà del caso concreto, in relazione al numero dei soggetti coinvolti, al numero delle violazioni e alla complessità delle indagini. Il giudizio di merito si espone a sindacato di legittimità unicamente sotto il profilo del vizio di motivazione. Cfr. Cass. SU 28210/2019, 12830/2006, 25916/2006, 3043/2009.

Ribadito ciò in linea generale, nel caso di specie, ove entrano in gioco in funzione integrativa anche le disposizioni di vigilanza in materia di sanzioni e procedura sanzionatoria amministrativa, la Corte di appello si è congruamente riferita alla particolare complessità dell'ispezione, durata quasi cinque mesi e conclusasi alla fine di (Omissis), per cui la data (25/1/2013) in cui il capo del dipartimento ha apposto il visto circoscrive un proporzionato periodo di valutazione degli esiti dell'indagine.

Il secondo motivo è rigettato.

3. Con il terzo motivo si censura che la Corte di appello abbia ritenuto che è valida la notificazione presso la residenza anziché il domicilio eletto perché il destinatario è cessato dalla carica ed anche perché un'ipotetica nullità della notificazione sarebbe sanata per il raggiungimento dello scopo. Si deduce la violazione della L. n. 689 del 1981, art. 14 in combinato disposto con gli artt. 141 e 149 c.p.c., comma 3.

Il terzo motivo non è fondato.

Infatti, l'avv. M. era cessato dalla carica in virtù della quale il domicilio era stato eletto. In ogni caso la nullità, ove sussistente, non avrebbe potuto essere pronunciata, poiché l'atto ha raggiunto lo scopo a cui è destinato e – contrariamente a quanto il difensore del ricorrente ha mostrato di ritenere anche nella discussione orale – la sanatoria per convalidazione oggettiva ha carattere retroattivo.

Il terzo motivo è rigettato.

4. Con il quarto e il quinto motivo si censura che la Corte di appello abbia rigettato il secondo motivo di opposizione sulla tardività della contestazione sotto i due seguenti profili: (a) omissione di pronuncia sulla tardività della contestazione per incompletezza della lettera notificata il 15/3/2013 (quarto motivo, ove si deduce la violazione dell'art. 112 c.p.c.); (b) motivazione omessa o apparente (quinto motivo, ove si deduce la violazione dell'art. 135 c.p.c., in combinato disposto con il D.Lgs. n. 385 del 1993, art. 145, art. 111 Cost.).

Il quarto e il quinto motivo sono da esaminare congiuntamente. Essi non sono fondati.

Sebbene la motivazione sul punto sia particolarmente stringata, essa non è apparente e quindi offre un testo all'interpretazione che coglie nel rinvio all'art. 1.2. delle disposizioni di vigilanza in materia di sanzioni e procedura sanzionatoria amministrativa altresì l'indicazione implicita del criterio logico che presiede al rigetto dei profili di incompletezza lamentati dal ricorrente, vale a dire che il contenuto della lettera di contestazione è rispettoso dei requisiti fissati dalla normativa secondaria e pertanto non è incompleta. Con questa integrazione la motivazione adottata dalla corte territoriale è riducibile a coerenza. Il che le consente di superare il vaglio del giudizio di legittimità, secondo i criteri concretizzati da Cass. SU 8053/2014.

Il quarto e il quinto motivo sono rigettati.

5. Con il sesto motivo si censura l'omissione ovvero il carattere meramente apparente della motivazione con cui la Corte di appello ha rigettato il terzo motivo di opposizione basantesi sulla incomprensibilità, indeterminatezza e contraddittorietà della contestazione. Si deduce violazione dell'art. 135 c.p.c., in combinato disposto con il D.Lgs. n. 385 del 1993, art. 145 art. 111 Cost.

Il sesto motivo non è fondato.

Pur nella sua stringatezza, la motivazione con cui la Corte di appello ha rigettato il terzo motivo di opposizione (p. 3) coglie nel segno: il ricorrente si è difeso in modo specifico e ciò conferma l'intellegibilità delle contestazioni.

Il sesto motivo è rigettato.

6. Con il settimo e l'ottavo motivo si censura il rigetto del quarto e del quinto motivo di opposizione sull'eccesso di potere per falsa rappresentazione, difetto di istruttoria, insufficiente

valutazione dei fatti, contraddittorietà tra atti. In particolare, il settimo motivo deduce la violazione ex art. 112 c.p.c.; l'ottavo motivo deduce la violazione dell'art. 135 c.p.c., in combinato disposto con il D.Lgs. n. 385 del 1993, art. 45, art. 111 Cost.

Il settimo e l'ottavo motivo sono da esaminare congiuntamente, in quanto sono accomunati dal sollevare la questione delle garanzie del procedimento sanzionatorio dinanzi alla Banca d'Italia.

Essi non sono fondati.

Il quarto e il quinto motivo di opposizione erano diretti a far valere la violazione del diritto di difesa e il carattere lacunoso dell'istruttoria, dovuti al fatto che la disciplina del procedimento sanzionatorio non prevede la trasmissione della proposta sanzionatoria all'incolpato, né l'audizione di questi da parte dell'organo titolare del potere di decisione finale.

Il rigetto di tali motivi di opposizione è in linea con la giurisprudenza di legittimità, ove si è argomentato che il procedimento sanzionatorio dinanzi alla Banca d'Italia ex art. 195 Tuf non viola l'art. 6, par. 1 Cedu. Infatti, ove il procedimento sanzionatorio non offra garanzie equiparabili a quelle del processo giurisdizionale, dall'art. 6 cit. discende che l'incolpato debba poter far valere le questioni relative alla fondatezza delle imputazioni a un organo giurisdizionale indipendente e imparziale. Ciò è previsto nell'ordinamento italiano attraverso l'opposizione alla corte d'appello (cfr. Cass. 25141/2015, 4/2019, 8237/2019, 9371/2020,16517/2020). La motivazione del provvedimento impugnato si è attenuta a questi principi e non si espone a censure.

Il settimo e l'ottavo motivo sono rigettati.

7. Con il nono motivo si censura che la Corte di appello abbia ritenuto che al fine di escludere la propria responsabilità l'avv. M. dovesse formalizzare il proprio dissenso in voto contrario. Si deduce la violazione dell'art. 2392 c.c., comma 3 in combinato disposto con la L. n. 7689 del 1981, art. 3.

Il nono motivo non è fondato.

Il dovere di agire informati dei consiglieri di amministrazione delle società bancarie implica il dovere di conseguire costantemente conoscenza adeguata delle caratteristiche dell'impresa bancaria. I consiglieri di amministrazione sono partecipi delle decisioni di gestione aziendale adottate dal consiglio di amministrazione. Ne segue il loro obbligo di contribuire ad assicurare un governo efficace dei rischi nelle aree dell'attività bancaria e di esercitare una funzione di monitoraggio sulle scelte compiute dagli organi esecutivi non solo attraverso le relazioni degli amministratori delegati, ma anche valutando se esercitare i poteri consiliari di direttiva o avocazione relativi ad operazioni rientranti nella delega agli amministratori. Ne consegue che il consigliere di amministrazione di società per azioni è solidalmente responsabile ex art. 2392 c.c., comma 2 della violazione commessa quando non intervenga per impedirne il compimento o eliminarne o attenuarne le conseguenze dannose (cfr. Cass. 15585/2022, 24851/2019, 5606/2019). Nella motivazione sul punto in relazione al caso di specie, la Corte di appello è in linea con questi principi.

Il nono motivo è rigettato.

8. Con il decimo motivo si denuncia ex art. 112 c.p.c. che la Corte di appello abbia omesso di pronunciarsi sull'undicesimo motivo di opposizione, che faceva valere la sproporzione tra le

attribuzioni di potere e la retribuzione dell'avv. M., da un lato, e, dall'altro lato, la sanzione irrogata.

Il decimo motivo non è fondato.

La Corte di appello si è pronunciata nel senso che il ridotto periodo di permanenza in carica dell'avv. M. non ne esclude la responsabilità e che l'ammontare della retribuzione è irrilevante poiché non vi è alcuna correlazione tra l'entità della retribuzione e il rispetto dei doveri inerenti alla carica. La motivazione è inappuntabile, anche perché tali incarichi non vengono affidati al quisque de populo, ma a persone che, in forza della loro esperienza e della loro preparazione, sono in grado di ben soppesare le responsabilità a cui vanno incontro nell'accettarli.

Il decimo motivo è rigettato.

9. Con l'undicesimo motivo si censura che la Corte di appello abbia ritenuto che, ove vi sia un conflitto di interesse di uno dei membri dell'organo collegiale ispettivo, ciò non invalida l'atto, poiché chi allega il conflitto è tenuto a provarne i riflessi invalidanti. Si deduce la violazione degli artt. 97 Cost., L. n. 241 del 1990, art. 1.

Con il dodicesimo motivo si censura che la Corte di appello abbia considerato che non sussiste alcun conflitto di interesse fra l'attività dell'avv. Tonellato presso lo studio dell'avv. M. e il suo ruolo di componente dell'organo collegiale ispettivo. Si deduce la violazione degli artt. 97 Cost., artt. 2,3, e 7 Codice deontologico della Banca d'Italia, L. n. 262 del 2005, art. 19, art. 42 Statuto della Banca d'Italia, 6 Codice di comportamento dei dipendenti delle pubbliche amministrazioni.

Con il tredicesimo motivo si censura che la Corte di appello abbia rilevato che l'avv. Tonellato era soltanto uno dei componenti dell'organo collegiale ispettivo, cosicché la sua partecipazione non ha viziato l'attività. Si deduce violazione della Sez. II Parte III Guida per l'attività di vigilanza della Banca d'Italia.

Con il quattordicesimo motivo si censura che la Corte di appello abbia rilevato che l'avv. Tonellato era soltanto uno dei componenti dell'organo collegiale ispettivo, cosicché la sua partecipazione non ha viziato l'attività, mentre ha rilevato che l'avv. M. fosse responsabile di non aver impedito che la maggioranza del consiglio deliberasse. Si deduce la violazione degli artt. 97 e 101 Cost.

L'undicesimo, il dodicesimo, il tredicesimo ed il quattordicesimo motivo investono tutti il ruolo di membro dell'organo collegiale ispettivo dell'avv. Tonellato, il quale aveva prestato attività professionale presso lo studio dell'avv. M.. Possono essere trattati congiuntamente.

Essi non sono fondati.

Infatti, in tale situazione non è disposta l'astensione a pena di invalidità dei provvedimenti sanzionatori. Inoltre, la Corte di appello ha accertato in modo che non si espone a censure in sede di giudizio di legittimità che non sussisteva alcun conflitto di interesse fra l'attività precedentemente svolta dall'avv. Tonellato presso lo studio dell'avv. M. e il suo successivo ruolo di dipendente della Banca d'Italia. Infatti – precisa la Corte di appello – tali attività non si sono svolte contemporaneamente (né hanno alcuna rilevanza giuridica la decorrenza giuridica anteriore dell'inquadramento dell'avv. Tonellato presso la Banca d'Italia e l'emissione successiva di fatture con riferimento ad attività svolte in periodi antecedenti la presa di servizio presso la Banca d'Italia). Infine, ad abundantiam, si è accertato che l'avv. Tonellato era solo uno dei membri

dell'organo collegiale ispettivo. Tutto il resto si risolve in un profilo di opportunità che rimane fuori dal perimetro di un controllo giurisdizionale di legittimità.

L'undicesimo, il dodicesimo, il tredicesimo ed il quattordicesimo motivo sono rigettati.

10. Il ricorso è rigettato. Le spese seguono la soccombenza e si liquidano in dispositivo.

Inoltre, ai sensi del D.P.R. n. 115 del 2002, art. 13, comma 1 quater, si dà atto della sussistenza dei presupposti processuali per il versamento, ad opera della parte ricorrente, di un'ulteriore somma pari a quella prevista per il ricorso a titolo di contributo unificato a norma dello stesso art. 13, comma 1 bis se dovuto.

Corte di Cassazione, [.] v Banca d'Italia, 25/10/2023, No 29594

Svolgimento del processo – Motivi della decisione

1. Il Direttore della Banca d'Italia, con Delib. 6 settembre 2016, inflisse a M.S., componente del Consiglio di amministrazione della cassa di Risparmio di Cesena, la sanzione pecuniaria di Euro 69.000,00, sulla base degli accertamenti ispettivi, i quali avevano riscontrato "carenze organizzative e nei controlli da parte dei componenti del Consiglio di Amministrazione" e "carenze nel processo del credito".

2. Il M., proposta opposizione innanzi alla Corte d'appello di Roma, chiese l'annullamento o la declaratoria d'inefficacia del provvedimento sanzionatorio e, in subordine, la riduzione della sanzione.

3. La Corte adita respinse l'opposizione.

Questi, in sintesi e per quel che ancora qui rileva, i passaggi argomentativi della sentenza:

- venne disatteso il primo motivo, con il quale il ricorrente lamentava il mancato rispetto del termine di novanta giorni di cui alla L. n. 689 del 1981, art. 14 assumendo che questo decorresse dal compimento dell'accertamento, avendo la Corte romana rilevato che l'accertamento si perfeziona solo con l'apposizione del visto da parte del Direttore Centrale; soggiungendo, inoltre, che, in ogni caso, il termine doveva risultare congruo e ragionevole in relazione agli accertamenti e rilevamenti compiuti (sul punto cita giurisprudenza di questa Corte riguardante sanzioni emesse dalla Consob);
- venne rigettato il secondo motivo, con il quale il ricorrente prospettava che le disfunzioni accertate non erano a lui addebitabili, poiché egli aveva assunto l'incarico solo dopo la conclusione di una precedente ispezione, assumendo il Giudice che il precedente accertamento non riguardava in alcun modo la complessiva "governance dell'intermediario, la sua organizzazione, il sistema dei controlli, il processo del credito nei suoi aspetti fondamentali ed in particolare non si occupava del tema della trasparenza nei rapporti con la clientela", inoltre la modulazione sanzionatoria tra i vari componenti del Consiglio di amministrazione risultava giustificata e non arbitraria;
- il terzo motivo venne disatteso evidenziandosi che la circostanza che "la Banca d'Italia, in sede di motivazione, non abbia minuziosamente confutato tutte le singole affermazioni esplicitate nelle controdeduzioni, non vuol dire che non ne abbia tenuto conto";

- il terzo motivo sconfessa analiticamente le critiche di merito, mosse con il quarto motivo, a riguardo delle disfunzioni organizzative, alla mancanza di strutturate procedure interne, specie nei rapporti con la clientela, risultando assente "adeguata procedura in materia (…) di 'ius variandi' 'Compliance'", in merito alle sovrastime del valore degli immobili posti a garanzia rispetto ai valori OMI (Osservatorio Mercato Immobiliare), in relazione alle decisioni assunte imprudentemente e alla distribuzione di dividendi, nonostante una situazione di accertato deterioramento aziendale, con riferimento alle critiche mosse in ordine alla gestione del credito, e, infine, avuto riguardo alla mancanza di controlli interni, avendo la Corte locale specificato che le critiche risultavano confutate rispetto "al 'Risk manager', alla 'Compliance' ed alla 'Internal Audit'".

4. M.S. ricorre avverso la sentenza sulla base di due motivi.

La Banca d'Italia resiste con controricorso.

5. Con il primo motivo il ricorrente denuncia la nullità parziale della sentenza in relazione all'art. 132 c.p.c., n. 4.

Assume il M. che la Corte romana aveva reso motivazione "affetta da manifesta ed irriducibile contraddittorietà e/o motivazione perplessa o incomprensibile" in ordine al primo motivo del ricorso, per avere affermato che il termine di cui alla L. n. 689 del 1981, art. 14, decorreva dal visto del Direttore Centrale, soggiungendo, tuttavia, che il termine in parola doveva essere congruo e ragionevole, avuto riguardo alla natura degli accertamenti.

5.1. La doglianza non supera lo scrutinio d'ammissibilità.

Come noto la giustificazione motivazionale è di esclusivo dominio del giudice del merito, con la sola eccezione del caso in cui essa debba giudicarsi meramente apparente; apparenza che ricorre, come anche di recente ha ribadito questa Corte, allorquando essa, benché graficamente esistente, non renda, tuttavia, percepibile il fondamento della decisione, perché recante argomentazioni obiettivamente inidonee a far conoscere il ragionamento seguito dal giudice per la formazione del proprio convincimento, non potendosi lasciare all'interprete il compito di integrarla con le più varie, ipotetiche congetture (Sez. 6, n. 13977, 23/5/2019, Rv. 654145; ma già S.U. n. 22232/2016; Cass. n. 6758/2022 e, da ultimo, S.U. n. 2767/2023, in motivazione).

A tale ipotesi deve aggiungersi il caso in cui la motivazione non risulti dotata dell'ineludibile attitudine a rendere palese (sia pure in via mediata o indiretta) la sua riferibilità al caso concreto preso in esame, di talché appaia di mero stile, o, se si vuole, standard; cioè un modello argomentativo apriori, che prescinda dall'effettivo e specifico sindacato sul fatto.

Siccome ha già avuto modo questa Corte di più volte chiarire, la riformulazione dell'art. 360 c.p.c., comma 1, n. 5, disposta dal D.L. 22 giugno 2012, n. 83, art. 54 conv. in L. 7 agosto 2012, n. 134, deve essere interpretata, alla luce dei canoni ermeneutici dettati dall'art. 12 preleggi, come riduzione al "minimo costituzionale" del sindacato di legittimità sulla motivazione, con la conseguenza che è pertanto, denunciabile in cassazione solo l'anomalia motivazionale che si tramuta in violazione di legge costituzionalmente rilevante, in quanto attinente all'esistenza della motivazione in sé, purché il vizio risulti dal testo della sentenza impugnata, a prescindere dal confronto con le risultanze processuali; anomalia che si esaurisce nella "mancanza assoluta

di motivi sotto l'aspetto materiale e grafico", nella "motivazione apparente", nel "contrasto irriducibile tra affermazioni inconciliabili" e nella "motivazione perplessa ed obiettivamente incomprensibile", esclusa qualunque rilevanza del semplice difetto di "sufficienza" della motivazione (S.U., n. 8053, 7/4/2014, Rv. 629830; S.U. n. 8054, 7/4/2014, Rv. 629833; Sez. 6-2, n. 21257, 8/10/2014, Rv. 632914).

Qui non ricorre alcuna delle ipotesi sopra richiamate, essendo del tutto evidente che la ratio portante della decisione è costituita dall'affermazione che i novanta giorni decorrono dal visto apposto dal Direttore Centrale. Nel resto si tratta di un mero obiter, peraltro, supportato da giurisprudenza riguardante le sanzioni Consob.

In disparte, è appena il caso di soggiungere che la Corte d'appello ha fatto corretta applicazione del principio di diritto enunciato da questa Corte, la quale ha chiarito che in tema di sanzioni amministrative irrogate dalla Banca d'Italia, il termine di decadenza previsto dalla L. n. 689 del 1981, art. 14 per la notifica della violazione decorre dall'apposizione del visto del direttore centrale della vigilanza bancaria e finanziaria, suggellandosi con esso la conclusione della fase di accertamento di tutti gli elementi dell'illecito, comprensiva, altresì, della valutazione e dell'adeguata ponderazione dei dati acquisiti e degli atti preliminari (Sez. 2, n. 4820, 19/02/2019, Rv. 652690).

6. Con il secondo motivo il ricorrente denuncia violazione e/o falsa applicazione "della 'lex mitior' in relazione al D.Lgs. n. 285 del 1993, artt. 144 e 144-ter (TUB) – illegittimità del D.Lgs. 12 maggio 2015, n. 72, art. 2, comma 3, per violazione degli artt. 3 e 117 Cost. in relazione all'art. 7 CEDU".

In particolare, il ricorrente evidenzia che "gli amministratori non sono più sanzionabili per le violazioni dell'art. 118 TUB, in quanto in questo caso la sanzione riguarda solo la banca ai sensi dell'art. 144, comma 1, lett. c), TUB; inoltre le violazioni di cui all'art. 53 TUB possono investire, oltre alla banca, anche gli apici aziendali unicamente qualora siano soddisfatte una delle tre condizioni fissate dell'art. 144-ter, comma 1, TUB". Un tale regime più favorevole non era stato applicato dalla Banca d'Italia.

6.1. La censura è inammissibile per la sua novità, non essendo stata offerta allo scrutinio della Corte d'appello. Ne' il ricorrente afferma che il Giudice abbia omesso di decidere su una tale doglianza, peraltro, in presenza di un'analitica rassegna delle censure svolta dalla Corte d'appello, la cui corrispondenza all'atto di opposizione non risulta affatto negata (cfr. Cass. nn. 2038/2019, 15430/2018, 27568/2017).

7. Di conseguenza, siccome affermato dalle S.U. (sent. n. 7155, 21/3/2017, Rv. 643549), lo scrutinio ex art. 360-bis c.p.c., n. 1, da svolgersi relativamente ad ogni singolo motivo e con riferimento al momento della decisione, impone, come si desume in modo univoco dalla lettera della legge, una declaratoria d'inammissibilità, che può rilevare ai fini dell'art. 334 c.p.c., comma 2, sebbene sia fondata, alla stregua dell'art. 348-bis c.p.c. e dell'art. 606 c.p.p., su ragioni di merito, atteso che la funzione di filtro della disposizione consiste nell'esonerare la Suprema Corte dall'esprimere compiutamente la sua adesione al persistente orientamento di legittimità, così consentendo una più rapida delibazione dei ricorsi "inconsistenti".

8. Il regolamento delle spese segue la soccombenza e le stesse vanno liquidate, tenuto conto del valore e della qualità della causa, nonché delle svolte attività, siccome in dispositivo.

9. Ai sensi del D.P.R. n. 115 del 2002, art. 13, comma 1-quater (inserito dalla L. n. 228 del 2012, art. 1, comma 17) applicabile ratione temporis (essendo stato il ricorso proposto successivamente al 30 gennaio 2013), si dà atto della sussistenza dei presupposti processuali per il versamento, da parte del ricorrenti, di un ulteriore importo a titolo di contributo unificato pari a quello previsto per il ricorso principale, a norma dello stesso art. 13, se dovuto, comma 1-bis.

Corte di Cassazione, [.] v Intesa San Paolo S.p.A., 30/11/2023, No 33416

Svolgimento del processo – Motivi della decisione

1. La Banca d'Italia, con provvedimento del 21 novembre 2015, ha disposto l'avvio della risoluzione di Banca delle Marche.

Detta procedura di risoluzione è stata attuata mediante:

1) riduzione integrale "delle riserve e del capitale rappresentato da azioni (…), anche non computate nel capitale regolamentare, nonché del valore nominale degli elementi di classe 2", a copertura delle perdite di eccezionale gravità, ai sensi del D.Lgs. n. 180 del 2015, art. 20;

2) cessione a un "Ente Ponte" (costituito con la denominazione di Nuova Banca delle Marche S.p.A., interamente posseduto dal Fondo Nazionale di Risoluzione) dei beni e dei rapporti giuridici individuati dall'Autorità di vigilanza, in conformità al D.Lgs. n. 180 del 2015, art. 43, commi 2 e 4.

In data 18 gennaio 2017, Unione di Banche Italiane S.p.A., UBI Banca, ha acquistato dal Fondo Nazionale di Risoluzione l'intero capitale sociale dell'Ente Ponte, che è stato successivamente incorporato in UBI Banca con atto di fusione in data 16 ottobre 2017; a sua volta UBI Banca è stata incorporata per fusione in Intesa Sanpaolo S.p.A. subentrata in tutti i rapporti, anche processuali, della prima a far data dal 12 aprile 2021.

2. L'attuale ricorrente conveniva in giudizio dinanzi al Tribunale di Ascoli Piceno Nuova Banca delle Marche (subentrata, quale "Ente Ponte", alla vecchia Banca delle Marche, in seguito alla risoluzione della stessa), proponendo domanda risarcitoria da inadempimento contrattuale per aver compiuto operazioni improprie e arbitrarie non adempiendo ai doveri di informazione, di buona fede, di trasparenza e di diligenza dell'attività gestita.

3. Il Tribunale di Ascoli Piceno, con sentenza n. 353/2019 accoglieva parzialmente la domanda e condannava UBI Banca al pagamento dell'importo di Euro 67.606,38 oltre interessi legali.

4. Ubi Banca interponeva gravame dinanzi alla Corte di Appello di Ancona, che con la sentenza qui impugnata accoglieva l'appello e respingeva l'originaria domanda.

Per quanto qui di interesse la Corte statuiva:

a) che l'appello è fondato, sotto l'assorbente profilo di carenza di legittimazione passiva in capo ad UBI Banca, o meglio di insussistenza di un trasferimento dell'asserito credito fatto valere dall'attore in primo grado – ove sussistente – dalla vecchia Banca delle Marche al c.d. "Ente-Ponte", e poi ad Ubi Banca;

b) il comportamento della Banca, così come risulta dagli esiti istruttori, non si è concretizzato, con un investimento avvenuto all'insaputa dell'attuale ricorrente, e lo stesso giudice di prime cure ha rilevato soltanto una insufficiente informazione sull'investimento;

c) il D.Lgs. n. 180 del 2015, il art. 43 include espressamente nella cessione delle azioni di responsabilità risarcitoria, ma esclusivamente nell'ipotesi in cui esse risultino già "in essere";

d) la circostanza che le somme prelevate per l'acquisto delle obbligazioni in esame erano indicate negli estratti conto quali "riflesse dai libri contabili obbligatori" della cedente, per cui le stesse erano, come tali, emergenti e/o conoscibili al momento della cessione dalla vecchia Banca delle Marche alla Nuova Banca delle Marche, secondo l'art. 2560 c.c., era del tutto irrilevante, poiché il dato fondamentale ed evidente è quello secondo il quale la disciplina codicistica, e segnatamente l'art. 2560 c.c., non era applicabile e nel rispetto dell'art. 58 TUB (principio espresso da Cass., n. 22199/2010);

e) la disamina di altre questioni non doveva essere svolta, anche in virtù del principio della ragione più liquida, che esime dall'analisi su altri motivi di appello, principale o incidentale.

5. Avverso detta sentenza C.D. ha presentato ricorso con due motivi ed anche memoria.

6. Intesa San Paolo S.p.A. ha presentato controricorso.

7. Il Pubblico Ministero in persona del Sostituto Procuratore Generale Dott. OMISSIS ha chiesto il rigetto del ricorso.

8. Il ricorrente ha dedotto con il primo motivo violazione o falsa applicazione del D.Lgs. n. 180 del 2015, art. 1, lett. ppp), artt. 43 e 47, del D.Lgs. n. 385 del 1993, art. 58 del provvedimento 21 novembre 2015 n. 1241013, approvato dal Ministero dell'Economia e delle Finanze con decreto del 22 novembre 2015, con cui la Banca d'Italia ha disposto l'avvio della risoluzione della Banca delle Marche S.p.A., nonché – in quanto occorra, delle regole legali di ermeneutica contrattuale (artt. 1362 ss. c.c.), in relazione all'art. 360 c.p.c., comma 1, n. 3.

La Corte d'appello, si sostiene, ha erroneamente riscontrato la carenza di legittimazione passiva sull'insussistente presupposto dell'estraneità del credito fatto valere dall'odierno ricorrente al novero delle situazioni oggetto di subentro dell'"Ente-Ponte" alla vecchia Banca delle Marche. Non ha considerato che la cessione attuata è regolata dal D.Lgs. n. 180 del 2015, artt. 42 e 43 che prevede all'art. 43, comma 4, che "… l'ente-ponte succede all'ente sottoposto a risoluzione nei diritti, nelle attività o nelle passività ceduti, salvo che la Banca d'Italia disponga diversamente ove necessario per conseguire gli obiettivi della risoluzione".

La stessa Banca d'Italia, si aggiunge, nell'avvio della risoluzione della Banca delle Marche, non ha previsto che l'"ente-ponte" potesse rendersi cessionario anche di una parte soltanto dei diritti, delle attività o delle passività dell'ente sottoposto a risoluzione. Le pretese di natura strettamente risarcitoria relative al rapporto contrattuale tra cliente ed istituto creditizio nell'ambito degli ordinari servizi bancari, rapporti che – mancando un'espressa esclusione disposta dalla Banca d'Italia – risultano unitariamente trasferiti dalla vecchia alla Nuova Banca delle Marche, e ciò proprio coerentemente con l'esigenza di preservare la continuità operativa dell'azienda di credito.

La domanda proposta, viene precisato, non investe in sé e per sé l'emissione di azioni annullate e/o la sottoscrizione di obbligazioni subordinate, bensì – puramente e semplicemente – la violazione degli obblighi cui la Banca era tenuta nei suoi confronti in relazione al rapporto a suo tempo instaurato, rapporto rimasto in essere con l'"Ente-Ponte" che vi è subentrato senza alcuna soluzione di continuità. L'operazione disposta da Banca d'Italia in attuazione delle previsioni del D.Lgs. 16 novembre 2015, n. 180 ha dato luogo a una netta separazione del patrimonio della vecchia Banca delle Marche: da un lato i rapporti destinati alla continuità nel mercato (tra i quali rientra il rapporto del correntista odierno ricorrente, rapporto in corso al momento della cessione, e ancora in corso a tutt'oggi) e dall'altro quelli per i quali detta prospettiva doveva considerarsi definitivamente perduta, trattandosi della gestione di crediti deteriorati cui l'"Ente-Ponte" è rimasto rigorosamente estraneo.

8.1. La censura è fondata.

8.1.1. Occorre rammentare, in premessa, che la domanda proposta riguarda pretese risarcitorie da inadempimento contrattuale della banca per aver compiuto operazioni improprie e arbitrarie, non adempiendo ai doveri di informazione, di buona fede, di trasparenza e di diligenza dell'attività gestita.

8.1.2. Il motivo, come si è visto, censura l'interpretazione dell'assetto normativo che ha disciplinato la risoluzione della Banca delle Marche, evidenziando una serie di stralci di norme sulle quali si fonderebbe la trasmissione della responsabilità risarcitoria dalla Banca all'"Ente-Ponte" e successivamente agli altri aventi causa a vario titolo. Ripropone la tematica della legittimazione passiva degli enti-ponte per le passività latenti (per lo meno, quelle di natura risarcitoria) aventi titolo in atti o in fatti posti in essere da banche sottoposte a risoluzione, secondo la normativa più volte citata, per contestare il diverso avviso della Corte di merito, che non ha esaminato la sussistenza dell'inadempimento agli obblighi informativi accertata in primo grado, pur contestata dalla banca con appello incidentale. Secondo il ricorrente, la Nuova Banca delle Marche S.p.A. è stata incorporata da UBI Banca che a sua volta è stata incorporata da Intesa San Paolo, e l'incorporazione dell'"Ente-Ponte" ha comportato il trasferimento alle banche incorporanti di ogni rapporto o situazione giuridica già facenti capo agli stessi.

La trasmissione dei rapporti della Banca delle Marche all'"Ente-Ponte" Nuova Banca delle Marche S.p.A. è avvenuta sulla base dei provvedimenti dell'Autorità di risoluzione adottati per risolvere la crisi irreversibile dell'azienda. In particolare, il citato provvedimento del 22.11.2015 e il D.Lgs. n. 385 del 1993, art. 43, comma 4, prevedono, per la Banca delle Marche, che "… l'ente-ponte succede all'ente sottoposto a risoluzione nei diritti, nelle attività o nelle passività ceduti, salvo che la Banca d'Italia disponga diversamente ove necessario per conseguire gli obiettivi della risoluzione". La Banca d'Italia, nel sancire l'avvio della risoluzione della detta Banca delle Marche S.p.A., ha disposto "la cessione dell'azienda da parte di Banca delle Marche S.p.A., in risoluzione, all'ente-ponte 'Nuova Banca delle Marche S.p.A.' ai sensi del D.Lgs. 16 novembre 2015, n. 180, art. 43, comma 1, lett. b)", ed inoltre all'art. 3 ha disposto che: "Restano escluse dalla cessione dell'azienda soltanto le passività, diverse dagli strumenti di capitale, come definite dal D.Lgs. 16 novembre 2015, n. 1801, art. 1, lett. ppp), in essere alla data di efficacia della cessione, non computabili nei fondi propri, il cui diritto al rimborso del capitale è contrattualmente subordinato al soddisfacimento dei diritti di tutti i creditori non subordinati dell'ente in risoluzione". E ancora: "L'ente ponte succede, senza soluzione di

continuità, all'ente in risoluzione nei diritti, nelle attività e nelle passività cedute ai sensi del D.Lgs. 16 novembre 2015, n. 180, art. 43, comma 4".

8.1.3. Poiché, nell'esercizio della facoltà attribuita alla Banca d'Italia, è stata prevista esclusivamente la non trasferibilità di alcune operazioni relative a strumenti finanziari, come sopra descritte, sorge questione se si siano legittimamente trasferite, come nel caso di specie, le passività corrispondenti ad obblighi risarcitori dell'emittente derivanti da condotte antecedenti la cessione, in quanto non espressamente escluse dalla cessione (diversamente da quanto previsto dal successivo D.L. n. 99 del 2017 per la soluzione della crisi di altre Banche dove l'esclusione delle pretese risarcitorie è espressamente prevista).

8.1.4. La stessa Corte d'appello presuppone che la domanda proposta non ha ad oggetto la contestata emissione di azioni e/o obbligazioni subordinate annullate, bensì l'inadempimento di BdM agli obblighi informativi nel momento della sottoscrizione, anche se, avendo escluso la legittimazione della Banca non disamina queste questioni, anche in virtù del principio della ragione più liquida, che esime dall'analisi su altri motivi di appello, principale o incidentale (p.5).

A ben vedere la sentenza impugnata non nega l'assetto normativo concernente la successione del cessionario ente-ponte nelle passività, ma ritiene, evocando un precedente di merito, che l'art. 43 del D.Lgs. cit. "… include espressamente nella cessione le azioni di responsabilità risarcitoria, ma esclusivamente nell'ipotesi in cui esse risultino già 'in essere'".

Sul punto, ritiene che l'affermazione degli attuali ricorrenti che "le somme prelevate per l'acquisto delle obbligazioni in esame erano indicate negli estratti conto quali 'riflesse dai libri contabili obbligatori' della cedente, per cui le stesse erano, come tali, emergenti e/o conoscibili al momento della cessione di Vecchia BdM a Nuova BdM, secondo l'art. 2560 c.c." sarebbe irrilevante, poiché tale norma codicistica non è applicabile per le cessioni di azienda bancaria, condividendo (ancora una volta la motivazione del precedente di merito già ricordato), che il requisito della preesistenza del credito vantato non vada ricondotto al momento in cui è stato effettuato l'acquisto delle azioni, ma "all'avvenuto esperimento delle azioni alla data di efficacia della procedura di risoluzione…".

La questione, quindi, si riduce all'individuazione del presupposto della preesistenza delle pretese risarcitorie rispetto al trasferimento all'Ente cessionario.

8.1.5. A favore della soluzione interpretativa adottata dalla Corte di merito è il combinato disposto dell'art. 43 e dell'art. 1.1. del Provvedimento di Cessione di Banca d'Italia del 22 novembre 2015 che testualmente recita: "tutti i diritti, le attività e le passività costituenti l'azienda bancaria della banca in risoluzione, ivi compresi i diritti reali su beni mobili ed immobili, i rapporti contrattuali ei giudizi attivi e passivi, incluse le azioni di responsabilità, risarcitorie e di regresso in essere alla data di efficacia della cessione".

La lettura congiunta di tali disposizioni consentirebbe, di affermare che devono ritenersi incluse nel perimetro dei rapporti ceduti solo le pretese risarcitorie "in essere" al momento della cessione, con conseguente esclusione di quelle non ancora incardinate in uno specifico contenzioso al momento del trasferimento. L'assunto troverebbe fondamento nel fine di garantire la continuità delle funzioni essenziali dell'istituto di credito in crisi ed in quello di evitare potenziali effetti negativi sulla stabilità finanziaria di tutto il sistema.

E, inoltre, la cessione all'ente-ponte è stata attuata sul presupposto che il valore complessivo delle passività cedute non potesse superare il valore totale delle attività (art. 40 della Direttiva 2014/59/UE e D.Lgs. n. 180 del 2015, art. 43) e tale obiettivo si raggiunge se le passività siano accertabili attraverso le scritture contabili, per realizzare la netta cesura tra l'ente cedente (c.d. bad company) e l'ente cessionario (c.d. good company) ed evitare il "contagio" della situazione di dissesto (punto 53 dei Considerando della Direttiva 2014/59/UE), ma confermerebbe che l'ente-ponte cessionario non possa essere chiamato a rispondere di passività non conosciute o conoscibili, che emergano successivamente alla cessione (come nel caso delle pretese risarcitorie avanzate dai clienti per asseriti inadempimenti commessi dalle banche sottoposte a risoluzione non formulate prima della cessione).

8.1.6. In contrario deve però osservarsi quanto segue.

Gli artt. 23 e 24 del medesimo D.Lgs., prevedono che la valutazione delle passività deve sempre essere "prudente" e l'individuazione delle stesse deve essere strettamente collegata a quanto riportato nei libri contabili e nei registri contabili.

Nel caso, però, di passività "potenziali in quanto non ancora accertate" occorre verificare se si tratti di passività trasferibili e costituenti l'azienda bancaria alla data di efficacia della cessione ovvero di debiti già esistenti al momento del verificarsi della vicenda circolatoria. Le passività di cui trattasi corrispondono a richieste risarcitorie da accertarsi in sede di giudizio e che al momento della efficacia della cessione non risultavano essere sottoposte al vaglio giudiziale. La nozione di "passività potenziale" è nota nelle tecniche di redazione di bilancio e si esclude l'obbligo di ogni rilevazione in bilancio per cui essa non è destinata ad influenzare quantitativamente la situazione patrimoniale-finanziaria e il risultato economico dell'esercizio di competenza; tuttavia è necessaria un'adeguata informativa nella nota integrativa sulla natura e, laddove possibile, sugli effetti finanziari e, quindi, anche sulla valutazione della stessa e sulle ragioni di incertezza del relativo ammontare o momento di sopravvenienza e sulla probabilità di eventuali indennizzi a ristoro dell'obbligazione che dovesse risultare in futuro confermata.

Limitarsi, pertanto a ritenere che il discrimen tra l'inclusione oppur no di tali pretese risarcitorie sia la proposizione delle domande giudiziarie risulta essere riduttivo, perché escludere o diminuisce l'obbligo di prudente valutazione delle passività esplicitamente previsto.

Per risolvere la questione sono d'ausilio sul punto gli arresti di questa Corte, anche se per il diverso caso di obbligazione sanzionatoria, che hanno ritenuto che alla cessionaria si trasferisce anche questa obbligazione, perché già sorta per effetto dell'illecito compiuto dai soggetti ad essa appartenenti e, quindi, a prescindere dal momento della sua effettiva comminatoria in applicazione del D.Lgs. 1 settembre 1993, n. 385, art. 58 (Cass. n. 22199/2010, Cass. n. 18528/2014 e Cass. n. 2523/2017).

La stretta correlazione, infine, tra l'esistenza del credito e la sua necessaria iscrizione nelle scritture contabili è regola esclusivamente presente nell'art. 2560 c.c., comma 2, che come già detto, non si applica alle cessioni bancarie ed il diverso tenore della norma applicabile dell'art. 58 TUB, prevedendo il trasferimento delle passività al soggetto cessionario e non la semplice aggiunta di responsabilità di quest'ultimo a quella del cedente, deroga alla norma codicistica, in virtù del principio di specialità (così in motivazione spec. Cass., n. 22199/2010).

D’altronde la stessa Corte di merito ribadisce l’inapplicabilità della norma codicistica per contraddire la censura degli appellanti secondo cui le passività “erano indicate negli estratti conto quali ‘riflesse dai libri contabili obbligatori’ della cedente, per cui le stesse erano, come tali, ben ‘emergenti’ e/o conoscibili al momento della cessione di Vecchia BdM a Nuova BdM, secondo quanto disposto dall’art. 2560 c.c.”, senza rilevare che la stessa inapplicabilità della norma rende applicabile la norma speciale dell’art. 58 di diverso contenuto e valenza anche per il profilo che interessa.

9. Il secondo motivo denuncia omesso esame di fatti decisivi, in relazione all’art. 360 c.p.c., comma 1, n. 5. La Corte per valutare il comportamento della Banca lo ha qualificato come non sufficientemente informativo senza considerare fatti ed elementi dedotti dall’appellato (ora ricorrente), idonei, se esaminati, a determinare una decisione diversa da quella adottata.

Il terzo motivo denuncia violazione degli artt. 115 e 167 c.p.c., in relazione all’art. 360 c.p.c., comma 1, n. 3 Gli elementi ulteriori, dei quali era stata omessa la valutazione, non erano mai stati ritualmente contestati dalla Banca e pertanto dovevano essere considerati un comportamento univocamente rilevante ai fini della determinazione dell’oggetto di giudizio, con effetti vincolanti per il giudice ex art. 167 c.p.c..

9.1. Il secondo e il terzo motivo sono assorbiti dall’accoglimento del primo.

10. Per quanto esposto il primo motivo del ricorso va accolto. La sentenza impugnata va pertanto cassata, in relazione alla censura accolta, con rinvio al giudice indicato in dispositivo, il quale si atterrà a quanto sopra indicato e provvederà anche sulle spese del giudizio di legittimità.

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Locus standi	Case T-527/22
Material common or conflicting interests	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Methodology for calculating *ex ante* contributions	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21
National Resolution Authority measures following the SRB's decision	Case T-527/22
Need for speed	Case T-732/19
Need of weighing up	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21
No breach	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20 (x2)
No obligation for the ECB and the SRB to hear the credit institution at each phase of the resolution procedure	Case T-732/19
No right to a new calculation of the *ex ante* contribution	Case T-688/21
Non-contractual liability	Case T-424/22, Case T-90/23, Case T-131/23 (x3)
Non-reimbursement rule	Case T-688/21
Objective of *ex ante* contributions	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Objectives of the Single Resolution Fund	Case T-688/21
Obligation of the SRB to take a decision following an assessment of failing or likely to fail	Case T-732/19

Power conferred on the Commission to adopt delegated acts	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Preparatory nature	Case T-525/22, Case T-526/22
Principle of equal treatment	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Principle of legal certainty	Case T-688/21; Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21
Principle of proportionality	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Principle of protection of legitimate expectations	Case T-732/19
Protection of business secrets	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21
Provisions of an institutional nature	Case T-424/22, Case T-90/23, Case T-131/23
Public access to documents	Case T-496/18 (x2)
Resolution procedure	Case T-732/19; Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20 (x4); Case T-496/18
Resolution scheme	Case T-525/22, Case T-526/22
Right to access	Case T-496/18 (x3)
Right to be heard	Case T-732/19
Right to effective judicial protection	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21
Right to good administration	Case T-732/19
Scope of the assessment of the Courts	Case T-732/19; Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20 (x2); Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21
Serious breach of national law on anti-money laundering and countering the financing of terrorism	Case C-803/21 P
Shareholders	Case T-527/22
Shareholders and creditors	Case T-496/18
SRB's competence and powers	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20; Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21
SRB's decision to deny compensation to shareholders and creditors	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20 (X2)
SRB's discretion	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21
Standard of review of the Appeal Panel	Case T-496/18
Technically complex assessment	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Technically complex cases	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Undertaking whose activity is the acquisition of holdings	Joined Cases C-207/22, C-267/22 and C-290/22
Unjust enrichment	Case T-688/21
Valuation 2	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Valuation 2 and Valuation 3 carried out by the same valuer	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Valuation 3	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20 (x2)
Valuation for the purpose of resolution	Case T-525/22, Case T-526/22; Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Withdrawal of a credit institution's authorisation	Case C-803/21 P (x2)

3. Series of legal provisions

ARTICLES	CASES
TFEU, Article 127	Case T-424/22, Case T-90/23, Case T-131/23
TFEU, Article 263(4)	Case T-527/22; Case T-732/19
TFEU, Article 290	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
TFEU, Article 296	Case T-732/19
TFEU, Article 340	Case T-424/22, Case T-90/23, Case T-131/23
TFEU, Article 340(2)	Case T-688/21
TFEU, Article 340(3)	Case T-424/22, Case T-90/23, Case T-131/23
CFREU, Article 41(2)(a)	Case T-732/19
CFREU, Article 41(2)(b)	Case T-496/18
CFREU, Article 41(2)(c)	Case T-732/19
Regulation (EC) 1049/2001, Article 6(1)	Case T-496/18
Regulation (EC) 1049/2001, Article 8	Case T-496/18
Regulation (EU) 575/2013, Article 4(1), Point 1(a)	Case C-427/22
Regulation (EU) 575/2013, Article 4(1), Point 26	Joined Cases C-207/22, C-267/22 and C-290/22; Case C-427/22
Regulation (EU) 575/2013, Article 4(1), Point 42	Case C-427/22
Regulation (EU) 1024/2013, Article 4(1)(a)	Case C-803/21 P (x2)
Regulation (EU) 1024/2013, Article 4(3)	Case C-803/21 P
Regulation (EU) 1024/2013, Article 6(4) to (6)	Case C-803/21 P
Regulation (EU) 1024/2013, Article 14(5)	Case C-803/21 P (x2)
Regulation (EU) 1024/2013, Recital 28	Case C-803/21 P
Regulation (EU) 806/2014, Article 18	Case T-732/19 (x2)
Regulation (EU) 806/2014, Article 18(1)	Case T-688/21
Regulation (EU) 806/2014, Article 18(1)(a)	Case T-732/19 (x2)
Regulation (EU) 806/2014, Article 18(1)(c)	Case T-527/22
Regulation (EU) 806/2014, Article 18(1)(a), (b) and (c)	Case T-732/19
Regulation (EU) 806/2014, Article 18(6)(b) and (c)	Case T-732/19
Regulation (EU) 806/2014, Article 20(15)	Case T-525/22, Case T-526/22
Regulation (EU) 806/2014, Article 20(16)	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Regulation (EU) 806/2014, Article 20(17)	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Regulation (EU) 806/2014, Article 20(18)	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Regulation (EU) 806/2014, Article 20(5)	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Regulation (EU) 806/2014, Article 22	Case T-732/19
Regulation (EU) 806/2014, Article 29(1)	Case T-732/19
Regulation (EU) 806/2014, Article 69(1)	Case T-688/21
Regulation (EU) 806/2014, Article 70(1)	Case T-688/21
Regulation (EU) 806/2014, Article 70(2)	Case T-688/21; Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Regulation (EU) 806/2014, Article 70 (1) e (2) sub 2, points a) and b)	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Regulation (EU) 806/2014, Articles 70 (1) and (2), 17 (1), 21 (1) and 7a, 27 (5)	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Regulation (EU) 806/2014, Article 70(3)	Case T-688/21; Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Regulation (EU) 806/2014, Article 70(4)	Case T-688/21

Regulation (EU) 806/2014, Article 76(1)(e)	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Regulation (EU) 806/2014, Article 85(3)	Case T-496/18
Regulation (EU) 806/2014, Article 90(3)	Case T-496/18
Regulation (EU) 806/2014, Article 90(4)	Case T-496/18 (x2)
Council Implementing Regulation (EU) 2015/81, Article 7(1)	Case T-688/21
Council Implementing Regulation (EU) 2015/81, Article 7(3)	Case T-688/21
Council Implementing Regulation (EU) 2015/81, Article 8(3)	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Council Implementing Regulation (EU) 2015/81, Recital 11	Case T-688/21
Directive 2013/36/EU, Annex I	Joined Cases C-207/22, C-267/22 and C-290/22
Directive 2013/36/EU, Article 18(e)	Case C-803/21 P
Directive 2013/36/EU, Article 18(f)	Case C-803/21 P
Directive 2013/36/EU, Article 3(1), Point 22	Joined Cases C-207/22, C-267/22 and C-290/22
Directive 2013/36/EU, Article 34	Joined Cases C-207/22, C-267/22 and C-290/22
Directive 2013/36/EU, Article 67(1)(d), (e) and (o)	Case C-803/21 P
Directive 2013/36/EU, Article 8(1)	Case C-427/22
Directive 2014/59/EU, Article 103(7)	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Directive 2014/59/EU, Article 48(1)	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Directive 2014/59/EU, Article 82(2)	Case T-732/19
Commission Delegated Regulation (EU) 2015/63, Annex I	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x5)
Commission Delegated Regulation (EU) 2015/63, Article 12(2)	Case T-688/21
Commission Delegated Regulation (EU) 2015/63, Article 13(3)	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Commission Delegated Regulation (EU) 2015/63, Article 6	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Commission Delegated Regulation (EU) 2015/63, Article 7	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Commission Delegated Regulation (EU) 2015/63, Article 7(4)	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Commission Delegated Regulation (EU) 2015/63, Articles 4 to 9	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21
Commission Delegated Regulation (EU) 2015/63, Articles 5 to 9	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Commission Delegated Regulation (EU) 2015/63, Articles 5, 6 and 7	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21 (x2)
Commission Delegated Regulation (EU) 2015/63, Articles 6(5) to 7	Case T-383/21, Case T-384/21, Case T-385/21, Case T-387/21, Case T-388/21, Case T-389/21, Case T-397/21
Delegated Regulation (EU) 2016/1075, Article 41(2)	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Delegated Regulation (EU) 2016/1075, Article 41(4)(a)	Joined Cases T-302/20, T-303/20 and T-307/20, Case T-304/20, Case T-330/20, Case T-340/20
Statute of the ESCB and of the ECB, Articles 12 and 13	Case T-424/22, Case T-90/23, Case T-131/23

II – The case-law of the EU administrative review bodies

1. Synthesis

Appeal against an amended decision adopted by the SRB following the remittal of the case by the Appeal Panel

Appeal Panel SRB, Case 6/2023

2. Series of keywords

KEYWORDS
Admissibility of the appeal before the Appeal Panel (x2)
Binding nature of Appeal Panel's decision
Proceeding before the Appeal Panel (x3)
Scope of the assessment of the Appeal Panel
SRB's amended decision following the remittal of the case by the Appeal Panel (x2)
SRB's amended decision upon remittal by the Appeal Panel

3. Series of legal provisions

ARTICLES
Regulation (EC) 1049/2001, Article 8
Regulation (EU) 806/2014, Article 24
Regulation (EU) 806/2014, Article 24(7)
Regulation (EU) 806/2014, Article 85(8)
Regulation (EU) 806/2014, Article 90(3)

III – The judgments of the national apical Courts

Italy

1. Synthesis

Administrative pecuniary sanctions against a member of the management body of a credit institution

Corte di Cassazione, sect. II, Judgment of 5 September 2023, No 25844

Corte di Cassazione, sect. II, Judgment of 25 October 2023, No 29594

Passive legal standing of the bridge bank in actions for damages for misselling conducts of the credit institution placed in resolution by the Bank of Italy

Corte di Cassazione, sect. I, Judgment of 30 November 2023, No 33416

2. Series of keywords

KEYWORDS	CASES
Action brought by shareholders	Cass. 33416/2023
Administrative pecuniary sanctions (x4)	Cass. 25844/2023, Cass. 29594/2023
Bridge institution tool	Cass. 33416/2023 (x3)
Compensation for damage	Cass. 33416/2023
Contingent liabilities	Cass. 33416/2023 (x2)
Duties of members of credit institutions' bodies	Cass. 25844/2023
Duty to act in an informed manner	Cass. 25844/2023
Duty to exercise due care	Cass. 25844/2023
Effects of resolution	Cass. 33416/2023 (x3)
Full jurisdiction of the Court of Appeal of Rome	Cass. 25844/2023
Irrelevance of the amount of the remuneration	Cass. 25844/2023
Irrelevance of the duration of the tenure as a member of a credit institution's board of directors	Cass. 25844/2023
Liability of members of credit institutions' bodies	Cass. 25844/2023
Limitation period for imposing administrative sanctions (x2)	Cass. 25844/2023, Cass. 29594/2023
Passive legal standing of the bridge institution	Cass. 33416/2023
Procedural safeguards	Cass. 25844/2023
Right to an effective judicial protection	Cass. 25844/2023
Starting moment (x2)	Cass. 25844/2023, Cass. 29594/2023
Time reasonably necessary to ascertain the violation	Cass. 25844/2023
Valuation	Cass. 33416/2023

3. Series of legal provisions

ARTICLES	CASES
ECHR, Article 6	Cass. 25844/2023
Italian Civil Code, Article 2381(6)	Cass. 25844/2023
Italian Civil Code, Article 2392(2)	Cass. 25844/2023
Italian Civil Code, Article 2560(2)	Cass. 33416/2023

Italian Law 689/1981, Article 14(2) (x2)	Cass. 25844/2023, Cass. 29594/2023
Italian Legislative Decree 385/1993, Article 58	Cass. 33416/2023
Italian Legislative Decree 385/1993, Article 145	Cass. 25844/2023
Italian Legislative Decree 180/2015, Articles 23 and 24	Cass. 33416/2023
Italian Legislative Decree 180/2015, Article 43(4)	Cass. 33416/2023

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